

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 16
5363578

BETWEEN

RICHARD FLOYD
Applicant

AND

HAUHUNGAROA 2C BLOCK
INCORPORATED
Respondent

Member of Authority: P R Stapp

Representatives: Geoff O'Sullivan, Counsel for the Applicant
Penny Swarbrick, Counsel for the Respondent

Investigation Meeting: 18 and 19 September 2012 at Taupo

Submissions received by: 4 December 2012 by memoranda

Date of Determination: 8 February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about Mr Floyd's termination of employment from his position as a farm manager with Hauhungaroa 2C Block Incorporated. Mr Floyd claims that the dismissal was unjustified, and in particular was not a genuine redundancy where there was a background involving allegations about his performance and stock management, updating his individual employment agreement and the appointment of a farm manager in an acting position to cover a lengthy period of annual leave. Also he claims that his position was filled by another person with effect from 1 May 2012. He is also claiming that he was unjustifiably disadvantaged in his employment and that the respondent has breached his terms and conditions of employment and not acted in good faith.

[2] Mr Floyd is claiming reinstatement, reimbursement of any lost wages and compensation for hurt humiliation and injury to feelings.

[3] Hauhungaroa 2C Block Incorporated (the Incorporation/the farm) denies all Mr Floyd's claims.

[4] Both parties are seeking costs.

The issues

[5] The issues are as follows:

- i. What are the applicant's terms and conditions of employment in regard to his position, "garden leave" and pay? Were the terms altered?
- ii. Which agreement applied, 7 June 2000 or 31 March 2011?
- iii. Was the reason for the dismissal a genuine redundancy on 20 January 2012?
- iv. Did the respondent publish unsubstantiated and derogatory comments about Mr Floyd?
- v. Was there a breach of the applicant's terms and conditions of employment and a breach of good faith by the respondent?
- vi. Was the respondent's dismissal process fair? In particular was Mr Floyd consulted and was he advised that his employment was in jeopardy?

The law

[6] The Court held in *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 that:

I do not consider that the recent statutory changes were intended to revisit long-standing principles about substantive justification of redundancy exemplified by judgments such as Hale. The words and phrases of s.103A echo the statements of Cooke P and Richardson J in Hale as set out in paras 40 and 41. Although Parliament was prescriptive in 2004 so far as process was concerned, on substance of

justification for dismissal it appears to have been satisfied, by enacting s 103A, to return to the position espoused by the Courts in cases such as and following Hale. So long as the employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A.

[7] To date the Court's position on this has not changed, although the test has changed from "would" to "could". Under s 103A (2) of the Employment Relations Act the Authority must apply the test: Whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred (from 1 April 2011). In addition the broad principles under s 103A (3) of the Act must be applied in the context of redundancy, and under s 103A (4) of the Act any other factors may be considered.

The facts

[8] Mr Floyd was employed by the Incorporation as a farm manager from 1984 for 27 years.

[9] The farm is run by the Committee of Management. There is a sub committee that is referred to as the Farm Committee. The farm is located in the central North Island. It is one of the respondent's business interests.

[10] Mr Floyd's employment was governed by a written employment agreement; the first was signed on 7 June 2000. In 2010 the Incorporation sought to update Mr Floyd's written employment agreement with a new agreement and presented him with a proposed agreement in November 2010 to sign. Amongst the proposed terms was a provision for eight week's notice for redundancy. The copy of the proposed agreement given to Mr Floyd by the Incorporation did not have a commencement date written in.

[11] As background, in April 2010 the Incorporation engaged Mr William Wilson, a farm consultant, to review the business performance of the Incorporation and he prepared reports in regard to a review of the business performance, an intra-structural development plan (9 June 2010) and a farm property development plan (September 2010).

[12] On 21 February 2011 Mr Wilson provided a report to the Incorporation on the stock condition on the farm. In reply to criticisms about farm practices and stock management Mr Floyd provided a report to the Incorporation's Committee of Management and attached a veterinary report that he requested independently of the Board and which he says was to cover him from any criticism. Unknown to Mr Floyd the Committee of Management requested Geoff Burton, a registered farm management consultant, to provide an appraisal/assessment of the current condition of livestock, particularly one mob of cows and calves and to assess the adequacy of current feed supply.

[13] During 2011 Mr Floyd's accrued holiday entitlements became an issue. Mr Floyd was requested to take his accumulated leave on 4 March 2011. Mr Floyd was requested to take 187 days outstanding holidays commencing from the close of business on 18 March 2011, until returning to work on 13 December 2011.

[14] Mr Floyd signed the proposed written employment agreement on 31 March 2011 (the second agreement) when he was on leave, and returned it to the Incorporation. It was not signed by the Incorporation as there was a disagreement over the start date. Mr Floyd included "*1 September 2010*" as the start date in the agreement because he genuinely believed that that had been agreed to by the Incorporation during their discussions. The Incorporation denies the claim. It understood that the agreement would apply from the date of signing. I hold that the incorporation's position is consistent with a blank space in the proposed agreement for the date of signing when the agreement was given to Mr Floyd.

[15] In the meantime, the committee of management engaged another person to act as the acting farm manager during Mr Floyd's absence, on a fixed term employment agreement. As a result of Mr Wilson's reviews, the holiday issue and the stock conditioning and feed issues that emerged, the Committee of Management engaged Gary Newland to become involved in the employment matters with Mr Floyd. This led to Mr Newland becoming involved in the Committee of Management's management of change proposal. The proposal was to change the farm manager role to that of a general manager to incorporate the entire Incorporation's business activities. The activities included the farming livestock business, forestry-carbon business, nitrogen, investments and the farm-property. On 14 November 2011 (while Mr Floyd was still on holiday) he was advised of the proposed restructure by Mr

Jason Cribb, the Chairman of the Committee of Management. This letter outlined the general reason for the proposal as follows:

As discussed with you, you are advised the Strategic Plan has been adopted, which coupled with past business performance, have led the Committee of Management (CoM) to form a view that in the future a higher level of in-house management is required with greater focus on:

- *longer term farm operations*
- *wider matters other than current farming operations*
- *financial business management*
- *more extensive analysis*
- *greater reporting*

It is proposed that the CoM take a more “governance” role rather than have a close management involvement. There will be less reliance on an external farm advisor. These proposed changes are consistent with the ongoing generic changes in general farming practices to be more scientific and business orientated. To implement these changes it is proposed that the current position of Farm Manager be disestablished and replaced by a General Manager.

It is important that you understand that we are talking about the Farm Manager position not being required. This proposal is not related to any concerns about your performance as a Farm Manager, it’s solely about the future business needs.

You have previously indicated that your preference is farm work and you do not have an interest in the business orientated tasks. The CoM agrees that your skills and knowledge are better suited to your preferred work and believes that you do not have the skills and knowledge required for the General Manager position or could gain the required level of capability by training. It is therefore proposed to advertise for a General Manager.

Because of these points and there being no alternative role that you could be redeployed to, if the proposal is implemented, your employment would end by redundancy.

We seek your feedback on the proposal by 21 November.

...

[16] It was expected by the Committee of Management that Mr Floyd would provide his feedback either by contacting members directly and speaking to them in writing and/or at a meeting where Mr Floyd was entitled to bring a support person.

[17] In the meantime Mr Floyd requested a copy of the strategic plan that had been adopted. He engaged a representative from the Amalgamated Workers Union New Zealand (AWUNZ) to represent him. Mr Floyd never received a copy of the strategic

plan, despite requesting it and repeating his request. He was given an extra week to respond to the proposed restructuring.

[18] Mr Newland contacted Mr Floyd's AWUNZ representative on 13 December 2011 and explained that the decision to restructure was not conditional on a final strategic plan. He also says that he informed the AWUNZ representative that the Committee of Management had completed its decision making process (including consultation) and made the decision to proceed with the restructure. Mr Newland at first informed the AWUNZ representative that Mr Floyd would be given one month's notice as required under clause 11 of the first signed employment agreement (that is the 7 June 2000 agreement since the proposed/second agreement had not been signed off by the employer). Mr Newland alerted the AWUNZ representative that Mr Floyd would be told that he did not have to return to work and that he would be on "garden leave" until he was advised of the decision and then paid in lieu of notice. This was formalised by Mr Cribb in a letter.

[19] Evidence of the notice confirming discussions and meeting on the proposal to restructure can be found in letters dated 27 October 2011 and 1 December 2011. In the latter letter Mr Floyd was advised that the Committee of Management had not received any feedback and that a final decision on the restructuring would be made and would be discussed with him when the parties met with a mediator on Wednesday, 7 December 2011. This delayed the appointment of a new general manager.

[20] On 16 December 2011 Mr Floyd was informed that his employment would terminate by way of redundancy on 20 January 2012. A letter confirmed that he would not be required to work out notice and instead would remain on "garden leave" until the end of the period of his notice. This matter was then challenged by Mr Floyd's new lawyer from Wellington (letter 21 December 2011). Mr Floyd, despite returning to work from his leave, was informed that as a result of the restructuring proposal he was not required at work and the acting farm manager in effect continued in that role.

[21] First, the acting manager's fixed term employment arrangement was extended, and second the acting manager subsequently signed a new employment agreement in a new role of General Manager that took effect from 1 May 2012. This is confirmed by Board minutes produced during the Authority's investigation. Until then the acting

manager carried out the duties of the farm manager position that had been held by Mr Floyd.

[22] On 17 December 2011 the Incorporation's AGM took place and the chairman made his report public. The report included the comments:

"...our farm consultant reported allegations of livestock in poor condition. This began a dispute with the farm manager who was vehement in his view that the stock were in good condition..."

[23] Mr Floyd's employment terminated on 20 January 2012 when his pay ceased and included one month's notice to that date. It has been conceded that Mr Floyd should have been paid for a further two months given the subsequent appointment of a new general manager later. The parties attended mediation. It now falls on the Authority to make a determination

Determination

[24] The last signed employment agreement was signed off on 7 June 2000 by both parties. This was not altered except that the respondent proposed a new agreement in September 2010 to negotiate. There were two key matters that caused the negotiations to stall and these were the wording of a redundancy provision and how the salary should be made up. Mr Floyd signed off the agreement in March 2011 and inserted a start date of *1 September 2010* backdating it. The Incorporation says it never agreed to this. I have to accept that because of the other two unresolved matters. Mr Floyd was also on leave at the time. The Incorporation never signed the agreement off. The blank space for a date to be inserted is more consistent with a date when the agreement was signed rather than backdating.

[25] I hold that there can not have been a meeting of minds on the full terms where there was a disagreement on the start date and the Incorporation had not signed the agreement, even though the Incorporation put forward the proposed agreement. The starting point for analysis must therefore be Mr Floyd's 2000 employment agreement.

[26] The chairman's report made at the Incorporation's AGM included statements of fact from two reports. First there was the report from the farm consultant, and second a report from the independent consultant. Mr Floyd at the Authority's investigation meeting agreed the statement published in the chairman's report was

accurate. That matter does not need to be taken any further. Indeed the Incorporation acknowledged a dispute.

[27] I hold that there has been no unjustified disadvantage and the respondent has accepted that the matters of process involved in the dismissal can be addressed as part of the dismissal claim.

[28] There is no breach of the applicant's terms and conditions relating to the salary claim under the proposed employment agreement, I hold.

[29] I am left to determine the issue of the claim for unjustified dismissal.

[30] S 103A (2) of the Act which came in to effect on 1 April 2011 applies as to whether the employer's actions were what a fair and reasonable employer "could" have done in all the circumstances at the time. The employment relationship problem relates to a genuine redundancy I hold. My reasons are:

(a) That the role of farm manager is different in its scope to the proposed role of general manager. It is a wider role than the farm manager role.

(b) That the proposed role of general manager related to a change incorporating a wider role that is consistent with the Incorporation's business interests other than the farm, and involving more reporting actions where the Committee of Management takes on more "governance" rather than direct management and less involvement for a farm consultant.

(c) That there was poor financial performance on the farm.

(d) That Board minutes, produced during the Authority's investigation support a new management structure being required, but that there would need to be a new employment agreement, new job description, and business management skills and further responsibility required in the proposed new role.

(e) That the farm engaged help from a new consultant who analysed the farm, made recommendations and prepared a plan for change. These were documented.

(f) That there was a clear proposal made for a new role to be established relating to the reports and consultant's involvement in regard to the farm's performance and financial difficulties.

(g) That the consultant had a regular involvement on the farm.

(h) That Mr Floyd rejected any prospect that he would be the general manager because he insisted that he was the farm manager only.

(i) That Mr Floyd's entitlement to holidays and the negotiation of a new employment agreement were separate matters.

(j) That there was a process involving the Farm Committee. This was supported by a strategic plan being developed separately. The incorporation explained why Mr Floyd was not given the strategic plan and I am satisfied that it did not add any more to what Mr Floyd had been informed.

(k) That another consultant was engaged for the change process.

(l) That the applicant was advised of the new role and proposal and consulted on 14 November 2011.

(m) That Mr Floyd was represented throughout by AWUNZ first, and supported by his wife.

(n) That the applicant requested a copy of the strategic plan and although he was not given it he knew of the changes and has not been able to support that anything in the document would have changed the outcome.

(o) That the 2012 strategic plan is proof that the general manager role is now in place and is different to the position held by Mr Floyd. This is supported by the allocation of responsibilities across the business as opposed to just the farm.

(p) That the negotiation of a new employment agreement was to regularise existing arrangements.

[31] I have balanced the above by considering the job descriptions produced at the Authority's investigation meeting. The position description for the general manager

appears to have been a work in progress at the time, but does give an indication of change sufficient to support the Incorporation's evidence.

[32] I hold that for the reasons relied upon by the Incorporation it could and was entitled to implement Mr Floyd's redundancy as a fair and reasonable employer. The proposed change can be compared with the situation applying before the proposal was put forward, i.e. that there was a change to Mr Floyd's position and the evidence is consistent that Mr Floyd was the farm manager previously, not the general manager as proposed. As such I have not been convinced of any ulterior motives for the dismissal even though in the background there were issues about stock and farm management, but the involvement of the two consultants has satisfied me that the issues were separate matters to the change management of the Incorporation's business.

[33] I am satisfied that Mr Floyd was consulted and informed of the likely outcome and what it could mean for him in his position on the farm (applying s 103A (3) of the Act). However, under s 103A (4) of the Act, other factors can be considered.

[34] Mr Floyd has not been treated fairly when procedurally the Incorporation retained the services of the acting farm manager for a period that Mr Floyd was available to work, but put on garden leave, and before Mr Floyd's position ceased to exist. Mr Floyd's farm manager role was disestablished when the new general manager's role was filled later. Simply the Incorporation kept on the acting manager because he was already acting in the role during Mr Floyd's leave and this would avoid any difficulties with Mr Floyd. The Incorporation inadequately consulted Mr Floyd over the "garden leave", because there was no provision for such leave in the employment agreement. It is not clear that Mr Floyd had any ability to respond to the garden leave given that the Incorporation had made the decision and put it to the AWUNZ representative. Nor has the "garden leave" been sufficiently justified given the underlying alleged issues raised about Mr Floyd's performance when the employer is relying on redundancy. Certainly in the background there were issues about Mr Floyd's performance but these were not relied upon at the time and never properly sorted out by a proper enquiry involving Mr Floyd. Also, there does not appear to have been any discussions around the Incorporation's decision to implement "garden leave". A fair and reasonable employer could not rely on replacing Mr Floyd by another person before giving effect to the redundancy decision, I hold. Mr Floyd was willing and able to return to work and a fair and reasonable employer could have

planned a process more sympathetically and sensitively given Mr Floyd's 27 years' work for the Incorporation. Mr Floyd was denied an opportunity and the chance to apply from an equal position and from the platform of his existing position on the farm because the decision had been made to replace him as he supposedly did not have the skills. As an existing employee being made redundant he was entitled to receive much better consideration.

[35] Mr Floyd has a personal grievance, I hold. Given the genuineness of the redundancy and the change put in place it is not practicable and reasonable to reinstate Mr Floyd to his position. I am satisfied his position has changed and the employer made a decision to replace Mr Floyd with a person who has a wider skill set for a wider role to manage the business operations other than just running the farm based on what appears to be a genuine selection process, albeit done later, which was not challenged.

[36] The redundancy became affective 1 May 2012. Mr Floyd's position ceased and the new role was filled. Mr Floyd is entitled to the wages from 20 January 2012 for the time that it took to replace his role on 1 May 2012. Also, a fair and reasonable employer could have considered the eight week's notice for redundancy that it proposed in the new employment agreement for Mr Floyd. However, I accept that the Incorporation had no obligation to give such notice since the term had not been signed off by both parties, but since the proposal was made by the Incorporation it could have acted more generously.

[37] I am satisfied that Mr Floyd attempted to mitigate his loss by making arrangements involving a business to obtain earnings after his employment ceased. He applied for work also, but without success. I accept he had no other earnings.

[38] There is some ambiguity and confusion on the amount of Mr Floyd's actual salary payment. I have based my calculation on the termination final pay slip that refers to "current salary" of \$2,307.69 gross (termination payslip document 16) per fortnight (employment agreement). The total for 7 fortnightly payments amounts to \$16,154.83 gross. The wage time and holiday records have not been entirely helpful because they are an accounting package and there is a lack of certainty about the annual amount of the salary actually paid and what the unit amount referred to means. I have used what appears to be a fortnightly before tax sum and this equates closely

with what appears to be the unit amount of an ordinary (daily) rate of \$230.77 in the documents produced.

[39] Mr Floyd has been upset by the way he was treated in the process and the employer's failure to act fairly and this means he is entitled to compensation for hurt and humiliation, because of his evidence and that of his partner. I note that although a sum was not claimed in the statement of problem that there was an earlier claim in the letter raising the personal grievance of \$20,000. In *Simpsons Farms Limited v Aberhart*¹ the Court confirmed an award of \$15,000 compensation at the highest end of discretionary awards and relating to redundancy. Mr Floyd's and Mrs Floyd's evidence does not establish the full amount as claimed. However, I accept that Mr Floyd's feelings have been affected by the way the employer treated him in the dismissal after 27 years of work and the lack of any consideration on the adequacy of notice given the Incorporation proposed eight weeks in the proposed employment agreement for him. Mr Floyd has expressed his feelings and reaction to his dismissal in his evidence, which I accept the dismissal procedure caused an impact on him. This does not relate to the genuineness of the redundancy because he can not be compensated for the loss of his job. He was not entitled to redundancy compensation. He was supported by the evidence of his wife who alluded to the impact on him of the way in which the dismissal was carried out. I award Mr Floyd \$10,000 compensation.

[40] I hold that Mr Floyd did not contribute to the situation giving rise to the personal grievance. Thus no deduction has been made to the remedies.

[41] There has been a request for costs to be reserved.

Summary of orders

[42] The Hauhungaroa 2C Block Incorporated is to pay Richard Floyd:

- a. \$16,154.83 gross lost wages. Leave remains open if there is an issue on the calculation of the above amount of lost wages, only because I have had to resort to assumptions from the documents including the reference to the parties' written submissions.
- b. \$10,000 compensation under s 123 (1) (c) (i) of the Act.

¹ [2006] ERNZ 825

[43] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority