

[4] Milkpride says there was no demotion, rather Mr Karaka offered to step down and his offer was accepted.

The demotion

1. Background

[5] Taharua Farm is a large scale dairy farm. It operates two dairy sheds. One is a rotary shed, and the other a new herringbone shed which was certified in November 2008 for sending milk to Fonterra. Mr Karaka had responsibility as unit manager for the rotary shed. He was also responsible for several staff members (up to about 10 although the actual number varied during the season) including their deployment and the management of their rosters. Further duties included maintaining milk quality standards and developing milking shed hygiene, maintenance and safety programmes.

[6] Mr Karaka reported to Milkpride's regional operations manager, Ray Griffin.

[7] According to the parties' written employment agreement Mr Karaka's hours of work were 'as necessary to ensure that the business needs of the employer are met but in any event shall be no less than 40 hours per week'. Mr Griffin was concerned that Mr Karaka worked very long hours. He believed such hours were not required and Mr Karaka should have delegated more to his staff. Indeed the company's catch cry was that managers should 'do more managing and less doing'. Mr Karaka's hours of work were seen as a symptom of his failure to give the attention he should to management matters, and instead carrying out himself farm duties which staff should have been carrying out.

[8] During August 2008 Mr Griffin raised informally with Mr Karaka the concerns about Mr Karaka's failure to delegate together with wider issues concerning time management and the deployment of staff, and further concerns with milk quality and milking procedures. He and Leigh Mathieson, Milkpride's general manager, sought to assist Mr Karaka by providing a 'focus planner' which was to be used to prioritise tasks and delegate them. After a visit to the farm in September 2008 Mr Mathieson issued a memorandum which Mr Griffin discussed with the two unit managers. The memorandum focussed on the need for regular meetings, baseline checks, structured communication, and planning.

[9] By October Mr Griffin considered the farm to be in disarray. On 14 October Messrs Griffin and Mathieson met with Mr Karaka to discuss the issues. They raised in particular Mr Karaka's hours of work, and their view that fatigue was impacting on his performance. Mr Karaka said he needed extra staff. There were vacancies to be filled at the time, and that process was completed shortly afterwards.

[10] Mr Griffin believed that Mr Karaka's habits did not change and the same problems continued to arise after the meeting. In an email to Mr Karaka dated 30 October 2008 he proposed a plan for organising the rotary shed and expressed the view that the shed was out of control. By that he was referring to what he considered to be either the lack or failure of systems in the shed, which was leading to adverse consequences for the quality of the milk and in turn significant financial consequences for the company.

[11] While Mr Griffin acknowledged the rotary shed required maintenance, and there were difficult problems with effluent in the shed, he was concerned about the way problems were managed. For example he was concerned about the failure to monitor adherence to an understood routine for something as simple as ensuring the milk was being chilled properly. More fundamental failures included the failure to call on the right resources to assist (such as suitable tradespeople rather than staff members), a failure of planning and failures in communication. Thus Mr Griffin's view was that he and the other unit manager encountered similar problems, but they were able to address them effectively in a way Mr Karaka was not.

[12] In addition Mr Griffin had diarised a series of incidents which had occurred in the week of 19 – 25 October, commenting that: 'most of the problem solving is coming from myself and I am finding it harder to leave the shed as new problems arise.'

[13] In a letter to Mr Karaka dated 8 November 2008 Mr Griffin again acknowledged Mr Karaka's hours of work and expressed concern about them. He went on to list a number of specific incidents, although he said the primary concern was Mr Karaka's failure to act as a manager. Mr Griffin wished to put in place an immediate plan to resolve the concerns, and sought an agreement on changes to the way in which Mr Karaka was operating on the farm.

[14] In that respect the resulting meetings were not disciplinary in nature. Their primary purpose was to construct a strategy for better managing or avoiding incidents of the kind being experienced.

[15] Mr Griffin, Mr Mathieson and Craig Coote, the human resources manager, met with Mr Karaka on either 9 or 10 November. It was common ground that Mr Griffin went through the concerns listed in the letter, and that Mr Griffin asked Mr Karaka for suggestions.

[16] For his part Mr Karaka said he told Milkpride he accepted there was a need to fix the problems, and acknowledged he did not offer any concrete suggestions. He said in evidence that he believed he needed the right resources, but again acknowledged he did not explain that at the time. He also wanted to have a meeting with his staff, to discuss with them ways of getting on top of the problems. That, too, was not said at the time.

[17] According to Mr Griffin, Mr Karaka said only that he 'wanted what was best for the farm and Milkpride' and 'offered to step down or leave if this was the best way forward'. Mr Karaka denied saying this.

[18] There was another meeting the next day during which Milkpride sought to discuss further any suggestions Mr Karaka had.

[19] Accordingly Mr Coote said in evidence he asked Mr Karaka what options he had to put forward. The only options Mr Karaka suggested were that he step down or leave. Otherwise he sat and shrugged his shoulders. Mr Coote told Mr Karaka that his stepping down was not the company's preferred option. Mr Karaka replied that he was old-fashioned and respected management, and said 'you decide what is best for the farm'.

[20] Mr Karaka agreed that he was old-fashioned, and that he told Milkpride he respected management. Otherwise his view of the meeting was that he 'had a feeling something would happen'. Mr Griffin had allegedly made a cryptic remark along those lines some two weeks earlier, and Mr Karaka was applying it to the circumstances in which he now found himself. Again he did not raise the matter at

the time. Mr Karaka also said he was thinking about the meeting with his staff, which he had not yet been able to hold. Unfortunately again, however, he did not say so.

[21] Finally, Mr Karaka said in evidence that Mr Coote told him Milkpride had no alternative but to demote him. Having said that he also said Mr Coote had a soft voice that was difficult to hear, he was not focussing during the meeting and his mind was 'all over the place'. Unfortunately those statements call into question from an objective point of view the accuracy of his account of what was said.

[22] Mr Karaka's attitude during that second meeting in particular leads me to consider it likely that Mr Coote's account is more accurate. In turn Mr Griffin's account of the first meeting is also likely to be the more accurate. Mr Karaka must accept the consequences of the statements he made, and accept responsibility for any failure to engage with the company otherwise.

[23] Mr Coote's evidence was that, at a third meeting on 11 or 12 November, Mr Coote asked Mr Karaka if he had anything else to say. Mr Karaka repeated that he would step down. Mr Coote told him he had experience the company needed and suggested the best role going forward was that of milk production supervisor. That position was second-in-charge to the unit manager. Mr Karaka said 'fine'. Mr Coote informed Mr Karaka that his salary would be reduced, to which Mr Karaka replied 'Ok'.

[24] Mr Karaka said he told Mr Coote it did not matter what he said as Milkpride had already made up its mind. He again denied saying he would step down or leave. However Mr Coote's account of events is more likely, and I accept it.

[25] Either at the end of the meeting, or just afterwards, Mr Karaka was informed on very short notice of the arrival of a new employee who could take up his unit manager's duties. The new employee, Geert Dings, arrived at the farm on or about 11 November. His employment agreement specified a start date of 12 November, and identified his position as unit manager. Mr Karaka believes that Mr Dings had already been employed to replace him.

[26] Mr Dings gave evidence that he had initial discussions with Mr Coote about vacancies in the South Island. These vacancies were not followed up, but Mr Coote subsequently approached him about the possibility of a position in Taupo.

[27] As a result there was a further discussion a week or two before Mr Dings' arrival in Taupo. Mr Dings was told he would be in a management role, addressing technical issues associated with milk quality in particular. He was aware there were two unit managers, and said he understood he would be a third manager who would focus on problem solving.

[28] Regarding the reason for Mr Dings' appointment, clearly there were serious problems with the rotary shed, associated with the serious problems with milk quality. Given the background to this matter I consider it likely that Milkpride anticipated at least an overlap between Mr Karaka's and Mr Dings' duties. For present purposes I also consider it likely that it anticipated embarking on a more formal performance management procedure to address its concerns.

[29] However Milkpride is relying on Mr Karaka's raising and acceptance of the demotion during the November meetings. I have found on the facts that he did so. As a result he pre-empted any plans Milkpride had to take further action on its concerns about his performance.

[30] A letter dated 24 November was given to Mr Karaka, confirming the new arrangement and attaching a new employment agreement which included a reduced salary. Mr Karaka advised Mr Griffin a few days later that he did not agree and was not signing the new agreement. Thereafter he continued to carry out the milk supervisor's duties, but retained his previous salary pending a resolution of the dispute.

[31] On 5 December 2008 Mr Karaka raised a personal grievance in a letter of that date. It commented in detail on the incidents Mr Griffin had been raising. This was the first time the company had received a response.

[32] The parties then embarked on discussions in an attempt to resolve the grievance.

2. Whether there was an unjustified demotion

[33] For the reasons just discussed, I find on the facts that Mr Karaka agreed to the demotion.

[34] Accordingly there was no unjustified action on Milkpride's part.

The dismissal

1. Background

[35] Also in December 2008, rumours began circulating to the effect that staff were being offered positions with 'the Koreans', with Mr Karaka managing the business. Mr Griffin was asked to investigate the rumours.

[36] He asked the staff for information about what had been said, and by whom. He obtained a written statement from Jason Smith, a milk production supervisor, saying that there was a discussion at his home on 13 December during which Mr Karaka offered him a management position on any of the five farms belonging to the Koreans. Mr Karaka told Mr Smith he was responsible for employing the managers, and went on to offer salaries to Mr Smith as well as his wife. He told Mr Smith he would be meeting with the 'Korean bosses' on 15 January 2009, and would get back to him after that.

[37] A written statement from the other unit manager, Piet van Zyl, characterised what was said to him as 'not an official job offer but mentioned in general conversation.' Mr Van Zyl sought something in writing before he would consider the exchanges on the matter had become more serious. He said in his statement to Milkpride that he asked Mr Karaka about his plans for the next season, to be told Mr Karaka 'was already sorted with the Koreans'. Mr Karaka commented to him that 'the Koreans' would need operations managers and Mr Van Zyl would have to travel around the country to meet with Mr Karaka wherever he was. There would be a delay until mid-January while finance was obtained, then it would be 'all go'.

[38] Before his employment with Milkpride began, Mr Karaka had been employed briefly on a farm owned by 'a Korean farmer'. On or about 8 January 2009 he met with the former employer, who offered further employment. Mr Karaka replied that he wished to 'sort out the mess' with Milkpride first. After his dismissal he began employment at a farm owned by the former employer.

[39] Mr Karaka also had another Korean connection. In late 2008 a group of Korean investors contacted Mr Karaka to discuss a planned investment. Mr Karaka had met this group at a sale several months earlier, and given them some advice about equipment purchases. There was an arrangement to stay in touch.

[40] Following the further contact Mr Karaka arranged a meeting with the investors early in December. Mr Karaka was accompanied by a Milkpride employee who wished to leave her employment in circumstances not involving Mr Karaka, and sought an interview with the Koreans. That action alone was inherently likely to cause gossip, misinformation and speculation among the staff.

[41] Mr Karaka informed Mr Griffin that he was meeting with this group, to discuss a farm they wished to purchase. Mr Griffin denied being told another employee was accompanying Mr Karaka, but whether or not that is true Milkpride did not rely in the decision to dismiss on Mr Karaka's actions in respect of that employee.

[42] For his part Mr Karaka said in evidence that no offer of employment was made to him by this group, and there was no arrangement under which he would recruit staff. I do not believe that evidence amounted to the whole truth. Given the nature of the information he was able to make available to Mr Smith and Mr van Zyl, the plan to meet with the investors again on 15 January, and his circumstances at the time, it would be very unusual if Mr Karaka had not had some discussion with the investors about his own prospects. As for any arrangement that he recruit staff, even if that was not a firm arrangement as far as the Koreans were concerned, Mr Karaka had already introduced them to one potential employee and had spoken to Mr Smith and Mr van Zyl in the terms he did. He was effectively acting as a recruiter.

[43] Regarding the detail of his conversations with Mr Smith and Mr van Zyl, Mr Karaka accepted that he told them he had been 'talking to a group of Koreans' and

said he explained what 'the Koreans' had told him about their plans. Mr Karaka denied offering employment to Mr Smith and Mr van Zyl.

[44] On receipt of the statements from Mr Smith and Mr van Zyl, Mr Griffin wrote a letter to Mr Karaka dated 19 December 2008, seeking a meeting on 20 December. The letter advised of information that Mr Karaka had made approaches to staff relating to offers of employment on farms owned by Korean investors with whom Mr Karaka was associated. Milkpride considered the allegations to be serious, and amounted to a severe breach of trust and confidence.

2. The disciplinary meetings

[45] There were delays in arranging a meeting, so that the requested meeting did not go ahead until 19 January 2009. Mr Karaka and his daughter attended together with Mr Griffin and Debbie Piggott, a human resources consultant. Mr Karaka was shown the statements of Mr Smith and Mr van Zyl. He confirmed having those discussions with them but said there was no job offer, and nor was he in a position to make such an offer.

[46] He said further that the staff had approached him regarding possible employment elsewhere. He had further discussions with Mr Smith at Mr Smith's request. The discussion with Mr van Zyl was just a general discussion.

[47] A note of the 19 January meeting, signed as a true reflection of the meeting by Mr and Ms Karaka, also records that Mr Karaka commented that the contents of the statements Mr Smith and Mr van Zyl had given were correct. Mr Karaka did not seek to dispute the account of what he said in the Authority either, rather he said in effect that the issue was one of interpretation. His position was that he was simply imparting information.

[48] Mr Karaka said further that Mr Smith had been pressured to provide his statement to Milkpride. Milkpride did not accept this. For present purposes I am prepared to accept Mr Smith felt uncomfortable about his involvement, and even that he felt pressured. However Mr Smith did not give evidence in the Authority. According to Mr van Zyl, who did give evidence, Mr Smith expressed to him a

concern that giving a statement would prejudice the offer of employment he thought had been made to him. In any event, there was no evidence of anything inappropriate about the efforts to obtain a statement from Mr Smith. Moreover, the truth of the content of the statement he gave was accepted.

[49] Finally, Mr Karaka suggested that the disciplinary action was the company's reaction to his personal grievance. Milkpride did not accept that, and neither do I.

[50] Mr Griffin decided to speak to Mr Smith and Mr Van Zyl again, in order to confirm what had been said to them. He met them together, on 20 January. He said both confirmed the contents of their statements. Mr van Zyl agreed with that account in his evidence.

[51] Mr Griffin and Ms Piggott met again with Mr and Ms Karaka on 22 January. They informed Mr Karaka that Mr Smith and Mr van Zyl stood by the content of their statements. Mr Karaka maintained that both had approached him, and he had merely passed on information relating to opportunities. He made a further allegation which would have amounted to a disparity of treatment argument. Mr Griffin responded by denying any knowledge of the matter. It has not been pursued.

[52] It was common ground that Mr Karaka also confirmed at the time that he had met with the investors on 15 January, although it appears no such meeting went ahead. Mr Karaka acknowledged in evidence that he told Mr Smith there would be a further meeting with the investors on 15 January, although he said the meeting did not go ahead because of the intervention of the disciplinary process.

3. The decision to dismiss

[53] Mr Griffin consulted with Mr Coote and Ms Piggott about what to do. Although someone signed the letter of dismissal on behalf of Mr Coote, I accept that Mr Griffin was the decision-maker.

[54] All three concluded that Mr Smith and Mr Van Zyl had no reason to lie, and did not accept that Mr Karaka's discussions with them were only general in nature. They believed Mr Karaka had offered positions to them.

[55] They saw this as a serious breach on the part of a senior manager, and was of particular concern because Milkpride made a significant investment in its staff and it did not wish to lose them. In addition, the loss would have impacted on its day to day operation, and the staff would have been difficult to replace. Such a breach of trust was unacceptable, and dismissal was to be the result.

[56] A final meeting went ahead on 26 January. Milkpride advised of its decision.

[57] The letter of dismissal, dated 24 November 2008 in error, confirmed the company's conclusions that Mr Karaka: had an association with Korean investors at the time job offers were made; made an appointment and met with Mr Smith during which an offer was made to Mr Smith and his wife; approached Mr van Zyl with an offer of employment; and did so while employed by Milkpride as a senior manager.

[58] Mr Karaka was not required to report again for work, and was asked to vacate the house provided as part of his job within 7 days.

4. Whether the dismissal was justified

[59] The test of the justification for a dismissal requires a consideration of whether the action the employer took at the time was the action an employer acting fairly and reasonably would have taken.

[60] With reference to the findings expressed in the letter of dismissal, Milkpride was correct in concluding that Mr Karaka had an association with Korean investors at the relevant time and had met with those investors. Not only that, he had taken another employee with him because the employee sought an interview with them.

[61] Regarding whether Mr Karaka made offers of employment to Messrs Smith and van Zyl, or had merely imparted information to them, Mr Smith believed he had received an offer while Mr van Zyl was far more cautious.

[62] For present purposes I accept that Mr Karaka may not have had authority to make any offer of employment on behalf of the Korean investors, and that Mr Smith might not have been a 'person intending to work' for the Koreans in terms of the

definition in s 5 of the Employment Relations Act. It was said in the submissions for Milkpride that Messrs Griffin and Coote, and Ms Piggott, are laypeople and to them Mr Karaka's conduct amounted to an offer of employment. I was asked to view their decision in that light.

[63] There is at least no real dispute about what Mr Karaka said to Mr Smith and Mr van Zyl, and no uncertainty about the essence of Milkpride's concern about Mr Karaka's conduct.

[64] There was a submission on behalf of Mr Karaka that it was critical to maintain a distinction between the Korean farmer with whom Mr Karaka resumed employment, and the group of investors. If the submission was intended to suggest that Milkpride wrongly assumed Mr Karaka's new employer was also the employer referred to in the conversations with Mr Smith and Mr Van Zyl, then even if such a wrong assumption was made it does not affect the essence of the conduct or the concerns about it.

[65] Mr Karaka's willingness to follow up with Mr Smith in particular, and the depth of the information about possible positions with the investors which he provided to Mr Smith and Mr Van Zyl, mean his conduct amounted to more than simply providing them with information. I would also say that Mr Karaka's actions amounted to an attempt to entice them into alternative employment rather than to the making of offers of employment that would be binding if accepted.

[66] In turn I believe the conduct is better addressed in the context of whether it was consistent with Mr Karaka's obligations of fidelity and good faith. I do not consider that it was, and neither in effect did Milkpride. I accept the submission that Mr Karaka's conduct was disloyal. Milkpride's decision to dismiss was an action an employer acting fairly and reasonably would have taken.

[67] For these reasons I find the dismissal was justified.

Costs

[68] Costs are reserved.

[69] The parties are invited to agree on the matter. If either party seeks an order from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum setting out the party's position. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority