

- Monies owing in respect of accounts paid by the Employer on behalf of the Employee including, but not limited to, private toll calls, power and charge accounts.
- Monies to repair or replace damage or loss to the Employer's equipment, caused by wilful or careless action or inaction, misuse or abuse.

Clause 21.1(a) 4 week's notice of resignation shall be given by the Employee.

Clause 21.2 If the Employee fails to work out the notice period by reason of his/her own choice, the Employee shall not be paid for the non-worked proportion of notice and the Employer shall be entitled to compensation for the Employee's breach of this agreement calculated at the pay the Employee would have received during the unworked notice period.

[4] Mr Jensen says that on 11 September he approached Mr David Jackson and it was agreed he could leave with two weeks notice instead of the four required in the written employment agreement.

[5] Mr Jackson agrees Mr Jensen approached him on 11 September and advised that he wished to resign from his employment. However, Mr Jackson says he did not agree that Mr Jensen would only need to work out two of the four weeks notice as he [Mr Jackson] had already made arrangements to be away from the farm from 1-4 October and Mr Jensen's partner had agreed to provide relief cover for his absence.

[6] The Employment Agreement required Mr Jensen to provide four weeks notice in writing. In absence of the requisite notice or any agreement to the contrary, and as can be seen from the clauses from the Employment Agreement as set out above, the agreement allowed Mr Jackson to make a deduction for the unworked period of notice from any monies owed to Mr Jensen at the end of his employment.

[7] I find it was common ground that on 11 September Mr Jensen advised Mr Jackson he had some bad news, that he had found another job and needed to start on 1 October. Mr Jackson was unhappy about the lack of notice and after Mr Jensen insisted that he needed to commence his new job on 1 October, Mr Jackson told him he had to do what he had to do. Mr Jensen says this was Mr Jackson's agreement that he only provide two weeks notice.

[8] I do not agree with Mr Jensen that Mr Jackson's words amounted to an agreement to vary the requirement for four weeks notice. Mr Jensen was well aware that Mr Jackson was unhappy about the lack of notice. I am satisfied that Mr Jensen was aware at the time Mr Jackson was not in agreement to a reduction in the notice

period but decided to ignore the employment agreement between them and leave on 27 September.

[9] Given the breach by Mr Jensen to work out his four weeks notice pursuant to the employment agreement I am satisfied the deduction from the monies owed to Mr Jensen at termination, which included his holiday pay, was lawful. Mr Jensen's claim in this regard therefore fails.

Unjustified disadvantage

[10] I am required to examine Mr Jackson's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[11] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Mr Jackson's actions disadvantaged Mr Jensen in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[12] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Mr Jackson establishes justification for any disadvantageous actions, there is no grievance.²

[13] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

[14] Mr Jensen says that his employment agreement did not contain a written job description and as a result he felt he had to do every task on the farm and had no way

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

of knowing whether he was performing as expected or not. He also says his employment agreement lacked a description of the hours of work he was required to work and that this caused him considerable stress and anxiety throughout his employment.

[15] As already mentioned previously in this determination, the parties to this employment relationship signed a written employment agreement on 19 December 2007. The agreement at clause 5.2 has a handwritten note that a job description is attached. Despite having initialled the page on which clause 5.2 is set out, Mr Jensen says he did not receive any attachments and did not question this at the time he signed the employment agreement. At no stage during his employment did Mr Jensen raise any issues with regard to not having a copy of the job description.

[16] I find it is more likely than not that there was a job description attached to the employment agreement when Mr Jensen signed it. Even if I found a breach, I am satisfied Mr Jensen would not have been disadvantaged by the absence of a job description. This is because, at the investigation meeting I interviewed Mr Jensen's partner, Ms Cindy White. Ms White confirmed Mr Jackson's evidence that there was a white board and a diary in the cowshed. The evidence of Mr Jackson is that the whiteboard was used to set down the daily tasks to be carried out on the farm.

[17] I am satisfied that through the use of the whiteboard Mr Jensen was always aware of the daily tasks to be completed. Further, Mr Jensen was not new to farming work. He had previous experience as a farm worker and therefore was fully conversant with the tasks needing to be undertaken on the farm on a daily basis.

[18] With regard to the hours of work, it is correct that Mr Jackson and Mr Jensen both signed the employment agreement without setting out in the spaces provided in the agreement for the start and finish times of work. This is certainly an action that could lead to disadvantage.

[19] Mr Jensen says he was required to take every second weekend off but that he was frequently asked to work on his weekend off and that this caused him stress and anxiety.

[20] The job description, which I have found on the balance of probability was attached to the employment agreement at the time it was signed by Mr Jensen, sets out

the time off as being 1 weekend off a month over calving (1st July – 31st October), then every 2nd weekend off (1st November – 30 June).

[21] Further, Mr Jackson produced copies of the diary from the cowshed which sets out Mr Jensen's weekends off. This diary was available to Mr Jensen on a daily basis.

[22] Standing back and considering the circumstances objectively, I find Mr Jensen was not disadvantaged in his employment by any unjustifiable actions of Mr Jackson. I can be of no further assistance to Mr Jensen.

Costs

[23] Costs are reserved. Mr Jackson represented himself at the investigation meeting. It is likely therefore that he has incurred no legal costs in defending this matter. However, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Jackson may file and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority