

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 406
3045093

BETWEEN PAUL JOHNSTONE
Applicant

AND ASLAN FARMS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Kate Wilson, counsel for the Applicant
Andrea Twaddle and Anna Jackman, counsel for the
Respondent

Investigation Meeting: 6 December 2018

Submissions received: At the investigation meeting

Date of determination: 19 December 2018

DETERMINATION OF THE AUTHORITY

- A. Paul Johnstone is to be reinstated on an interim basis to his former position as farm manager for Aslan Farms Ltd, pursuant to s 127 of the Employment Relations Act 2000.**
- B. Interim reinstatement is to restore Mr Johnstone to his former position with Aslan Farms Ltd on the same terms and conditions of employment, pending the hearing of his personal grievance.**
- C. The order for interim reinstatement is suspended for two days from the date of this determination to enable arrangements to be made for Mr Johnstone to return.**
- D. Mr Johnstone is to fully co-operate with any reasonable**

requirements of Aslan Farms Ltd necessary to facilitate his return to work.

E. Costs are reserved

Employment relationship problem

[1] Paul Johnstone claims that he was unjustifiably dismissed from his position as farm manager on a Waikato farm property, the operation of which is managed by Aslan Farms Ltd (Aslan Farms or the company). Aslan Farms claims that it was justified in dismissing Mr Johnstone.

[2] Mr Johnstone has filed a claim in the Authority seeking interim reinstatement to his former position. This application is opposed by Aslan Farms. The parties were unable to resolve the matter at mediation. I decided to hear and determine this matter on the basis of affidavit evidence.

[3] Prior to the investigation meeting, an issue arose regarding the prospect of counsel for one or both parties being required as witnesses to events which occurred during an adjournment to the disciplinary meeting. I decided that in light of the interim reinstatement application being heard on affidavit evidence only, there was no difficulty with counsel continuing for that application. Counsel subsequently agreed to both parties' representatives continuing to represent their clients.

[4] Between them the parties filed ten affidavits as well as a large number of documents. An investigation meeting was held on 6 December 2018 to hear the parties' helpful submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[6] The issues for determination in this interim reinstatement matter are:

- (a) Does Mr Johnston have an arguable case of unjustified dismissal against Aslan Farms, and if, after a substantive determination, does he have an arguable case for permanent reinstatement?
- (b) Where does the balance of convenience lie? What detriment and injury will Mr Johnstone and Aslan Farms incur as a result of interim reinstatement being granted or not? Is there an adequate alternative remedy.
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

Appointment

[7] Prior to working for Aslan Farms, Mr Johnstone had lengthy experience as a farm manager and filed a number of positive references regarding his previous work. He applied for the job with Aslan Farms and was interviewed by Richard Luxton. Mr Luxton is the director of Aslan Farms. He has been involved in the farming community his whole life, in several of capacities, including on a governance level. Affidavits supporting Mr Luxton as a good employer were received.

[8] The parties have different perspectives regarding the appointment of Mr Johnstone's wife Cheryl Johnstone, who started as a herd manager at the farm at the same time. However, these issues are not critical to the interim reinstatement question. Suffice it to say that, as from 1 June 2018, Mr and Mrs Johnstone were both working on the farm and sharing a house on the property, along with their two adult children.

Early period of employment

[9] Mr Johnstone paints a somewhat rosier picture of his early months than Mr Luxton does. However, both agree that there were no formal meetings or disciplinary processes. I accept the suggestion in submissions for Mr Johnstone, based on affidavit evidence filed for Aslan Farms, that Mr Luxton's jolly and positive manner may have contributed to Mr Johnstone's sense that all was well.

[10] Mr Luxton's affidavit speaks of him working hard to build and maintain a reputation in the farming world as a good employer and community person. This

¹ *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863.

includes a personal goal of providing a working environment that enables people to have time off like any other industry, rather than traditional farming rosters.

[11] This is the background to the first issue which arose between the parties, namely whether Mr Johnstone was taking proper time off himself and ensuring that his direct reports had time off. There had been some discussion in the first few months about time off.

[12] Mr Luxton was also aware of an incident on 17 August 2018 between Mr Johnstone and a fertiliser contractor. Mr Johnstone's affidavit evidence was that he understood from what Mr Luxton said when they discussed it at the time that the matter was dealt with.

Performance review

[13] Mr Luxton emailed Mr Johnston on 12 September 2018 indicating that employee time and herd records and a fortnightly report needed to be completed. Mr Luxton also noted that he needs to be informed if there is an issue such as the effluent issue "today". Mr Johnstone considered that he was keeping records as were needed but in his notebook, rather than in the electronic manner preferred by Mr Luxton.

[14] Mr Luxton noted in his email "I have let some of this slide due to the settling in period and your systems that have worked for you in the past through calving". He notes that he is happy with the way that Mr Johnstone managed the feeding animal welfare and "generally most things to date". Mr Luxton then said that he will have an independent person conduct a performance review. He arranged a human resource advisor to be involved. There was no reference to this being a disciplinary investigation or to disciplinary outcomes being possible.

[15] On 18 September 2018 a discussion between Mr Luxton and Mrs Johnstone became heated, including Mr Luxton telling her that she was "not fucking listening to me". He subsequently apologised for this on more than one occasions. Mr Johnstone was upset when he heard about the exchange.

[16] Mr Luxton and Mr Johnstone met for the performance review on 25 September 2018, along with the HR advisor Mr Luxton contracted. During the meeting positive features of Mr Johnstone's work were noted as well as concerns about the effluent issue, taking time off, record keeping and staff management were

discussed and noted on the performance review document. After Mr Luxton saying that two of Mr Johnston's family members who were working on the farm were not capable of doing their job, Mr Johnstone became upset and said "I resign, you've got six weeks' notice".

[17] Some emails were exchanged between Mr Johnstone and Mr Luxton, which included Mr Luxton taking Mr Johnstone to have given his notice in the absence of any explicit denial of resignation. The parties engaged representatives and by agreement Mr Johnstone was returned to or reinstated to the farm manager role from 3 October 2018.

Earlier dismissal allegations

[18] In the statement of problem Mr Johnstone claims that he was unjustifiably dismissed on two occasions prior to the 31 October 2018 dismissal. One dismissal is alleged to have been a constructive dismissal at the performance review meeting on 25 September 2018. Regardless of whether Mr Johnstone can establish some type of grievance claim in this earlier period, he did continue to work for Aslan Farms. I therefore do not consider that I need to assess the prospect of interim reinstatement for those matters. They do form a background to the consideration of Mr Johnstone's later dismissal.

Return to work

[19] After Mr Johnstone returned to work in early October 2018, he and Mr Luxton met without issue, to discuss the summer feed plan and management of the farm.

[20] However, on the day of Mr Johnstone's return, 3 October 2018, Mr Luxton initiated a disciplinary process, inviting Mr Johnstone to a disciplinary meeting. The letter identifies the issues to be discussed as falling under four heads; management of staff, taking time off, record keeping and the effluent issue. Mr Johnstone was put on notice of Aslan Farm's view of the serious nature of the allegations and possible disciplinary outcome.

[21] A week later on 10 October 2018, having sought information from contractors, Aslan Farm's representative provided Mr Luxton provided statements from the contracting firm involved in the August incident. Further information regarding the August information was supplied on 16 October 2018 along with an email from a

manager of an equipment service company who preferred to deal with Mr Luxton than Mr Johnstone. Mr Johnstone's affidavit evidence was that he had had no interactions with the author of the email.

[22] Further allegations regarding a water incident and an interaction with a technician from a service supplier were put on 24 October 2018. Mr Johnstone's affidavit describes the water matter as something he needed training on.

[23] There were some difficulties with finding an agreed meeting time, but the disciplinary meeting occurred on 29 October 2018, with both parties represented. This predominantly largely related to issues identified and discussed in the performance review meeting on 25 September 2018.

[24] In his affidavit Mr Luxton says that it was not the specific incident concerning the fertiliser contractor in which was in question here but rather the fact that there were three more times in five months of employment where contractors had raised issues about how Mr Johnstone had conducted himself towards them.

[25] Following the conclusion of the meeting, Mr Johnstone was given a day to respond to two emails provided after the meeting, as well as information provided during the disciplinary meeting. Mr Johnstone was then summarily dismissed for serious misconduct by way of a six page letter dated 31 October 2018. I summarise the issues outlined in the letter as staff management, time off, record keeping, delay in reporting the effluent issue, failure to constructively engage in the performance review and a pattern of conduct towards contractors who reported finding him difficult to deal with.

Arguable case for unjustified dismissal

[26] Mr Johnstone maintains that his dismissal was unjustified. Aslan Farms does not accept that there is an arguable case.

[27] There are aspects of Mr Johnstone's claim which I do not consider it necessary to resolve at this time. It is alleged that Mr Luxton had an ulterior motive in dismissing Mr Johnston and pre-determined that decision. Those are matters best considered after seeing and hearing the witnesses give their evidence in person.

[28] For Mr Johnstone it is argued that there is no substantive justification for dismissal as the grounds for dismissal were either:

- (a) dealt with and resolved by the parties at the time;
- (b) a direct result of Aslan Farm's failure to provide adequate resources so Mr Johnstone could take time off;
- (c) performance related issues which were discussed at the review meeting; or
- (d) matters which did not warrant disciplinary action, being training or performance issues.

[29] There is an arguable case on the basis of Mr Johnstone's affidavit evidence that at least some of the matters dismissed on were historical and were known about prior to the performance meeting and dealt with either prior to or at that meeting.

[30] In terms of some performance issues or standards, it is clear from Mr Luxton's own words that he let things slide early on, understandably allowing for a settling in period and as Mr Johnstone had systems of his own which he was using. However, knowing what he knew on 12 September 2018, Mr Luxton assessed that a performance review was sensible. There is no indication that this was something which could lead to disciplinary action.

[31] A question arises about whether the review was provided for under the employment agreement, or whether it was of some other nature. Clause 25 of the employment agreement, which is headed "Performance below expectation" sets out a process in some detail. It requires action to be taken as soon as practicable after "the event" and for the potential outcome of the formal meeting to be identified. Further, after consideration of responses if performance is below reasonable expectations, consideration will be given to whether a formal performance warning will be issued.

[32] It is not evident from the affidavit evidence that Mr Luxton envisaged the September review as coming within that clause. His email setting up the review meeting does not indicate that.

[33] Submissions from Aslan Farms described the 25 September meeting as a catch up to see how things were going, part of its good faith obligations and not part of a formal process. While I accept that clause 25 appears not to have been relied on, it is hard to describe the process as informal. The performance appraisal document is

nine pages including discussion recorded at the end. It identifies issues for discussion, drawing on areas from Mr Johnstone's job description and sets out detailed comments from Mr Luxton on at least eight elements of the job description

[34] On the evidence available I must take it that Mr Luxton considered the issues which he was aware of as at 25 September 2018 were not sufficient to base a "Performance below expectation" process on.

[35] The involvement of external human resource expertise, without notification being given of possibly disciplinary action or the adoption of the clause 25, supports this. The affidavit from the human resource adviser refers to this being a performance review, without reference to clause 25.

[36] Mr Johnstone's departure from the meeting obviously prevented any kind of result being decided at the time. However, Aslan Farms could have attempted to complete that process, once it was agreed that Mr Johnstone's employment was to continue from 3 October 2018. There was also a prospect of proceeding under clause 25 which envisages only a warning being given.

[37] Although Mr Luxton did receive more information after the 25 September meeting it appears to have been in the nature of somewhat similar matters to what it had been dealing with in the performance review.

[38] On the basis of the affidavit evidence it is not fully explained why the company did not attempt to begin where the process had been left off. Instead it chose to proceed, past the catch up/performance review stage, past the "Performance below expectation" stage and straight to disciplinary action.

[39] I am satisfied that Mr Johnstone has an arguable case that Aslan Farms did not act as a fair and reasonable employer could have done and therefore he was unjustifiably dismissed.

Arguable case for permanent reinstatement

[40] I now consider whether it is practicable to reinstate, in the sense of being feasible to re-impose the employment relationship.² The interests of the parties and

² *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63].

the justice of their cases are to be balanced. At the present time reinstatement is not the primary remedy but is one which may be considered.

[41] A significant feature of this case is the location of the job and Mr Johnstone's position. Mr Johnstone is the manager of the farm; a responsible role. As such he does not have someone frequently supervising him. Mr Luxton is rarely on the farm. His affidavit says that he is there for 10 to 20 minutes at a time.

[42] This has the advantage in a reinstatement situation of meaning the two men would have to spend little time together thus avoiding potential conflicts. However, the disadvantage is that there would be little oversight of Mr Johnstone's performance or conduct without a significant change in the way Mr Luxton operates. Mr Luxton has provided affidavit evidence about his other commitments, which it appears, would make it difficult for him to spend substantial amounts of time on the farm on an on-going basis.

[43] Mr Luxton asserts that he has lost trust and confidence in Mr Johnstone. Such a loss weighs against the practicability of reinstatement. However, I note the statement in *Harris v The Warehouse Ltd* that a review of the circumstances may reasonably and objectively show that there are no grounds, or at least sufficiently sound grounds, to lose trust and confidence.³

[44] Mr Luxton's assertions must be seen in light of his earlier awareness of the substantial majority of the issues on which the dismissal is founded and decision at that time to proceed to a performance review, without indication of any prospect of disciplinary action. Whilst I accept that Mr Luxton's concerns may have been heightened by the receipt of the additional matters, it is hard to see objectively how they are sufficient to push the matter from an issue to be discussed in a review to a complete loss of trust founding a summary dismissal.

[45] In terms of Mr Johnstone's conduct since the dismissal, despite still living on the farm as a result of his wife's service tenancy, there is no indication of him being disruptive. Mr Johnstone appears to have worked effectively after the agreement that he return to work at the start of October 2018. Mr Johnstone's affidavit supports him still caring about the property and about the quality of his work and his own reputation as a dedicated farm manager. Mr Johnstone has accepted the need to keep

³ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [162].

records up to date and take time off, offering to work towards a positive working relationship moving forward.

[46] Mr Luxton says that resourcing the farm has been difficult since Mr Johnstone's departure. Mr Johnstone's representative submitted that that supported his reinstatement being practical and not involving prejudice to Aslan Farms. However, for Aslan Farms, the difficulty was described as being the uncertainty of not knowing what was happening (with the reinstatement application pending), rather than necessarily any difficulty with finding a new farm manager.

[47] The farm manager job is available, with Aslan Farms quite properly not having made arrangements to fill it permanently.

[48] On the basis of the untested affidavit evidence, I do not accept Aslan Farm's submission that Mr Johnstone's contributory conduct is sufficient to disqualify him from reinstatement as a remedy.

[49] I conclude that Mr Johnstone's claim to permanent reinstatement is arguable.

Balance of convenience

[50] Here I weigh the interests of Mr Johnstone and the interests of Aslan Farms.

[51] Mr Johnstone's affidavits provide extensive evidence about the detriment or injury which he would incur if he was not reinstated in the interim.

[52] Mr Johnstone has searched for other employment and has been submitting applications for other jobs. I am satisfied that it has been difficult in this short period for him to find other employment with similar remuneration, benefits and location. This is partly because of the widespread practice of starting and finishing farming jobs and share-milking arrangements at 1 June each year. Although evidence has been brought for Aslan Farms that some jobs are currently available, I accept that Mr Johnstone is significantly less likely to obtain work now than he would be closer to the lead up to 1 June.

[53] Mr Johnstone was the primary earner in the family. Although Mrs Johnstone remains employed she was off work on sick leave due to stress.

[54] Mr Johnstone is concerned about his ability to remain living in the house on the farm. One of his children suffers from a health condition which makes a sense of sameness, consistency and structure important to managing the condition. The current location allows ready access to that family member's support groups and doctor.

[55] Mr Johnstone's ability to remain in the house is not totally predicated on his being in employment, as his wife also has a service tenancy entitlement and that allows the family to stay in the home. However, there are some uncertainties regarding that situation and Mr Johnston's accommodation situation would be strengthened if he is granted interim reinstatement.

[56] Mr Johnstone has also provided evidence regarding the worsening of his own health since being dismissed. His affidavit describes suffering sleepless nights and constant worry. He has felt sad and worthless since dismissal. He has undertaken supportive activities to try to improve this situation.

[57] Mr Johnstone has filed his curriculum vitae and positive references referring to him as a loyal, high achieving and hard-working employee. Interim reinstatement would likely preserve Mr Johnstone's career and livelihood until this matter is resolved.

[58] I now balance that against detriment which Aslan Farms would suffer if Mr Johnstone was reinstated.

[59] If Mr Johnstone is reinstated Aslan farms would receive his labour in return for paying his salary. Mr Johnstone has signed an undertaking in accordance with s 127(2) of the Act. Therefore in the event of financial loss Aslan Farms would be covered. Aslan Farms also refers to a concern about Mr Johnstone's performance and the need to supervise him if he returns. I will deal with the issues regarding Aslan Farm's employees and contractors below.

[60] I am not satisfied that Mr Johnstone's losses in terms of the effects on his career and his own health and family's position can be adequately compensated by monetary remuneration. The balance of convenience lies with Mr Johnstone.

Overall justice of the case

[61] At this point I stand back and look at where the overall justice of the case lies.

[62] I adopt a cautious approach in assessing the relative strengths and weaknesses of the case at this stage. As indicated above, Mr Johnstone's case includes claims of predetermination and improper motives, which, if accepted, would add significantly to the strength of his case. I make no findings on those matters at this point. From Aslan Farm's perspective, it had issues about Mr Johnstone's performance which it was entitled to pursue, but I have expressed doubt as to whether, including in light of earlier events, it was reasonable to move immediately on his return to work in early October, to pursue these through a disciplinary process.

[63] On the face of his affidavit evidence, Mr Johnstone has shown a willingness to accept areas of performance he can change to meet Mr Luxton's requirements or relatively recent legislative changes regarding the recording of hours of work for salaried employees such as himself. He has committed to work hard and prove himself to be passionate about farming. The performance review document indicates some areas of strong performance by him.

[64] Aslan Farms expresses concern that it could not have a harmonious and productive relationship with Mr Johnstone, pointing to his disputing of aspects of Mr Luxton's evidence. However, disputes in evidence are not uncommon, even in situations of an existing employment relationship and are not necessarily fatal to the continuation of a satisfactory working relationship. Mr Luxton's commitment to being a good employer will no doubt assist.

[65] A significant factor is that when Mr Johnstone went back to work in early October, he and Mr Luxton appear to have been able to work together satisfactorily. Mr Johnstone's affidavit refers to a lengthy discussion, with Mr Luxton being pleased about the plan. Mr Johnstone describes the situation as business as usual. Examples of business like emails between the two in October, were also provided.

[66] In terms of third parties, I consider the situation of other employees. The only other permanent employees on the farm are Mrs Johnstone and another herd manager. Mrs Johnstone is supporting her husband's application for reinstatement. Neither party had filed an affidavit from the other herd manager. For Mr Johnstone, it was suggested, without opposition, that the two had a good relationship.

[67] In terms of contractors, Mr Luxton expresses concern about Mr Johnstone's ability to work with them. Although this could present a difficulty I was not pointed

to any evidence regarding the frequency with which Mr Johnstone would have to deal with contractors or the number of contractors which he had to deal with, compared to the number who had been in contact with Mr Luxton.

[68] In summary the overall justice favours Mr Johnstone and his reinstatement is reasonable and practicable.

[69] I order that Paul Johnstone is reinstated on an interim basis to his former position as farm manager by Aslan Farms Ltd pursuant to s 127 of the Act. Interim reinstatement is to restore Mr Johnstone to his former position on the same terms and conditions of employment, pending the hearing of his personal grievance claim.

[70] The interim reinstatement order is suspended for two days following the date of this determination to enable arrangements to be made for Mr Johnstone to return. Mr Johnstone is to co-operate fully with any reasonable requirement of Aslan Farms necessary to facilitate his return to work.

Next steps

[71] An Authority officer will contact the parties' representatives to set up a telephone conference, where arrangements will be made for a substantive investigation meeting. The parties are also able to access further mediation to assist with the implementation of Mr Johnstone's interim reinstatement or with any prospects of resolution of the remainder of his claims.

Costs

[72] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority