

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 4  
3017137

BETWEEN            SAM ROBINSON  
                                 Applicant  
  
A N D                KOANUI FARM TRUST  
                                 Respondent

Member of Authority:     James Crichton  
  
Representatives:         Alex Kersjes, Advocate for Applicant  
                                 Hamish Burdon, Advocate for Respondent  
  
Investigation Meeting:    12 January 2018 at New Plymouth  
  
Oral Determination:      12 January 2018  
  
Written Confirmation of    19 January 2018  
Determination:

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Robinson) alleges that he was unjustifiably dismissed from his employment by the respondent (Koanui) and Koanui resist that claim.

[2]     The employment was always to be of a short duration and there was no written employment agreement.

[3]     According to Koanui, there was the suggestion that if Mr Robinson's employment proved satisfactory, he might aspire to a full-time permanent position as Herd Manager which would commence after the initial three month employment.

[4]     However, the employment relationship in the initial three month period was unhappy. Koanui say that Mr Robinson displayed poor workmanship and had no

work ethic, preferring to spend time fishing or seeing his girlfriend in Whanganui. Koanui also maintained that Mr Robinson's attitude to the employer was completely inappropriate, that Mr Robinson talked back to the employer when instructions were given, that he would frequently get angry, and did not seem to have his heart in the job.

[5] For his part, Mr Robinson maintained that Koanui had suspected him of using drugs, and that he had offered to take a drug test but the employer had never followed up on this. Mr Robinson adamantly denied ever taking drugs and also maintained that, although there were a number of performance issues which he acknowledged, he did not accept all of the performance issues resulted in warnings (as Koanui maintains) or that he got the help and support that he felt he was entitled to from the employer.

[6] The employer tabled a statement at the Investigation Meeting which listed nine verbal warnings which Koanui say Mr Robinson received during the employment although, as noted above, Mr Robinson only accepted a third of those warnings as having been given as a legally constituted warning. On 8 April 2017 Mr Robinson was advised by Koanui that his employment was terminated.

### **Determination**

[7] It is accepted there was an employment relationship between these parties.

[8] It is apparent on the evidence that that employment relationship came to an end by termination at the behest of the employer.

[9] The question is whether the dismissal was justified or not, Mr Robinson maintaining the dismissal was unjustified and that he is entitled to remedies.

[10] The employment agreement was oral and was supposed to be for three months. Given it started in mid-February that would suggest it would conclude in mid-May.

[11] However that is not consistent with the usual rule in the dairy industry which would have had the employment concluding at the end of May.

[12] Mr Robinson was paid \$17 per hour. Both parties accept that this figure was to include holiday pay, although the wage slips do not make that plain. As a

consequence, the employer has very honourably conceded that holiday pay is due and owing on the whole of the employment.

[13] I hold that the dismissal is unjustified, the procedural defects in the process undertaken by the employer being so major as to constitute unfairness to the employee.

[14] However, I accept the view advanced for Koanui to the effect that numerous verbal warnings were given to Mr Robinson by Koanui during the very short employment, which taken in their totality go some significant distance towards justifying the dismissal. Were it not for the significant procedural deficits, Koanui might have succeeded in justifying the dismissal.

[15] These procedural deficits need to be spelt out. First, the law contemplates a measured process of time taken to investigate matters of concern, consideration given to representations made by the employee, reflection on that and then a decision issuing after the employee has had an opportunity to be heard.

[16] Here, the decision to dismiss was the culmination of a long process of unsatisfactory performance and it certainly appeared to me to be characterised by the employer simply losing patience with Mr Robinson and dismissing him in the heat of the moment.

[17] There was no opportunity for Mr Robinson to be involved in the process, no ability for him to make submissions about how the performance problems were to be treated, whether those problems amounted to serious misconduct or whether dismissal was the only remedy.

[18] My own considered view is that a proper investigative process might have concluded the matters complained about did no amount to serious misconduct, only ordinary misconduct, and so a final written warning might have been appropriate.

[19] Moreover, even if the totality of the complaints were found to constitute serious misconduct, no consideration was given to other possible responses to the wrongdoing, such as an indication that given these difficulties, the employment would not continue beyond the end of the three month term originally contemplated.

[20] Dismissals made in haste and in the heat of the moment almost invariably result in a conclusion of this sort.

[21] After all, the Authority's duty, after a claim of personal grievance for unjustified dismissal is made, is to assess whether the decision the employer made, after that employer had conducted a proper investigation, was a decision that a fair and reasonable employer in that employer's shoes could make.

[22] This means it is enough if the employer's decision is one of the decisions a fair and reasonable employer could make.

[23] In the present case, were it not for the complete absence of a proper investigation and consultation with Mr Robinson, I might have concluded the number of warnings over such a short period justified a dismissal.

[24] Having found there has been an unjustified dismissal, my next task, before considering remedies is to evaluate contribution. If the actions of the employee contributed to the circumstances giving rise to the personal grievance then remedies must be reduced if Mr Robinson's actions were both causative and blameworthy.

[25] This case is a graphic example of both those factors. There would have been no dismissal if there had not been so many performance problems with Mr Robinson. These performance deficits caused the dismissal.

[26] Further the performance deficits were, in themselves blameworthy. They were sufficient to attract warnings from Koanui. By my count, there are nine warnings over two months of employment which is about one a week.

[27] I consider that the level of contribution is very high. I put it at 66.66 percent.

[28] I turn now to remedies. Compensation at a start figure of \$12,000 is sought. That is too high. This is a case where, but for the procedural flaws, dismissal might have been justified.

[29] Mr Robinson spoke about the difficulties he had as a consequence of the dismissal. But he brought much of that on himself. I am satisfied Koanui wanted him to succeed and despite him not appearing to acknowledge this, they were effectively trialling him for the Herd Manager role. I am satisfied that was Koanui's intention.

[30] But Mr Robinson's performance problems were so grave that it was almost inevitable that the employment would come to an end at some point and potentially on a justifiable basis.

[31] I make the following awards inclusive of the contribution I have found, except where indicated:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$1,000;
- (b) Holiday pay at the rate of \$430.71 without any deduction for contribution; and
- (c) A contribution to lost wages in the sum of \$1,100.

**Costs**

[32] Costs are reserved but since both parties have achieved a measure of success in this determination, I commend to both of you the prospect that you resolve matters on your own terms.

[33] If you should not be successful in that regard, either party may file and serve a memorandum as to costs and the other party will then have 14 days from the date of their receipt of that document to respond. I will then deal with the costs application on the papers.

James Crichton  
Chief of the Employment Relations Authority