

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 104
3163281

BETWEEN	MARCO ANTONIO PEREZ QUINTANA Applicant
AND	CD & JE JOHNSTON Respondents

Member of Authority: Alastair Dumbleton

Representatives: Laura Trethewey, advocate for the Applicant
Josh Nyika, counsel for CD Johnston

Investigation Meeting: 7 March 2022

Determination: 22 March 2022

DETERMINATION OF THE AUTHORITY

A. No orders are made.

B. Costs are reserved.

Employment Relationship Problem

[1] The applicant, Mr Marco Quintana, was dismissed from employment as Farm Manager for the respondents, Colin and Judith Johnston. Terms and conditions of the employment were set out extensively in an individual employment agreement (the IEA).

[2] Upon being dismissed Mr Quintana quickly raised a personal grievance, claiming his dismissal was unjustified. The respondents rejected his claim.

[3] An application was then lodged by Mr Quintana asking the Authority to investigate and resolve the grievance. Under s 127(1) of the Employment Relations Act 2000 (the ER Act), he sought an order of reinstatement in the interim until the investigation is held and a decision given.

[4] The Johnstons oppose the application.

[5] Mediation urgently directed by the Authority was provided to the parties but did not resolve the problem. Consequently, a hearing has taken place to investigate and determine whether interim reinstatement should be ordered pending completion of a full investigation.

[6] Mr Quintana has, as required with an interim reinstatement application, given an undertaking to abide by any order the Authority may make in respect of damages; s 127(2) of the ER Act.

Identity of the employer

[7] The legal entity of Mr Quintana's employer is apparently an unincorporated partnership of Colin and Judith Johnston. When there was no appearance by the latter before the Authority and she appeared not to have taken any steps in the matter, Judith Johnston was put in contact by phone with the Authority at the outset of the investigation meeting. In the presence of the parties and their representatives she advised that she was aware of the proceedings and was content for the meeting to take place without the Authority hearing further from her. She confirmed Colin Johnston's advice that the issue of her liability for the grievance or for interim reinstatement, should either claim succeed, was the subject of an arrangement the pair had made in that regard.

The dismissal

[8] As Farm Manager, Mr Quintana was responsible for all aspects of the care, feeding and milking of a herd of some 200 dairy cows. He was dismissed after two occasions on which Mr Johnston had discovered animals with broken tails.

[9] The IEA contains several provisions relating to animal welfare and the responsibilities Mr Quintana had for looking after the herd properly and professionally.

Abuse, cruelty or mistreatment of animals, is expressed to be serious misconduct under the IEA for which dismissal may be effected without notice.

[10] The Animal Welfare Act 1999 also creates offences for the mistreatment of animals, which may be prosecuted by the Ministry of Primary Industries (MPI). Fines or imprisonment may be imposed as punishment.

[11] The first occasion on which broken tails were discovered was at the end of October 2021. By then Mr Quintana had been employed for some 17 months, since June 2020, living on the farm with his family in a house that came with the job.

[12] Mr Johnston, who worked about the farm and sometimes milked with Mr Quintana, noticed some cows with broken tails, injuries he described as horrible and sickening to see. He checked the herd on 30 October 2021 and counted 23 cows with broken tails, some damaged in two places.

[13] Mr Johnston advised Mr Quintana of what he had found and blamed him for the injuries. Mr Johnston then informed Mr Quintana that he was immediately starting disciplinary proceedings and that summary dismissal and criminal charges could be the outcome. Mr Quintana was stood down from work on pay and a meeting was arranged to discuss the broken tails.

[14] On 1 November, Mr Johnston met Mr Quintana and listened to what he had to say. He made it clear that he believed Mr Quintana was responsible for the cows' injuries.

[15] There is a divergence in the evidence as to what was said. Mr Quintana's evidence is he denied responsibility. Mr Johnston's evidence is that Mr Quintana admitted breaking the tails by bending them to move the cows around, although he would not say how many he had broken in this way.

[16] Also discussed was an allegation that Mr Quintana had been seen by a fencing contractor working on the farm, kicking new-born calves in the head, to make them use the feeder. Mr Johnston's evidence is that Mr Quintana denied kicking the animals but admitted "moving" them using his foot.

[17] At the end of the meeting Mr Quintana was told he must not repeat his conduct and he was instructed to resume work. No disciplinary action was taken, and no complaint made to MPI.

[18] The second occasion on which broken tails were discovered by Mr Johnston was 22 January 2022. His evidence was that he found 17 breaks and that these were fresh instances not in existence among the herd in late October 2021, when he had found 23 breaks.

[19] Without any prior contact or communication from Mr Johnston, the following day Mr Quintana was notified by email of his summary dismissal. The reason given to him for taking this action was “continued violence towards animals in your care”. Mr Quintana was given 14 days’ notice to vacate the farmhouse where he and his family lived, and he was advised that MPI would be notified of the animal abuse.

[20] Before taking this action Mr Johnston said he looked once again at the disciplinary provisions of the IEA and concluded he had already followed them from the time of the breaks discovered and enquired into in October and early November 2021. He considered there was nothing left for him to do but impose summary dismissal and notify MPI.

Post dismissal inspection of herd

[21] Several days after the dismissal on 2 February 2022, at the request of Mr Johnston a vet inspected the herd. She and an MPI team examined 200 cows. They reported 43 cows with varying breaks, some tails with more than one. The vet considered the breaks had occurred in a time frame of six months to two weeks before the inspection. The vet also looked for but was unable to find any obvious hazards in the milking shed or yards and other places the cows moved through every day, which might have explained the injuries.

[22] The 43 breaks counted by the vet and MPI included those counted in October 2021 by Mr Johnston who had apparently undercounted by three in reaching his total of 40. (The vet’s chart shows 43 breaks, although her letter records 44).

[23] Mr Johnston showed the Authority a number of close-up photos taken of the broken cow tails he had discovered. This graphic presentation readily conveyed a sense

of the pain the animals must have felt upon suffering such injuries, however they may have been inflicted.

Evidence untested at this stage

[24] Evidence was presented by affidavit from Mr Quintana, Mr Johnston and the fencing contractor working on the farm, who said he had observed Mr Quintana mistreating calves in July 2021 and reported then to Mr Johnston what he had seen.

[25] As the evidence will not be tested by questioning until the substantive investigation of the grievance takes place, the Authority's findings in this determination are provisional only and may change after the witnesses have each been questioned if required.

The tests for the Authority to apply

[26] The standard tests or questions for consideration in determining an interim reinstatement application are;

- Is there a serious question to be investigated in relation to:-
 - (i) the unjustified dismissal claim?
and, if so,
 - (ii) the claim seeking permanent reinstatement?

- Where does the balance of convenience lie?

- Are other adequate remedies available?

- Where does the overall justice of the case lie?

[27] The object of the ER Act must also be taken into account when considering the tests, which have been restated recently in *VMR v Civil Aviation Authority* [2022] NZEmpC 5, at [123] to [129], with commentary as to how they are to be applied.

A serious question

[28] For the respondents, in relation to (i), the claim of unjustified dismissal, counsel readily accepted the presence of a serious question or arguable case.

[29] The case is not a weak one and easily rises above the relatively low threshold of an arguable case.

[30] The Authority finds that the second occasion on which Mr Johnston had discovered broken tails in January 2022, could not simply be treated by him as one continuous situation which began with the first occasion in October 2021. Although the two occasions were separated by only a few weeks, it was apparent to Mr Johnston that the second was a fresh instance of broken tails. Although it appeared to him to be a repetition of the same or similar earlier conduct by Mr Quintana, if the second instance was going to become the foundation for potential disciplinary action the procedure in the IEA needed to be followed in full and Mr Quintana given a fresh opportunity to explain what involvement he may have had with the second lot of breakages. The IEA procedure is expressly to be followed in full in every case where serious misconduct is alleged.

[31] Arguably Mr Johnston applied the IEA procedure to a time frame running between two distinct occurrences of possible serious misconduct, and he thereby sought to link past with present but without hearing at all from Mr Quintana about the later breakages which he conflated with the earlier breakages.

[32] Also arguably, Mr Johnston had closed off the earlier disciplinary enquiry by taking no further action after meeting Mr Quintana, instructing him not to repeat his conduct and allowing him to resume work. It was arguably unfair to later revive the disciplinary process but only at its very end stage of imposing punishment, without first conducting an adequate investigation to establish Mr Quintana's responsibility, if any, for the second lot of breakages.

[33] Mr Johnston saw the matter as 'open and shut,' as if he had caught Mr Quintana in the act, but this approach does not recognise the protection the disciplinary procedure of the IEA is intended to give employees before a decision is made whether to dismiss or impose other disciplinary action. Under the IEA the employer's ability to justifiably

dismiss was conditional upon investigating or enquiring properly and fully into any conduct the employee is believed to be responsible for. The more serious the misconduct, the greater the proof the employer must have before dismissing. Although the circumstances seemed to suggest to Mr Johnston that Mr Quintana was responsible for the injuries suffered by the cows, no-one saw him do it and there was no camera filming the cows.

[34] The Authority's conclusion on part (i) of this test is that Mr Quintana has an arguable case that he was unjustifiably dismissed. By failing to follow the disciplinary procedure, Mr Johnston in dismissing Mr Quintana did not observe a critical term of his employment agreement and acted in disregard of the purpose of the disciplinary procedure. The way Mr Johnston proceeded was unfair and unreasonable.

Permanent reinstatement – is there a serious question?

[35] As Mr Quintana has sought reinstatement to resolve his personal grievance, if his dismissal is found to be unjustified he will be reinstated, provided that is practicable and reasonable; s 125(1) and (2) of the ER Act.

[36] Despite looking, he has not found another job, and his current work visa confines him to being employed by the respondents.

[37] Some assessment must be made of the nature of the misconduct for which he was dismissed. Mistreatment of farm animals is capable of being serious misconduct. The IEA identifies abuse, cruelty or mistreatment of animals or stock, leading to potential distress, injury or death, as serious misconduct. Such conduct may also be an offence at law punishable by fines or imprisonment.

[38] Mr Johnston's conclusion that Mr Quintana was responsible for the broken tails was not based entirely on suspicion or guesswork. An instance of animal mistreatment involving Mr Quintana had been brought to Mr Johnston's attention in July 2021 by the fencing contractor working on the farm. His evidence is he saw Mr Quintana kicking new-born calves in the head while trying to get them to use the feeder. He also saw Mr Quintana throwing calves off a trailer into the shed, where they fell heavily in a heap on top of each other. The contractor who is apparently familiar with working in a farm environment was disturbed by Mr Quintana's conduct and reported it to Mr Johnston.

His assistant was also upset by the sight. Of his own volition the contractor has now given a statement to MPI.

[39] Mr Johnston did not immediately raise with Mr Quintana the report made by the contractor in July, but did take it up with him three months later on 1 November. In answer Mr Quintana denied using excessive force on the calves while handling them.

[40] On 1 November after their meeting, Mr Johnston's evidence is that he had been given a confession by Mr Quintana that tails had been broken by moving the cows using excessive or improper force while they were in his charge as their sole handler.

[41] Mr Johnston placed some reliance on Mr Quintana's expressions used in a text message produced in evidence. He viewed these as an acknowledgment of complicity in the harm suffered by the cows. The Authority considers those responses are equivocal about his involvement, and English was not the first language of Mr Quintana. It is at least clear from his words that Mr Quintana's objective in his text to Mr Johnston was to preserve his employment above all else.

[42] Mr Johnston was not required to obtain evidence of the sort and to the standard of proof that MPI might need to successfully prosecute an offence. Surrounding circumstances were of some relevance. Mr Quintana was solely responsible for handling of the cows, there seemed to be no sign of a hazard causing the injuries and, although possible, it was unlikely a third party had gone unnoticed on to the farm with the intention of deliberately harming the Johnstons' cows for some unknown reason. It also seems from the photos of the injuries and from the large number of broken tails, that the injuries were not something that a handler could have been responsible for without realising what he had done at the time.

[43] The requirement at s 125 of the ER Act for reinstatement is a qualified one; reinstatement is to be provided wherever practicable and reasonable.

[44] The nature of the particular employment relationship in this case and the nature of the serious misconduct alleged against Mr Quintana with at least some foundation for concern about Mr Quintana's conduct towards animals in his care, make this a grievance where the case for permanent reinstatement is a weak one when practicability and reasonableness are taken into account.

[45] Mr Quintana as Farm Manager was a lone employee in charge of the herd. His employer Mr Johnston was also his only supervisor, solely responsible for the day-to-day operations of the farm. For that reason the employment required a high degree of trust and confidence, particularly with regard to the humane treatment of the stock from which the farm derived income. A farm manager needed to be trusted to work largely without supervision, maintaining ethical practices to promote the welfare of animals.

[46] Mr Johnston was entitled to have a farm manager in whom he could have confidence and faith that the employee would not do anything that might unnecessarily reduce the value of his business. Adverse economic consequences flowed from the injuries to the animals. Mr Johnston believes that he may lose about \$28,000 as result of the damage to cow tails. The ability to sell the animals as milking cows is limited and they may now only be suitable for the meat works. "Profit loss" to the employer caused by deliberate action or inaction of an employee, is expressly capable of being serious misconduct under the IEA.

[47] The Authority accepts that Mr Johnston genuinely feels he cannot trust Mr Quintana to work properly with the cows, and he cannot be present all the time to prevent Mr Quintana from harming the animals, if he is inclined to do that. Mr Johnston's serious misgivings about Mr Quintana's conduct are not completely groundless.

[48] Some weight is to given to the fact that MPI are investigating Mr Johnston as well as Mr Quintana for the harm. That seems inevitable given the independence of the MPI as an enforcement agency and the need for it to consider within reason all those who had the opportunity to cause the injuries for whatever reason.

[49] If reinstated Mr Quintana is likely to be dismissed if he is subsequently convicted of any charges that may yet be laid against him by MPI. In that situation there will be ongoing disruption to the resumed employment.

[50] Also, Mr Johnston, who has been dairy farming for over 45 years, was planning to retire and had made that known to Mr Quintana before the employment problem had arisen. His plans may be affected if he has to continue supervising an employee rather than stepping back and having a contractor take responsibility for the herd, as he planned to do.

[51] For the above reasons the Authority finds that the case for permanent reinstatement is weak at best.

The balance of convenience

[52] The risk of doing Mr Quintana an injustice by not ordering interim reinstatement must be balanced against the risk to animals of suffering harm.

[53] The fencing contractor was clear in his affidavit about animal cruelty or mistreatment he and his assistant had seen in July. Questions may be raised about the apparent inaction of Mr Johnston for some three months after he was given that information, but that does not detract from something that was seen to have taken place and that goes to the heart of this employment relationship. It also goes to Mr Quintana's ability to observe the public law relating to animal treatment generally.

[54] Even if Mr Johnston was content to do nothing for a long time about what he had been told by the fencer happened, the MPI is unlikely to attach much weight to his attitude when it has a public responsibility to investigate breaches of law and take enforcement action when necessary for the general good.

[55] Although the MPI investigation is likely to take some time, the balance of convenience favours the status quo remaining while that is being done, at least until a full investigation of the Authority has taken place. The risk of further animal injury should not be an acceptable risk to farmers or to the wider community whose interests are properly a concern of MPI.

[56] Also, the balance of convenience does not favour interim reinstatement to a one-on-one employment relationship where a high degree of trust and confidence in the employee is a necessity.

[57] Mr Quintana emphasised the fragile position he may now be in because of his current immigration status and because of the loss of employment that supported his ability, and that of his partner and their child, to stay in New Zealand. The Authority has very little to go on in assessing the consequences of dismissal in this regard. If not from an immigration officer, an affidavit from an experienced licensed immigration advisor may have made the position clearer.

[58] It would be surprising if Mr Quintana is told by the Immigration authorities that he must leave New Zealand or be deported, when he has quickly taken steps to challenge his dismissal and have his job with the Johnstons restored. Shortly he will be able to confirm to the Immigration authorities a firm date fixed for the substantive investigation of his grievance. It seems unlikely he would be forced to leave before that has taken place and a determination issued. This determination at this stage gives some support for his claim that his dismissal was unjustified.

[59] He may also be able to have recourse to the specialist Immigration and Protection Tribunal to seek relief from any action taken to deport him.

[60] It seems inevitable that if his case before the Authority becomes a matter of interest to the Immigration authorities, the final outcome of his grievance claim will be awaited before it is taken into account by those authorities. Reinstatement on an interim basis alone may not advance Mr Quintana's quest for residence.

[61] The strength of his claim of personal grievance does not tip the balance of convenience in Mr Quintana's favour.

Availability of other remedies

[62] The Authority accepts that monetary remedies such as lost wages and compensation, will not fully restore Mr Quintana to the position he would have been in had he not been dismissed. Mr Johnston is in a position to meet any monetary awards.

[63] This factor does not weaken his claim for interim reinstatement.

The overall justice of the application

[64] Stepping back and looking at the overall justice of the case, for the purposes of this application Mr Johnston has himself been able to identify a problem with the way he dismissed Mr Quintana. It is not an insignificant one. The dismissal may yet be found to be unjustified and in that event Mr Quintana will become entitled to be reinstated provided that is practicable and reasonable.

[65] In this latter regard the Authority finds that the overall justice does not favour Mr Quintana's application for interim reinstatement.

[66] The Authority places most weight on the nature of the alleged serious misconduct in this case: the mistreatment of animals on a considerable scale. Things should be left as they are while MPI performs its role. Both Mr Johnston and Mr Quintana were motivated to complain to MPI about each other and they may therefore understand why it will be in the overall interests of animal welfare for the employment relationship not to be resumed at this stage.

[67] If the Authority's full investigation within the next few weeks makes Mr Quintana's responsibility for what happened much clearer (when his contributory conduct if any is considered) and if it becomes plain that he was wrongly blamed, he could expect then to have a stronger case for reinstatement at that point, even if MPI's investigation is ongoing.

The application is declined

[68] For the above reasons no orders are made by the Authority.

Costs

[69] Costs are reserved until the substantive claims have been investigated and determined.

Further mediation

[70] Although the parties have had mediation, they may consider that further mediation could lead to the best resolution of this particular grievance in the circumstances. They should confer about a resumption of mediation.

Alastair Dumbleton
Member of the Employment Relations Authority