

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 77
5324829

BETWEEN

VICTORIA ELIZABETH
KEEBLE
Applicant

AND

SHAMROCK PASTURES
LIMITED
Respondent

Member of Authority: Philip Cheyne
Representatives: Rex Hancock, Advocate for Applicant
Nanette Bolstad, Advocate for Respondent
Investigation Meeting: 26 May 2011 at Christchurch
Further information: 27 May 2011 from the Respondent
Determination: 31 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Victoria Keeble worked for Shamrock Pastures Limited in its dairy farm business in Canterbury from June 2010 until she was summarily dismissed on 25 August 2010 for failing to put oil in her farm motorbike. Ms Keeble says that she was unjustifiably dismissed because the company did not follow the disciplinary procedure set out in the employment agreement and because she had not received adequate training in how to maintain the motorbike. She also takes issue with several warnings received by her for unrelated matters shortly before the dismissal.

[2] Cliff Hocking is a shareholder and director of Shamrock Pastures Limited. He says that he dismissed Ms Keeble for serious misconduct comprising her failure to undertake maintenance checks on her motorbike resulting in serious damage.

[3] There are some factual disputes that must be resolved so I will set out more fully the relevant events before applying the law relating to justification for a dismissal. Neither party suggested that the statutory amendment to s.103A that came into force on 1 April 2011 is relevant and I agree that justification must be assessed in accordance with the pre 1 April 2011 law.

The prior warnings

[4] It is common ground that on 16 August 2010 Mr Hocking gave Ms Keeble three brief letters that convey warnings following events and discussions on 10 August, 14 August and 16 August 2010 respectively.

[5] Clause 9.3 of the employment agreement provides for disciplinary procedures. Clause 9.3.1 provides that *The employee must be advised of their right of assistance and/or representation at any stage and Of the specific matter(s) causing concern and given an opportunity to state any reasons or explanation and The employer will give consideration to the employee's explanation ...*

[6] It is clear that Mr Hocking did not follow these procedures in giving Ms Keeble warnings about the three incidents.

[7] In her statement of problem Ms Keeble says that these warnings were relevant to the subsequent dismissal. However, Mr Hocking says that they were not relevant and the dismissal stands alone. I accept Mr Hocking's evidence on this point. Ms Keeble has not suggested that she suffered any unjustified disadvantage (other than by reference to the dismissal) arising from these warnings; nor is there any evidence to support that. Ms Keeble also says that she was treated differently from another employee who was not warned for similar conduct. I accept the evidence that the other employee, as Mr Hocking's second in command, had other responsibilities that meant that he was not always on time for milking without that being a breach of his obligations to his employer.

[8] Accordingly it is not necessary to refer to the warnings further other than to say that if Mr Hocking had taken account of the warnings when he decided to dismiss Ms Keeble she would have succeeded in any challenge against each of the warnings.

The dismissal

[9] The 21 day roster worked on the farm provides eight days on, two days off, eight days on, three days off. 25 August 2010 was Ms Keeble's first day at work after three days off. There is a dispute about the precise time when the following events occurred but that need not be resolved.

[10] On Mr Hocking's account, which I accept for current purposes, he noticed the motorbike in front of the workshop and checked it because it should not have been there. He found it partially seized with no oil in the sump. He returned to his work nearby with Willie King, his 2IC. Soon after, Ms Keeble came over to where they were working. Mr Hocking asked her if she knew what had happened to the bike. She said it just stopped. Mr Hocking asked her if she had checked it before her days off. It is common ground that Mr Hocking had asked her to clean and service the bike before her days off. Ms Keeble said that she had not checked it. Mr Hocking became angry. I note his evidence that it was a time of *very high stress* because he was in the middle of calving working long hours without time off. Ms Keeble's evidence is that he told her she was *useless*. I accept this evidence. Mr Hocking also told her it was serious misconduct, to pack her bags and that she had 48 hours to vacate the supplied accommodation. Ms Keeble turned and walked back to the house.

[11] There was another exchange later between Ms Keeble and Mr Hocking but it is not necessary to detail that.

Justification

[12] Whether the decision to dismiss Ms Keeble 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.

[13] S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made.

[14] In addition, the employment agreement between Ms Keeble and the company says:

- 9.4.2 *The procedure for summary dismissal will be as follows:*
- a. *The employee must be advised of his/her right of assistance and/or representation at any stage.*
 - b. *The employer will advise the employee of the specific allegation, and the seriousness of the situation, and provide the employee with an opportunity to refute the allegation or explain the misconduct. If the explanation is not satisfactory to the employer, the employer will inform the employee that the allegations will be investigated further. The employee may be suspended, on pay, to allow a full investigation to take place.*
 - c. *When the employer is satisfied that the matter has been fully investigated, the employer will arrange a meeting with the employee and make the findings of the investigation known. The employee will be allowed a reasonable and adequate opportunity to make further representations to the employer.*

[15] For the company Mr Hocking accepts that Ms Keeble was not advised of her right to assistance and/or representation. His evidence is that he tried to follow the procedure in the employment agreement but I do not accept that he gave any thought to the provisions of the employment agreement at the time. He did not advise Ms Keeble of the *specific allegation, and the seriousness of the situation* nor did he allow her *a reasonable and adequate opportunity to make further representations*. Mr Hocking simply reacted in an angry manner and dismissed Ms Keeble telling her she was *useless*. Those are not the actions of a fair and reasonable employer.

[16] For Ms Keeble something is made of alleged failures in training her about how to properly maintain the motorbike. However, in evidence, Ms Keeble accepted that she had been trained in what was required. I also accept Mr Hocking's evidence that he made a point of stressing the importance of regular service checks when Ms Keeble was employed and later during her employment. If she was unsure about what was required Ms Keeble had adequate opportunity to seek assistance. There is no merit in the point about an alleged lack of training.

[17] For the foregoing reason I find that Ms Keeble was unjustifiably dismissed and that she has a personal grievance against her former employer.

Remedies

[18] I must assess the extent to which Ms Keeble contributed in a blameworthy way to the circumstances giving rise to the personal grievance. I find that Ms Keeble did contribute to a significant extent. She should have followed Mr Hocking's instructions and serviced the motorbike. If she had done that the problem would not have arisen. However, the company must take responsibility for Mr Hocking's complete failure to comply with the provisions in the employment agreement about dealing with serious misconduct dismissals. I assess Ms Keeble's contribution in the order of two-thirds.

[19] There is only a little evidence of hurt, humiliation or injured feelings. What evidence there is leads me to the conclusion that an award of \$1,500.00 would restore Ms Keeble to her previous position, subject to her contribution as assessed above.

[20] Ms Keeble was not able to find other employment until she obtained some relief milking (now at an end) about two months ago. I accept that Ms Keeble took reasonable steps to try and find other work. To further recognise Ms Keeble's contribution to the circumstances of the grievance I will limit the assessment of lost remuneration to the period specified in s.128(2) of the Employment Relations Act 2000. Three months ordinary time amounts to \$8,250.00 which reflects Ms Keeble's loss over that period. There will be an award to cover that loss subject again to Ms Keeble's contribution.

Summary

[21] Ms Keeble was unjustifiably dismissed.

[22] Shamrock Pastures Limited is to pay Ms Keeble the sum of \$2,750.00 (gross) pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000.

[23] Shamrock Pastures Limited is to pay Ms Keeble the sum of \$500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[24] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority