

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 361
3050612

BETWEEN	NATHAN POMANA Applicant
AND	HENDERSON FARMS TRUST LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Shannon Thompson for Applicant Graeme Henderson for Respondent
Investigation Meeting:	18 June 2019
Oral Determination:	18 June 2019
Record of Oral Determination:	19 June 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Pomana's employment were not affected to his disadvantage.**
- B. Mr Pomana was unjustifiably dismissed. Henderson Farms Trust Limited is ordered to pay to Mr Pomana the following amounts within 28 days of the date of this determination:**
- a) Lost wages of \$1,858.46 gross under s 123(1)(b) of the Act; and**
 - b) Compensation of \$10,000 under section 123(1)(c)(i) of**

the Act.

- C. Mr Pomana's claim for reimbursement of expenses is declined.**
- D. Henderson Farms Trust Limited is ordered to reimburse the sum of \$71.56 to Mr Pomana within 28 days of the date of this determination.**

Employment relationship problem

[1] Mr Pomana worked for Henderson Farms Trust Limited which operates a dairy farm from 29 May 2017. He worked as a Farm Assistant reporting to the Farm Manager. At a meeting on 19 December he was dismissed with one week's notice which ended on 23 June 2017.

[2] Mr Pomana challenges the dismissal which he claims was unjustified. He also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of his employer. In addition he claims Henderson Farms breached the terms of his employment agreement and seeks reimbursement for expenses.

[3] Mr Pomana withdrew a claim for arrears of wages at the investigation meeting.

Issues

[4] During a case management call with the parties on 15 February I confirmed the following issues needed to be investigated and determined:

- a) Whether one or more conditions of Mr Pomana's employment were affected to his disadvantage by the unjustified actions of Henderson Farms;
- b) Whether Mr Pomana was unjustifiably dismissed; and
- c) Whether Henderson Farms breached the employment agreement and if so whether any penalty should be imposed.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence received.

Disadvantage

[6] Mr Pomana claims one or more conditions of his employment were affected to his disadvantage by Henderson Farm's unjustifiable acts relating to:

- a) Poor work conditions;
- b) The state of his accommodation; and
- c) Discrimination on the ground of race.

[7] Mr Pomana bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Pomana discharges that onus then the burden of proof moves to Henderson Farms to establish on the balance of probabilities that any disadvantage Mr Pomana may have suffered was justified.

[8] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Henderson Farms actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Poor working conditions

[9] Through his statement of problem Mr Pomana stated the cows on the farm were mistreated with tails being broken and large holes in the paddocks. He stated fences were broken by livestock and not repaired and livestock were not being provided with a proper water supply due to water lines being broken resulting in empty troughs. He stated cows udders were touching the ground and dragging in their own effluent as some of the races had no proper drainage and became swamped at times. Cows suffered from mastitis and some were lame.

[10] At the investigation meeting Mr Pomana told me he raised his concerns with the Farm Manager and in response the Farm Manager arranged for a Veterinarian to visit the farm to address any animal welfare issues.

[11] Mr Pomana's partner made a complaint to the Ministry for Primary Industries (MPI) about the state of the farm. At the investigation meeting Mr Greame Henderson, a shareholder and director of Henderson Farms told me he was made aware of the complaint by Mr Pomana's partner but was unaware of any investigation or other action being taken by MPI.

[12] I am satisfied the animal welfare concerns held by Mr Pomana were satisfactorily addressed when he raised his concerns with the Farm Manager.

Accommodation

[13] In his statement of problem Mr Pomana stated that he was told during his interview that the farm accommodation was immaculate but when he moved into it he discovered it was far from immaculate. He stated when they moved into the house there was rubbish in the house, the carpets were stained, there were holes in the walls and the house was damp and smelt mouldy. He stated the floor boards and walls in the bathroom were rotting and the house was infested with rats.

[14] I have been provided with a copy of a video taken on the day Mr Pomana and his partner moved into the farm accommodation. That video confirms the poor state of the accommodation.

[15] Mr Henderson told me he normally undertakes an exit inspection when a worker leaves the accommodation but was unable to recall the circumstances of the previous tenant leaving. He acknowledged there was a water leak, which had been fixed, that had caused damage. After hearing about the state of the accommodation he met with Mr Pomana and his partner the following day to discuss their concerns. At that meeting it was agreed Mr Pomana's partner could fix up the accommodation and she would be reimbursed for all expenses.

[16] I am satisfied that having raised the concerns about the state of the accommodation the parties resolved the matter by agreement.

Discrimination

[17] Mr Pomana claims he was discriminated against on the basis of his race. He is of Maori descent.

[18] Under section 104 of the Act discrimination occurs where an employer subjects an employee to any detriment in circumstances in which other employees of the employer are not subjected to such detriment by reason of the employee's race. Section 109 of the Act states:

“ ... an employee is racially harassed in the employee's employment if the employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly-

- (a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and
- (b) is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and
- (c) has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

[19] In his statement of problem Mr Pomana claims he was subjected to racial comments while working with the Farm Manager who often referred to him as “...you Maori's...” and felt ostracised by the comments.

[20] Mr Henderson strongly objected to the claims that Mr Pomana had been subjected to discrimination on the basis of his race.

[21] At the investigation meeting Mr Pomana did not expand on the statements made in his statement of problem and was unable to tell me anything more about this claim.

[22] Mr Pomana's claim of feeling ostracised was not borne out by the evidence. For example a day or two before he was dismissed he had a discussion with the Farm Manager about a possible pay rise. He had only been working on the farm for about three weeks at that stage. It is unlikely that someone feeling ostracised would feel confident to have that type of discussion so early in an employment relationship.

There is no evidence he raised any concerns about the language used by the Farm Manager with anyone to enable it to be addressed.

[23] Mr Pomana has failed to establish to my satisfaction that he was subjected to any detriment in circumstances in which other employees were not subjected to such detriment by reason of his race.

[24] That is not to say I condone the use of racist comments in the workplace such as those attributed to the Farm Manager. Such comments are highly inappropriate and unacceptable in any workplace.

Conclusion

[25] Mr Pomana has failed to establish one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Henderson Farms and his application is declined.

Dismissal

[26] Mr Pomana was dismissed on 19 June 2017. When he was invited to attend the meeting on 19 June Mr Pomana believed the meeting was to discuss his earlier request to the Farm Manager for a pay increase.

[27] That was not the case. When Mr Pomana arrived at the meeting he was told feedback had been received from other staff that he was too slow in the performance of his work and staff did not want to work with him any longer. After a debate with Mr Pomana's partner, who attended the meeting with him, Mr Pomana was told he had to leave the farm by Friday 23 June. Mr Pomana rejected an offer to work out the remainder of the week. Henderson Farms terminated Mr Pomana's employment on 23 June 2017.

[28] In applying the test of justification set out in s 103A of the Act, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Henderson Farms sufficiently investigated allegations, raised the concerns with Mr Pomana, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[29] Evaluating Henderson Farms' actions against the objective standard of what a fair and reasonable employer could have done in the circumstances I have concluded Henderson Farms acted unjustifiably. Henderson Farms' actions also fell well short of the obligation on employers to be constructive in maintaining a productive employment relationship.

[30] Mr Pomana was dismissed because of concerns about his performance. Mr Henderson relied on a 90-day trial period provision contained in the employment agreement offered to Mr Pomana before he started work when making his decision to dismiss.

[31] Section 67A of the Act allows for written employment agreements to provide for a trial period of 90 days or less. Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period and prohibits an employee from bringing a personal grievance in respect of the dismissal.

[32] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.¹

[33] There is no dispute that Mr Pomana never signed the employment agreement accepting its terms including the 90 day trial period. Henderson Farms was therefore not able to rely on ss 67A and 67B of the Act when making the decision to terminate Mr Pomana's employment. Henderson Farms was required to adhere to the principles set out in s 103A of the Act which it has not.

[34] The process leading to Mr Pomana's dismissal was defective. Henderson Farms had not raised its concerns about Mr Pomana's performance prior to making the decision to dismiss him in a way that provided him with a reasonable opportunity to improve his performance. I accept the Farm Manager may have discussed concerns about the speed with which Mr Pomana was undertaking his duties. However, a fair process for performance management before moving to a disciplinary process would entail at least:

¹ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111; [2010] ERNZ 253 at [82].

- a) Giving Mr Pomana a reasonable specified timeframe to improve after raising concerns and discussing these with him;
- b) Making clear to Mr Pomana what the consequences of failing to improve were likely to be;
- c) Providing Mr Pomana with any support that was reasonably necessary to assist improvement; and
- d) Reviewing the performance again at the end of a reasonable time period and hearing Mr Pomana's explanations if there had been no acceptable improvement.

[35] I have noted that the proposed employment agreement at clause 24 sets out a process for dealing with performance that does not meet expectations. Had that process been followed as a guideline it is possible Mr Pomana would not have been dismissed on 19 June.

[36] Mr Pomana was not provided with any opportunity to respond to any concerns before the decision to terminate his employment was made and consequently there was no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Mr Pomana being treated unfairly.²

[37] Mr Pomana has established a personal grievance and is entitled to a consideration of remedies.

Remedies

[38] In resolution of his personal grievance Mr Pomana seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[39] Mr Pomana obtained alternative employment and was working within two weeks. He is entitled to reimbursement of lost wages for the two week period which amounts to \$1,858.46 gross.

² Employment Relations Act 2000, s 103A(5).

[40] Mr Pomana told me being dismissed after working for three weeks was stressful. He did not understand why he was dismissed. At the investigation meeting Mr Pomana told me he was not comfortable talking about how the dismissal made him feel and I observed his distress at attempting to convey his feelings to me. Mr Pomana did explain that he lost confidence but had to look for another job for his family.

[41] In all the circumstances of this case an appropriate award for compensation under s 123(1)(c)(i) of the Act is \$10,000.

[42] Under s 124 of the Act I must consider whether any remedies awarded should be reduced due to the conduct of Mr Pomana if his conduct contributed to the situation giving rise to his grievance.

[43] Mr Henderson was clear in his evidence that part of the decision to dismiss Mr Pomana was as a result of a serious threat made by Mr Pomana against another employee. I have accepted the evidence given at the investigation meeting that the situation around the threat made by Mr Pomana was dealt with quickly and in a way that satisfied all those involved. Mr Henderson also told me the performance issues were of concern, however, I have found those concerns were not dealt with in a reasonable way.

[44] Mr Pomana has not contributed to the action giving rise to his dismissal in any blameworthy way accordingly the remedies will not be reduced.

[45] Henderson Farms Trust Limited is ordered to pay to Mr Pomana the following amounts within 28 days of the date of this determination:

- c) Lost wages of \$1,858.46 gross under s 123(1)(b) of the Act; and
- d) Compensation of \$10,000 under section 123(1)(c)(i) of the Act.

Breach of the employment agreement

[46] Mr Pomana claims Henderson Farms breached the employment agreement. The difficulty with this claim, as discussed at the investigation meeting, is that there is

no concluded employment agreement between the parties. While some terms and conditions of employment may be implied, such as the agreed salary, the work to be undertaken and the provision of accommodation I am not satisfied Mr Pomana has established any breach of those terms.

[47] Even if there had been a breach of the term of employment regarding the accommodation it is unlikely a penalty would have been imposed.

[48] Mr Pomana's application for declarations that Henderson Farms has breached the terms of the employment agreement is declined.

Reimbursement of expenses

[49] Mr Pomana claims reimbursement of the expenses associated with the installation of an aerial to his accommodation. Mr Pomana confirmed at the investigation meeting that there was no agreement for him to incur the costs of installation and receive reimbursement from Henderson Farms. Mr Pomana's claim for reimbursement is declined.

Costs

[50] Neither party has incurred any representation costs in bringing this matter to the Authority. Mr Pomana is entitled to be reimbursed the filing fee. Henderson Farms Trust Limited is ordered to reimburse the sum of \$71.56 to Mr Pomana within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority