

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 159
5546294

BETWEEN TERESA NELLIE JANSEN
Applicant

A N D D.R. & D.M. MCKENZIE
FAMILY TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Phillip de Wattignar, Advocate for the Applicant
Simon Claver, Counsel for the Respondent

Investigation Meeting: 4 August 2015 at Dunedin

Submissions Received: 11 and 19 August 2015 on behalf of the Applicant
19 August 2015 on behalf of the Respondent

Date of Determination: 23 October 2015

DETERMINATION OF THE AUTHORITY

**A Teresa Jansen was unjustifiably dismissed from her
employment and the following orders have been made:**

- (i) D.R. & D.M. McKenzie Family Trust is to pay to
Teresa Jansen the sum of \$13,406.25 gross being
reimbursement of wages lost under s 123 (1) (b) of
the Employment Relations Act 2000. From the net
amount payable to Ms Jansen the sum of \$1142.32
net for earnings over the three month period is to be
deducted.**
- (ii) D.R. & D.M. McKenzie Family Trust is to pay to
Teresa Jansen the sum of \$8000 without deduction**

being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Employment Relations Act 2000.

B Costs are reserved and failing agreement a timetable has been set.

Employment relationship problem

[1] Teresa Jansen says that she was unjustifiably constructively dismissed from her employment with D.R. & D.M. McKenzie Family Trust (MF Trust) where she had worked since July 2013 as a relief milker and calf rearer.

[2] Ms Jansen seeks reimbursement of lost wages for the balance of the 2014/2015 season and compensation of \$12,000 for humiliation, stress and injury to feelings together with a contribution towards costs.

[3] MF Trust says that Ms Jansen was neither constructively nor actually unjustifiably dismissed and that it did everything reasonably within its powers to address her concerns and acted as a fair and reasonable employer.

The issues

[4] The Authority needs to determine the following issues:

- (a) Was Ms Jansen a casual employee?
- (b) How did the employment relationship end?
- (c) Was it in circumstances that amounted to a dismissal, constructive or actual?
- (d) Was the dismissal unjustified?
- (e) If Ms Jansen was unjustifiably dismissed, what remedies is she entitled to and are there issues of contribution or mitigation?

Was Ms Jansen a casual employee?

[5] Ms Jansen and her husband, Boyd Jansen, came to work on the farm MF Trust owned and operated from in or about July 2013. Mr Jansen was employed as a full

time farm worker and MF Trust says Ms Jansen was employed on a casual basis doing milking and calf rearing.

[6] Ms Jansen and her husband were provided with accommodation on the farm. They were permitted to keep their breeding pig at the back of that accommodation and to take penicillin milk from the farm to feed the pig.

[7] Ms Jansen's work involved rearing calves. She also undertook relief milking when Mr Jansen and the herd manger, Kelly, had their three days off every 11 days. The calf rearing takes place between August and December and Ms Jansen said that she had set hours to undertake the calf rearing commencing at 8am and sometimes earlier and working through to lunch and returning after lunch at about 2pm.

[8] It was only clear to the Authority that MF Trust regarded Ms Jansen as a casual employee when the statements of evidence were provided for the purposes of the Authority investigation meeting. Wage and time records had not been provided and the Authority requested these. They were provided on the day of the investigation meeting.

[9] Whether employment is casual or permanent in nature requires an analysis of days and hours worked by an employee and the nature of the work. It is necessary to assess whether work was unpredictable and *ad hoc* which would tend to support a relationship of a casual nature or consistent and predictable which could indicate the employment was permanent in nature.

[10] The employment relationship ended about five weeks into the 2014/2015 second season Ms Jansen worked for MF Trust. In those circumstances I have analysed the nature of the employment for the first season as well because there is no suggestion that it was intended Ms Jansen undertake different work for the second season.

[11] Ms Jansen was also asked to do other tasks around the farm by Rodd McKenzie who manages the farms for MF Trust and is in charge of employing staff. Ms Jansen said that she never turned down extra work over and above the more set duties although it is likely that she could have done so if she wished.

[12] The first time sheet that I have for Ms Jansen is for the period 2-8 September 2013. Ms Jansen was paid an hourly rate of \$25 per hour. Wages are shown as paid

from the period ending 2 August 2013 but there do not appear to be corresponding time sheets. I record that the net payments for the first four weeks of work are between \$700.75 per week and \$804.51.

[13] I have then analysed the average hours and days of work from the pay period ending 8 September 2013 to the pay period ending 30 December 2013 which is 17 weeks. That is a period for which I have time sheets and is when Ms Jansen undertook calf rearing work. The average hours for that period worked each week by Ms Jansen over those 17 weeks are 41.42 per week. The time sheets show that Ms Jansen consistently worked those hours over seven days. The time sheets show there was usually a start time of 8am although sometimes earlier and a return to work in the afternoon.

[14] After December 2013 the hours worked did reduce for the period ending 5 January 2014. The last payment for that season that I have records for is the week ending 18 May 2014. That period is 17 weeks and I have calculated the average hours worked by Ms Jansen as 21.48 per week. The time sheets show that those hours were often spread over seven days each week but there is less consistency than for the months August to December.

[15] Ms Jansen's relationship with MF Trust ended on 25 August 2014 for reasons that I shall come to. She had worked about five weeks into the new season averaging 34.56 hours per week.

[16] Denise McKenzie, Rodd McKenzie's wife, undertook the administration for the MF Trust including attending to matters involving payment of staff. Mrs McKenzie said the holiday pay was built into the hourly rate paid to Ms Jansen of \$25 per hour. This was not, however, an identifiable component of the hourly rate.

[17] Hours and days worked over the August to December period took on a pattern of regularity and there was I find an expectation on the part of Ms Jansen that her work during that time would be ongoing and predictable. I am satisfied that she simply reported to work and undertook her calf rearing duties during that period without engagement as such by Mr McKenzie for each period of work. I am not satisfied that Ms Jansen could have simply declined to attend at the workplace for calf rearing.

[18] The pattern of work for calf rearing was consistent and predictable for Ms Jansen. Although the events that I need to consider are toward the start of the second season Ms Jansen worked, there was no suggestion that Ms Jansen was employed for the second 2014 season on a different basis to the first. The duties that Ms Jansen was undertaking when the relationship ended in August 2014 were the calf rearing duties.

[19] When I consider all the above factors I am not satisfied that Ms Jansen was a casual employee when she was undertaking the calf rearing for the 2014 season. I find that she was a permanent employee. I am strengthened in my view by the written evidence of a previous employee of MF Trust, Demelza Maxwell. Ms Maxwell said that Ms Jansen's attitude changed towards her when Ms Maxwell also became involved in the calf rearing. She said that Ms Jansen told her that Mr McKenzie had not spoken to her about their roles and what was happening. Ms Maxwell said that Ms Jansen advised her that in the worst case scenario she would simply find another job. Ms Maxwell said that *I did not question the issue as I knew we both had full time employment for the duration of calving.*

How did the employment relationship end?

[20] At the start of the 2014/2015 season, in July 2014, a worker who I will call Danny came to work for MF Trust on the farm.

[21] On 12 August 2014 Mr Jansen said in his evidence to the Authority that he was assaulted by Danny at a farm run off which was situated about a 40 minute drive from the farm. Mr Jansen was injured and did not after that date return to work at MF Trust. The matter was reported to the Police and from a newspaper report dated 28 November 2014 it seems that a charge laid under the Summary Offences Act 1981 of assault on Mr Jansen was taken into account with other Crimes Act charges in the imposition of a sentence of imprisonment. I record that because there is some inconsistency with an earlier email from the police provided to Mr McKenzie by Mr Claver who was at that time representing Danny in October 2014 that the charge had been withdrawn. According to the newspaper article that did not appear to be the case.

[22] Both Mr and Ms Jansen continued to live in the farm accommodation after 12 August 2014 and Ms Jansen continued to work on the farm.

[23] Danny also continued to work on the farm after the incident with Mr Jansen before he was sentenced in or about late October. Mr McKenzie said that as he could recall when Danny first appeared in Court the Judge stated that Danny could go back to work as long as he did not work with Mr Jansen.

[24] There was evidence that Ms Jansen spoke to Mr McKenzie after 12 August about Danny although it was not clear exactly what was said. I find it likely that a short time after 12 August 2014 Ms Jansen was removed from relief milking with Danny and I accept that was because Mr McKenzie believed Ms Jansen felt unsafe around him. Mr McKenzie said that he did not want them working directly in the same cow shed and Ms Maxwell took over Ms Jansen's duties as a relief milker. The evidence supported Mr McKenzie made this decision because he felt that it was the best option in the interim. The evidence does not support that there was discussion with Ms Jansen before a decision was made to remove her from relief milking and she did not know the potential time frame that she would no longer be undertaking the milking.

[25] Ms Jansen was further concerned that Ms Maxwell was undertaking calf rearing duties for the 2014/2015 season. Ms Maxwell in her evidence said that she noticed Ms Jansen's attitude towards her change from her previously being pleasant, kind and friendly to being sullen and abrupt. She felt that Ms Jansen was threatened by her presence and because the calf rearing role was going to be split. As earlier set out Ms Maxwell asked Ms Jansen about whether she had been told about the change in calf rearing and Ms Jansen said she had not.

[26] Ms Jansen said in her evidence that Mr McKenzie had not discussed with her that Ms Maxwell would be undertaking the calf rearing duties for the 2014/2015 season so she raised her concerns about this with Mr McKenzie and he said that it was up to him who raised the calves and how it was done.

[27] Both of these matters caused Ms Jansen concern because she thought they would impact on her income and that she would lose about 2/3 hours work per day. During the investigation meeting the wage and time record for the short period Ms Jansen worked into the 2014/2015 season was able to be compared to the previous year's record. The record does not show there was an impact on earnings and hours worked for the short period into the new season but Ms Jansen was I find genuinely concerned about a reduced income and it was only early days in the season.

[28] Ms Jansen said that relationships with other employees on the farm began to deteriorate after 12 August, attitudes toward her changed and *the friendliness was not there*. Ms Jansen spoke to Mr McKenzie about Ms Maxwell and her view that everyone was against her. Ms Maxwell recalled having a conversation with Mr McKenzie about that.

[29] I find it likely that Ms Jansen thought that Danny should have been disciplined and was concerned that there was no investigation into his actions. Mr McKenzie in his evidence said that he was asked by Ms Jansen to do something about Danny and that she wanted him to go. He said that Danny had rights too and he was in a difficult position so he tried to do what was the right thing short term.

[30] There were two incidents between 12 August and 25 August about which there was some dispute. The first of these involved Mrs McKenzie who said that on 18 August she was going to the cowshed and Ms Jansen was walking towards her and did not speak. Mrs McKenzie said that she put her hands on Ms Jansen's shoulders and asked her what the matter was and Ms Jansen became abusive. Mrs McKenzie said that she was hurt and upset as she had often given Ms Jansen a hug. Ms Jansen said that she reacted in that way because Mrs McKenzie tapped her on the head. Mrs McKenzie denied that. Ms Maxwell did not witness that exchange but said that she saw Mrs McKenzie visibly upset and Ms Jansen yelled out abuse about Mrs McKenzie that Ms Maxwell heard.

[31] Ms Jansen said that on 24 August 2014 she had to go into the milking shed to get milk for the calves. Danny and Ms Maxwell were working in the shed at that time. Ms Jansen said that Danny threw an extension cord that she had been using and had put back in the shed on the ground, then picked it up and threw it in her truck and yelled abuse at her.

[32] Ms Maxwell, when she gave her evidence, noticed something come flying through the door out of the corner of her eye but was not a witness to the exchange between Ms Jansen and Danny. Her recollection was that Danny walked over to pick the cord up at which point she asked what it was and he said it was the extension cord Ms Jansen had used to run the pump for the milk. Danny told Ms Maxwell that Ms Jansen had just used the cord and thrown it back into the shed and that he had spoken to her and told her that he had just tidied everything up.

[33] There was conflict in the accounts of Ms Jansen who said that Danny verbally abused her and Ms Maxwell who said that it was Ms Jansen who was verbally abusing Danny. Ms Maxwell went outside to see Ms Jansen and discuss what was going on with her. Her evidence was that Ms Jansen told her to *fuck off* and that it had nothing to do with her and to stay out of it. Ms Jansen confirmed that she did not want to talk to Ms Maxwell about the incident and at that point went to the calf shed and continued feeding her calves.

[34] The evidence supported that after the incident involving her husband and Danny on 12 August Ms Jansen became visibly upset and concerned that nothing was done about Danny. I found Ms Maxwell to be a straightforward witness. She said that it was apparent Ms Jansen was not coping during this period and she *guarded herself off*. She said that Ms Jansen appeared anxious and upset and was not coping with the pressure.

[35] Mr McKenzie said Ms Jansen was talking to staff about the incident with Danny and *agitating for some sort of response*. He said that Mrs McKenzie tried to console Ms Jansen and she was tearful and wound up. Mr McKenzie said that it was plainly evident that Ms Jansen was upset and he said that he listened to her lots of times and asked what she expected him to do because he could not fire people on suspicion.

[36] Ms Jansen in answer to a question from Mr Claver as to whether her attitude changed agreed that it had but she said only in relation to how she was being spoken to and treated.

Final day of work 25 August 2014

[37] Ms Jansen made some handwritten notes about the exchange with Mr McKenzie on this day. Mr McKenzie agreed they were an accurate account except for the part about having to provide Ms Jansen with a safe place of work.

[38] Ms Jansen was feeding her calves between 8.20-9.00am. Mr McKenzie approached her and asked her how she was. Ms Jansen advised that she was not happy having been confronted by other staff. Mr McKenzie indicated that he had already been approached by other staff about the incident the previous day and mentioned that he had been told something by Danny although I do not find it likely that he elaborated on this.

[39] Ms Jansen indicated that Mr McKenzie should talk to both Danny and Ms Maxwell after Mr McKenzie asked what he could do about it. Mr McKenzie accepted that Ms Jansen did say that Danny had been aggressive and abusive. He said that he had heard something different about the incident.

[40] Both Mr McKenzie and Ms Jansen said that the exchange became heated. Mr McKenzie in his evidence said that he agreed that they both lost their tempers during the discussion on 25 August 2014.

[41] Ms Jansen said that Mr McKenzie then asked if she was handing in her notice and that she responded he had pushed her into a corner so she guessed she was. Mr McKenzie then advised Ms Jansen not to worry about finishing the calves and to leave the ute and go. He also advised that he wanted the pig off the property and Mr McKenzie advised that there would be no more milk provided for that pig from the farm.

[42] Ms Jansen left her ute and walked home to her farm accommodation in tears. Mr McKenzie said that in hindsight he thought that the discussion was contrived because it was *not Ms Jansen's style to say you're leaving me no option*. He said that he did confirm with her that she was resigning and that the conversation was structured in a way that left no alternative but for him to seek clarification of her intentions.

[43] Mr McKenzie said that he told Ms Jansen to leave because she had verbally resigned and that it had become a toxic environment. In his written evidence Mr McKenzie said that he did not want to give Ms Jansen an opportunity to sabotage.

[44] On 27 August 2014 Ms Jansen raised personal grievances with MF Trust for unjustifiable action causing disadvantage and unjustified dismissal.

Conclusion on how the relationship ended

[45] The employment relationship had become very strained after the incident on 12 August and Ms Jansen's unhappiness was obvious to those who worked with her. There was an incident on 24 August 2014 and Mr McKenzie approached Ms Jansen on the morning of 25 August as she was doing her usual work to ask her how she was that day. Ms Jansen responded that she was not happy. Ms Jansen wanted Mr McKenzie to take some steps and speak to Danny and Ms Maxwell. The evidence

supported the discussion become heated. Mr McKenzie asked Ms Jansen if she was handing in her notice and she responded that she had been pushed into a corner and *yes that she was*.

[46] Case law supports that an apparent resignation can also amount to a dismissal depending on the facts of the case.¹ I do not find that Mr McKenzie could safely rely on the words spoken by Ms Jansen to amount to a resignation. Mr McKenzie said that the whole discussion was contrived but the suggestion that Ms Jansen may be intending to hand in her notice came not from her but from Mr McKenzie. Mr McKenzie initiated the discussion that morning and it was in response to a question from him that Ms Jansen said yes she was handing in her notice. She was clearly upset at the time and left the workplace in tears. Mr McKenzie then I find seized unfairly on the words Ms Jansen spoke in response to his question and sent Ms Jansen away from the property immediately, asking that she leave the ute behind and remove the pig.

[47] A personal grievance of unjustified dismissal was raised two days after 25 August with clear reference to Ms Jansen having been sent away although the dismissal was also described as constructive in nature. There could have been, if it was felt that there was some misunderstanding from the exchange on 25 August, an offer of a workplace meeting to discuss issues. That did not occur. MF Trust was though willing to attend mediation but time had passed by that point and a successful resumption of the employment relationship less likely. Ms Jansen continued to live in the farm accommodation for a short time after 25 August 2014 which would have assisted such a meeting. As was noted in Boobyer²

The number and variety of the cases litigated concerning disputed resignations demonstrate the difficulty of these issues and the importancethat they should be resolved as soon as possible and as close as possible to the workplace in which they occurred.

[48] I find that Ms Jansen was actually dismissed from her employment on 25 August 2014 for the above reasons.

¹ *Boobyer v Good Health Wanganui Limited* Employment Court Wellington 24 February 1994 WEC 3/94

² At pg 3

Was the dismissal unjustified?

[49] Under s 103A of the Employment Relations Act 2000 the Authority must, in determining whether a dismissal was justifiable, objectively determine whether the actions of MF Trust and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[50] The Authority must in applying the test set out above consider the four procedural factors set out in s 103A (3)(a) to (d) of the Act and any other factors it thinks appropriate. It must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[51] A fair and reasonable employer will also comply with the statutory obligations of good faith.

[52] I turn firstly to the reasons why Ms Jansen's words were seized on and considered to amount to a resignation by Mr McKenzie who told her to leave employment immediately. Mr McKenzie had reached a conclusion that the work environment was not functioning well after 12 August and described it as toxic. He felt that Ms Jansen was the main reason for this. Mr McKenzie was in a very difficult position with Danny and his continued employment after 12 August but there were steps that could have been taken to preserve the employment relationship. I find it likely that Mr McKenzie had already formed a view after talking to Danny about the incident on 24 August that Danny may not have been the instigator or agitator that day. He did that though without hearing from Ms Jansen. I do not find that he could have dismissed Ms Jansen for that incident and certainly not without hearing from her.

[53] I find that Ms Jansen was dismissed for her behaviour since 12 August and the impact that was having on the working environment on the farm including the incident on 24 August 2014. Without taking steps to try to meet and identify the concerns and issues I do not find that a fair and reasonable employer could have dismissed Ms Jansen for those reasons. It is understandable that Ms Jansen would have been upset after her partner was injured and that she would have a level of resentment towards Danny. Whilst Mr McKenzie tried to keep them apart by not having them milk together I do not find that was properly communicated. The effect

of that was that Ms Jansen saw that as disadvantaging/punishing her by reducing her hours.

[54] If the concern was about Ms Jansen's behaviour reaching an inappropriate level then a formal meeting should have been held with her to discuss concerns. She should have been advised of the right to have a representative with her. Instead of using a fair procedure Ms Jansen's words about having no option but to give notice were seized upon in the circumstances by Mr McKenzie and she was required to leave work immediately.

[55] Having regard to the specific procedural factors in s 103A (3) (a) to (d) of the Act the allegations or concerns were not put to Ms Jansen before she was dismissed. She had no opportunity to respond to them and her explanations could not be considered as to whether the employment relationship could continue. These were not minor defects and Ms Jansen was treated unfairly as a result.

[56] I find that the dismissal was unjustified. I do not find that the actions of MF Trust in dismissing Ms Jansen were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Ms Jansen has a personal grievance that her dismissal was unjustified.

Remedies

[57] I have treated the two issues that were alleged to amount to disadvantage grievances together with the dismissal as they are I find closely connected for the purposes of remedies.

Lost wages

[58] Ms Jansen seeks lost wages for the balance of the 2014/2015 season less earnings received. I am satisfied that Ms Jansen has lost remuneration as a result of the personal grievance. I have considered whether to exercise my discretion to order a payment for compensation greater than three months under s 128 (3) of the Act as claimed. One of the difficulties in this case is that Ms Jansen became very unhappy in her employment which impacted on her relationship with her co-workers. I am not sure that she would have been able to remain at the farm beyond the three month period to 24 November 2014. I limit reimbursement to three months ordinary time remuneration.

[59] The next consideration is the basis on which to calculate the hours. I find it likely that Ms Jansen would have received the same average hours over that period as for the previous season which I have calculated as 41.25 hours per week at \$25 per hour.

[60] I am satisfied that Ms Jansen attempted to mitigate her loss over that period but that it was difficult for her to do so as she had to leave the farm accommodation mid-season. She did pick up some cleaning work and I have her earnings over that period as \$1142.32 and they appear to be net. That net amount should be deducted from the net sum to be paid to Ms Jansen to be consistent.

[61] Subject to contribution Ms Jansen is entitled to reimbursement of lost wages in the sum of \$13,406.25 gross. From the net sum payable for lost wages to Ms Jansen earnings in the sum of \$1142.32 net will have to be deducted.

Compensation

[62] There was I find distress to Ms Jansen when her relief milking hours were reduced without communication and there was no discussion about Ms Maxwell doing part of the calf rearing role. There was no discernible financial loss though for the few weeks before termination as a consequence. The consequences for Ms Jansen in losing her job were quite significant. I find that she was clearly very upset on 25 August 2014 and after a short period was required to vacate the farm accommodation and had to look for somewhere to live as well as employment. It was a significant upheaval. She could no longer keep the pig and had to give it away.

[63] I find in all the circumstances that a suitable award for compensation subject to contribution is \$8000.

Contribution

[64] I find on the balance of probabilities that Ms Jansen's attitude changed towards her colleagues and employer after 12 August 2014 and that impacted on functional relationships on the farm. There was some basis for the change in attitude. Ms Jansen's husband had been in an incident with Danny. In terms of the ongoing employment situation with Danny a more formal approach by MF Trust may have assisted. This could have been by way of a meeting with Ms Jansen to discuss what was happening in the short and long term with Danny and to hear her concerns. There

was no discussion before decisions were made to remove Ms Jansen from milking with Danny and no communication about how long that would be for. There was no communication about Ms Maxwell undertaking a role with calf rearing.

[65] I do not find that the remedies above should be reduced for reasons of contribution in all the circumstances.

Orders made

[66] I order D.R. & D.M. McKenzie Family Trust to pay to Teresa Jansen the sum of \$13,406.25 gross for reimbursement of wages lost under s 123 (1)(b) of the Employment Relations Act 2000. From the net sum payable the sum of \$1142.32 net for earnings will have to be deducted

[67] I order D.R. & D.M. McKenzie Family Trust to pay to Teresa Jansen the sum of \$8000 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c) (i) of the Employment Relations Act 2000.

Costs

[68] I reserve the issue of costs. It may be that the parties can reach agreement using the daily tariff as a guide. If that is not possible then Mr de Wattignar has until 5 November to lodge and serve submission as to costs and Mr Claver has until 19 November to lodge and serve a reply to those submissions.

Helen Doyle
Member of the Employment Relations Authority