

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 233  
5424989

BETWEEN DONALD DUNSMUIR  
Applicant

AND JENNY BUTLIN AND  
ARTHUR BUTLIN T/A  
BUTLIN FARM  
PARTNERSHIP  
Respondents

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Rita Nabney, counsel for the Respondents

Investigation Meeting: 28 March 2014 in Tauranga

Determination: 12 June 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. The dismissal of Donald Dunsmuir from his employment by the Butlin Farm Partnership was justified. His personal grievance application is dismissed.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] Arthur Butlin, who ran a farm near Te Puke in partnership with his mother Jenny Butlin, dismissed Donald Dunsmuir on 17 April 2013. Mr Dunsmuir had worked on the farm from late November 2011. He was initially milking on a casual and then part-time basis but was employed fulltime from 25 January 2013.

[2] Mr Dunsmuir, his wife and four children had moved into a house on the farm property in January 2012 while he was still a casual or part-time milker. He had no written employment agreement. His terms of his employment, agreed orally when he became a full-time employee at the start of 2013, were to have the use of the house rent-free and to pay the bill for power used in the house. His primary duties involved daily milking of the farm's dairy herd.

[3] On 3 April 2013 Mr Butlin gave Mr Dunsmuir a letter prepared by the Butlins' lawyer. The letter set out five allegations of inadequate work or unsatisfactory conduct by Mr Dunsmuir and said they would be treated as serious misconduct if substantiated.

[4] Mr Dunsmuir and his representative at the time attended a disciplinary meeting held in the offices of the Butlins' lawyers in Tauranga on 15 April. Two days later his representative was sent a letter advising that Mr Dunsmuir was dismissed for serious misconduct. The reasons given for his dismissal were:

- (i) He let penicillin contaminate the milk vat while working on 13 March, causing the partnership to lose the value of two days' production; and
- (ii) He failed to pay the power bill for his farm house; and
- (iii) He failed to comply with direct instructions not to let anyone under the age of 16 ride on the farm's 500cc 'quad bike'; and
- (iv) He burned rubbish at the house during a local fire ban; and
- (v) While Mr Butlin was away on holiday, Mr Dunsmuir failed to check that stock being grazed at an off-farm paddock had adequate water (which had resulted in some of the animals getting stuck in a creek when seeking water).

[5] The letter of dismissal directed Mr Dunsmuir to vacate the house on the farm "*immediately*". However, under arrangements Mr Dunsmuir made with Mr Butlin, the Dunsmuir family did not move out until around two weeks later and he was given the use of a farm vehicle to move belongings rather than hire a van.

[6] On 28 May Mr Dunsmuir raised a personal grievance. His statement of problem to the Authority said his dismissal was unjustified because:

- (i) He had not breached the fire ban; and

- (ii) He had not let his 14-year-old son the quad bike after being told he was not to do so; and
- (iii) He was not responsible for the stock grazed off the property; and
- (iv) The dispute about the power bill was not a matter amounting to serious misconduct; and
- (v) The contamination of the milk was not serious misconduct.

[7] The Butlins, in their statement in reply, said the allegations about Mr Dunsmuir's work, taken individually and collectively, amounted to serious misconduct and they followed "*correct process*" in terminating his employment.

[8] They also made a counterclaim for costs associated with the power bill and cleaning of the house after the Dunsmuir family moved out. The counterclaim was withdrawn before the Authority investigation as those issues were more properly in the Tenancy Tribunal's jurisdiction. However whether paying the power bill was an agreed term of employment, and whether the employer was justified in deciding Mr Dunsmuir's alleged failure to pay the bill was serious misconduct, remained a question for the Authority to consider.

### **The Authority investigation**

[9] The Authority investigation meeting received written and oral evidence, under oath or affirmation, from Mr Dunsmuir, his son Christian Dunsmuir, Arthur Butlin and Mr Butlin's personal partner Sophie Wellsted. Sadly the Butlins' lawyer, Blair Kiddle (who had attended the disciplinary meeting with Mr Butlin and who had prepared the dismissal letter sent to Mr Dunsmuir) died in January 2014 so was not available to give evidence.

[10] Mrs Butlin was also a potential witness but Mr Butlin reported at the investigation that his mother was too unwell to give evidence and I was satisfied by his later evidence that hearing from her was unnecessary. I accepted Mr Butlin's evidence that he was responsible, with the assistance of the now late Mr Kiddle, for investigating the allegations he made about Mr Dunsmuir's work and conduct. Mr Butlin also then made the decision, on behalf of the partnership, to dismiss Mr

Dunsmuir. He told Mrs Butlin of the decision after it was made and she had no part in making or approving it.

[11] The parties provided closing submissions at the end of the daylong investigation meeting.

[12] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all the evidence and submissions received. Rather I have set out findings of fact and law and expressed conclusions on the issues for resolution that were raised by Mr Dunsmuir's grievance and the Butlins' response.

### **Issues**

[13] In the light of the evidence and submissions heard, these issues required determination:

- (i) Had Mr Butlin fully and fairly investigated his allegations about Mr Dunsmuir's work; and
- (ii) Was Mr Butlin, on behalf of the partnership, justified in concluding the five instances identified in the 17 April 2013 letter of dismissal were serious misconduct; and
- (iii) Was Mr Butlin's decision, based on his conclusions about serious misconduct, justified in all the circumstances at the time?

### **Were the allegations sufficiently investigated?**

[14] Mr Dunsmuir did not dispute the occurrence of the milk contamination incident so the question of whether Mr Butlin sufficiently investigated the allegations and genuinely considered Mr Dunsmuir's explanations was about the other four concerns, examined in turn below.<sup>1</sup>

#### *The power bill*

[15] Mr Dunsmuir denied he had failed to pay power bills. Rather he said the arrangement made with him in January 2013 – at the point at which he was employed

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<sup>1</sup> Section 103A(3) of the Employment Relations Act 2000.

on a full-time, on-going basis – was not properly carried out by the Butlins. He said they were supposed to arrange a final reading of the power meter for the house and, from then on, give him a copy of the bill to pay. He said no reading was done and no bills were provided.

[16] The evidence of Mr Butlin and Mr Dunsmuir differed on what had happened in relation to payments for power in the previous year. Mr Dunsmuir's version of events was that Mrs Butlin had agreed to forego payments for power during 2012 in recompense for a reduction in his wages that year, although Mr Butlin disputed the details of that account of events. However I considered that history irrelevant in light of the allegation actually put to Mr Dunsmuir in the 3 April letter:

*The farm partnership agreed to pay the previously outstanding \$1800 and you have given the farm partnership assurances that this would not happen again. This obligation to pay for the power at the house forms part of your employment obligations. There is currently 3 months (approximately) outstanding.*

[17] Mr Dunsmuir said he had shaken Mr Butlin's hand at the time of making the full-time employment agreement in late January and said he would pay the power bill from then on. The allegation in the 3 April letter made it clear that what was at issue was the power bill from January 2013 onwards, not charges for any earlier period.

[18] Mr Dunsmuir accepted in his evidence that he had not paid the power bill in February and March but said this was because he was not given a copy of the bill to pay and no final readings of the meter had been done so that he could have had the bill transferred to his name.

[19] Mr Butlin said a photocopy of the power bill for the house – which were addressed to the farm partnership – were given to Mr Dunsmuir each month. However there was nothing to verify this had been done. No copies of those bills were produced among the many documents that Mr Butlin attached to his witness statement for the investigation. There was nothing provided to verify the basis for the amount of around \$1100 dollars that was said in the 17 April letter of dismissal to be outstanding.

[20] As a result I was not persuaded Mr Butlin had given Mr Dunsmuir a reasonable opportunity to respond to the concern about payments of the power bill or

genuinely considered Mr Dunsmuir's explanation about why those amounts had not been paid.

#### *Use of the quad bike*

[21] Mr Dunsmuir had various explanations on whether or when his son Christian had driven and ridden on the quad bike on the farm and the degree to which that was or was not outside the terms of instructions he was given by Mr Butlin.

[22] He said Mr Butlin had not told him that Christian should not be on the bike at all, only that he should not be on it alone. He said it was clear that Mr Butlin "*did not want Christian going off by himself*" but he believed Mr Butlin knew and accepted that Christian drove or rode along on the bike while helping his father with farm duties, particularly at the weekend.

[23] Mr Dunsmuir also denied seeing the contents of a letter Mr Butlin tried to give him during a discussion in the Butlins' farm house kitchen in November 2012. The letter stated it was "*not acceptable*" for Christian to drive the bike and referred to previous occasions that the same instruction was given but not obeyed.

[24] And Mr Dunsmuir also suggested that the three people Mr Butlin said had reported seeing Christian driving the bike on his own had mistaken Christian for Mr Dunsmuir. He said that as he and his son were of a similar size, they would have looked similar when wearing their farm gear and seen from a distance.

[25] Mr Butlin said he had given Mr Dunsmuir a clear instruction in November 2012 that Christian was not to drive the bike in any circumstances. Mr Dunsmuir said he had thrown the letter given to him back onto the kitchen table without opening it but he accepted, in answer to a question from me at the investigation meeting, that he knew what is said from what Mr Butlin told him at the time.

[26] I preferred Mr Butlin's account of Christian being forbidden to ride the bike at all rather than Mr Dunsmuir's explanation that he thought the instruction meant Christian could ride the bike if he was helping with moving cows to and from the milking shed or other farm-related work and provided that Mr Dunsmuir was there to supervise him.

[27] Mr Butlin's account was more likely because it was consistent with the instruction about a sticker clearly displayed on the bike – as corroborated by evidence from him, Mr Dunsmuir and Christian – that stated no one under 16 should drive the bike. I have also accepted the evidence of Mr Butlin and Ms Wellsted that they were concerned about this issue because of media reports about deaths on farms involving quad bike use, a Department of Labour safety campaign about farm use of quad bikes, and the prospect of prosecution for any quad bike accident resulting in injury on the farm. Their awareness made it more likely that Mr Butlin gave Mr Dunsmuir the instruction that he said he did give about Christian not riding the bike.

[28] I was also satisfied that Mr Butlin had received reports from a farm neighbour, two farm contractors, and Ms Wellsted of seeing Christian driving the bike on his own at various times after the November instruction and that Mr Butlin reasonably and honestly believed those reports. In one instance Ms Wellsted, when out walking on the farm, saw Christian on the bike and reported to Mr Butlin that when Mr Dunsmuir saw her, he shouted at Christian to get off the bike. On another occasion Ms Wellsted took a picture that showed Christian sitting on the back of the bike as a passenger. While Mr Dunsmuir's suggestion that at least some other reported instances could have been a case of mistaken identity (being him rather than Christian seen on the bike) was *possible*, I was also satisfied Mr Butlin could have reasonably concluded that this was not a sufficiently *probable* explanation given what he had heard from four different people about what they saw.

[29] While Mr Dunsmuir disputed the instruction was as unequivocal as Mr Butlin stated, I concluded Mr Butlin had sufficiently investigated the allegation and genuinely considered Mr Dunsmuir's explanation before deciding he did not accept it.

#### *Burning rubbish during the fire ban*

[30] Mr Dunsmuir accepted he had burned rubbish near his house soon after he and his family moved onto the property but said he stopped doing so after Mr Butlin and Ms Wellsted encouraged him to recycle more. Mr Butlin relied on reports from two neighbours that Mr Dunsmuir had burned rubbish during a council ban on fires in February and March 2013. Mr Dunsmuir said he knew about the ban and denied he

had burned rubbish during it. He said smoke from such a fire would have been clearly visible from the nearby town of Te Puke so it was unlikely that he would have taken the risk of getting noticed by burning rubbish during the ban.

[31] Ms Wellsted had also smelt smoke but had not seen Mr Dunsmuir setting up or tending a fire during that period. Similarly the reports Mr Butlin had from neighbours did not say that they had, in fact, seen Mr Dunsmuir doing so either.

[32] While Mr Butlin could reasonably have concluded there was rubbish burnt at some times near the house at which the six members of the Dunsmuir family resided, I was not satisfied that he had sufficient information or had investigated that concern sufficiently to conclude that it was more than likely Mr Dunsmuir was responsible for that activity at the time of the fire ban.

#### *Checking stock had enough water*

[33] Mr Dunsmuir said he was not responsible for looking after the stock that were moved to another property about one kilometre down the road from the farm while Mr Butlin was away on holiday for six days in late February and early March. He denied Mr Butlin's account that Mr Dunsmuir knew about the stock because he helped moved those animals down the road to the off-farm grazing paddock. Mr Dunsmuir said it was his son Christian and not him who helped moved those animals.

[34] Mr Butlin's evidence differed markedly. He said Mr Dunsmuir helped moved those animals down to the paddock a day or two before Mr Butlin and Ms Wellsted left for their holiday. He said that while they were at the paddock he showed Mr Dunsmuir how to operate the tap for the water trough.

[35] I have concluded Mr Dunsmuir's own evidence about two points concerning those stock established that he was aware they were at the off-farm paddock and that he understood he was responsible for them. Firstly, he said he had been to the paddock to set up an electric fence in order to prevent the stock wandering. Secondly, he said he twice drove down to the paddock to count the stock while Mr Butlin was away, once on his own and once with Christian. He said he had not got off the bike and gone into the paddock to check the water trough on either of those occasions. He

had no real explanation of why he would have travelled one kilometre to look at stock in a paddock if he was not responsible for checking on them during Mr Butlin's absence from the farm. Rather I have preferred Mr Butlin's evidence that he did ask and expect Mr Dunsmuir to check on the cattle and that this included, as a matter of farming common sense, checking that they had adequate water.

[36] In that context Mr Butlin had sufficient information about what was expected, had nothing more to investigate, and could reasonably have considered Mr Dunsmuir's explanation was inadequate.

### **Were Mr Butlin's findings of serious misconduct justified?**

[37] While Mr Butlin had not done enough to genuinely consider Mr Dunsmuir's explanations about the power bill and had not sufficiently investigated the concern about burning rubbish, he was justified in deciding Mr Dunsmuir's conduct in relation to the other concerns raised with him did amount to serious misconduct. I reached that conclusion from considering the statutory test of justification in relation to my findings about the milk contamination and breaches of the instructions about quad bike use and checking on stock.

#### *Milk contamination*

[38] Mr Dunsmuir accepted that he had mistakenly contaminated the milk vat on 13 March. Cows being treated with penicillin were milked separately after the main herd. On that particular night, when Mr Dunsmuir started that separate milking, he did not turn the tap or valve to stop the milk of those penicillin-treated cows running into the main vat. On realising his mistake he decided to 'dump' the milk from out of the main vat into storage drums rather than leaving it in the vat for collection by Fonterra. Milk put into the storage drums was then used for feeding calves on the farm.

[39] He told Mr Butlin about the incident the next day. The content of the main vat was from two days' milking so the farm lost the value of both days' production. Mr Dunsmuir's explanation of the event was that he was tired when the incident happened because he was doing the second of two milkings – 16 hours apart – that

day and his wife had come to help him in the shed. While she was cupping the cows, he was doing another task and had “*a momentary lapse of thinking*” so that he did not turn off the necessary tap.

[40] Mr Dunsmuir said he was tired because Mr Butlin had not been available to help with farm work as Mr Butlin had been away have dental surgery during that day. However Mr Butlin said he did not routinely help with the milking work in any event as that was Mr Dunsmuir’s role and his absence was irrelevant to Mr Dunsmuir’s tiredness.

[41] Mr Butlin said he suspected Mr Dunsmuir was distracted by discussion with Mrs Dunsmuir over a new car that they had purchased that day. There was no evidence to corroborate Mr Butlin’s theory on that point so the incident needed to be considered in relation to the law regarding an individual act of carelessness or a mistake by a worker. Generally mere inadvertence, negligence or oversight – although seemingly a dereliction of duty and having serious consequences – is deemed to be a matter of misconduct rather than serious misconduct.<sup>2</sup> However where an employer’s confidence and trust in a worker is deeply impaired by a worker’s *actions* or even a single *action* (rather than the *consequences* of the action or actions), an employer may justifiably decide the worker’s conduct was serious misconduct.<sup>3</sup> The justifiability of that decision is a matter of fact and degree in the particular circumstances of each case.<sup>4</sup> The Authority must consider that justifiability on the objective standard of whether it was what a fair and reasonable employer could have done in all the circumstances at the time.<sup>5</sup>

[42] A fair and reasonable employer may not have been able to justify dismissing Mr Dunsmuir on the basis of a loss of trust and confidence for that single error in the milking shed on that particular night alone. However the test to be applied required consideration of “*all the circumstances*”, which in this case included the doubts Mr Butlin had that Mr Dunsmuir would comply with instructions about a safety matter (use of the quad bike) and could be relied upon to carry out all his duties (checking the water for off-farm stock). In that context a fair and reasonable employer could

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<sup>2</sup> *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EC) at 319.

<sup>3</sup> *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 (EC) at [78].

<sup>4</sup> *Click Clack International Limited v James* [1994] 1 ERNZ 15 (EC) at 32; and *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 487.

<sup>5</sup> Section 103A of the Act.

have reached the same conclusion as Mr Butlin did – that he could no longer be confident and trust in Mr Dunsmuir to do what he was asked to do.

*Use of the quad bike*

[43] Mr Dunsmuir and Christian denied that Christian had driven on or ridden on the quad bike in a manner that breached the instruction that Mr Butlin gave in November 2012. However their evidence was based on a narrower view of the requirements of the instruction than what I have concluded it was more likely than not that Mr Dunsmuir was told. Mr Butlin had information from others – including the account of his partner Ms Wellsted – that reasonably established Mr Dunsmuir had allowed Christian to drive or ride on the bike contrary to that instruction, albeit when helping his father with farm work. Mr Butlin was not required to have proof beyond reasonable doubt but the information he did have left him, on the balance of probabilities, with grounds for believing that Mr Dunsmuir had breached his instruction, and in the light of previous discussions about it, Mr Butlin could have no real confidence or trust that Mr Dunsmuir would not continue to do so. In those circumstances a fair and reasonable employer could have decided Mr Dunsmuir's failure to stop his son's use of the quad bike was serious misconduct.

*Checking stock had enough water*

[44] Mr Dunsmuir, in his oral closing argument, admitted not having checked the water for the stock and not knowing some cattle were stuck in the muddy stream. However he submitted those oversights did not amount to serious misconduct.

[45] He denied having instructions to look after those cattle. I found that account unlikely given his evidence about visiting the paddock twice to count the stock. In those circumstances, his failure to carry out the simple task of checking the trough could have deeply impaired the trust and confidence that a fair and reasonable employer might have in a farm worker left in charge of farm duties in the absence of his employer. Again the focus of the justification test in those circumstances is on the action (or rather omission) rather than the consequences of it. Mr Butlin's finding of serious misconduct in relation to that concern was justified.

## **Was the decision to dismiss justified?**

[46] The procedural shortcomings in Mr Butlin's investigation on two concerns – the power bill and the burning – did not negate the reasonableness of his findings of serious misconduct, based on his loss of trust and confidence in Mr Dunsmuir, in light of what Mr Butlin reasonably and honestly believed to have happened about quad bike use, not checking the water for the stock, and the 13 March mistake while milking. A fair and reasonable employer could have decided to dismiss Mr Dunsmuir in relation to the latter three concerns so the shortcomings on the other two concerns did not result in Mr Dunsmuir being treated unfairly.

[47] I also considered two other concerns about how Mr Butlin acted in making and carrying out his dismissal decision.

[48] Firstly, no arrangement appeared to have been made for Mr Dunsmuir to have a chance to comment in advance of a decision about a disciplinary outcome if Mr Butlin decided, after considering Mr Dunsmuir's explanations at the 15 April meeting, that the concerns raised were serious misconduct. After that meeting Mr Dunsmuir was simply told of Mr Butlin's decisions about serious misconduct and dismissal through the 17 April letter sent to his employment law advisor at the time. However I had no direct evidence about any arrangements that the representatives involved in the 15 April meeting may have made about how such decisions were to be made and communicated – because Mr Kiddle had since died and because Mr Dunsmuir had chosen to represent himself after his statement of problem was lodged. Neither Mr Dunsmuir nor Mr Butlin could shed any light on this question from what they could recall of what their respective representatives had said at the time. Mr Dunsmuir's previous representative – an experienced employment law advisor – had drafted his statement of problem and made nothing of this point in it. From that I inferred the arrangement for the final outcome to be simply advised by letter (without further input on the likely level of sanction) had been agreed between the representatives.

[49] Secondly, the direction in the 17 April dismissal letter for the Dunsmuirs to "*immediately*" vacate the house caused some distress at the time. However, because arrangements were fairly promptly and amicably made for some reasonable time and

assistance before the Dunsmuirs moved out, Mr Dunsmuir did not end up being treated unfairly on that point.

[50] For the reasons explained in this determination I concluded the decision to dismiss Mr Dunsmuir for serious misconduct was justified in all the circumstances at the time. As a result I have dismissed Mr Dunsmuir's personal grievance application.

### **Costs**

[51] Costs are reserved. The parties should endeavour to resolve any issue as to costs between themselves. However if they are not able to do so, the Butlins may lodge and serve a memorandum on costs within 28 days of the date of this determination. Mr Dunsmuir would then have 14 days to lodge a reply memorandum. No variation to that timetable is permitted without prior leave of the Authority. If an Authority determination of costs is required, the parties could expect costs to be set on the basis and principles described in *PBO v Da Cruz*, including consideration of Mr Dunsmuir's limited means post-dismissal (as disclosed in his evidence in support of his lost wages' claim).<sup>6</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>6</sup> [2005] 1 ERNZ 808 (EC).