

The Issues

[4] Would a fair and reasonable employer have concluded that there was serious misconduct to enable it to dismiss Mr Roper in all the circumstances? Was the procedure fair? There are a number of factual conflicts and I will deal with them as I need to.

[5] I must scrutinise and determine on an objective basis whether the employer's actions, and how the employer acted, were what a fair and reasonable would have done in the circumstances at the time the dismissal occurred (*Air New Zealand Ltd v Hudson* (2006) 3 NZELR 155 applied).

[6] I am guided by the Judgment of his Honour the Chief Judge G L Colgan in *The Chief Executive of Unitec Institute of Technology v Kathleen Joan Henderson* (unreported) 19 March 2007 AC 12/07, in applying s 103 A of the Act:

Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand Parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all the ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

...the new section 103A test does not mean that the Court will substitute its own decisions for those of the employer...

The Facts

[7] Gary Roper started his employment as the farm manger of Pikarere Farm on 18 February 2002. He reported to Dan Stevenson, a company director of Pikarere Farm Limited. The parties signed off an employment agreement.

[8] A number of issues arose between Mr Roper and Mr Stevenson on 16, 21 25, 26 and 27 March 2007. In a letter dated 31 May 2007 Mr Roper was informed by Mr Stevenson about his concerns. These included some performance matters that had previously been issues and a reference to "Moving Forward", which included notice of lying and dishonesty and breaches of appropriate and proper expected behaviour destroying trust and confidence in the relationship.

[9] The letter referred to a matter relating to the grazing of cattle on the neighbour's property on Colonial Knob. Mr Stevenson requested Mr Roper to provide the key for Colonial knob and approached the neighbour. At first Mr Stevenson identified stock that did not belong to Pikarere Farm. He says Mr Roper told him "Steve" the manager of another property owned the stock. The next day, (27 May 2007), Mr Roper disclosed to Mr Stevenson that he (Mr Roper) owned the stock.

[10] Mr Stevenson concluded, in his letter, that having listened to what Mr Roper had to say, he would make a decision on moving forward. Mr Roper was put on notice that an outcome could involve dismissal, but before any decision was made, Mr Roper had the right to be heard and have a representative present.

[11] On 6 June 2007 Mr Stevenson found out from the farm's supervisor Graeme Twist that Mr Roper had disclosed to Mr Twist an arrangement Mr Roper had with the neighbour to graze the stock that was owned by Mr Roper. In return Mr Roper had agreed to mend the boundary fence for the neighbour, who had a responsibility for a half share of the costs of the boundary fence with Pikarere Farm. Also, the arrangement involved Mr Roper giving meat to the neighbour to put in the deep freeze.

[12] Next the parties met on 14 June 2007. Mr Stevenson responded to the issues covered at that meeting on 26 June in a letter, which included his concerns about the grazing arrangement and ownership of the stock.

[13] On 27 June 2007 an issue arose on the use of firewood by the farm's tenant without Mr Stevenson's authority. Mr Stevenson saw the tenant, Mr David Jones, carting a wheelbarrow of firewood and asked him what he was doing with it. Mr Jones says he told Mr Stevenson that he had Mr Roper's permission to use it because he had helped once to split the firewood. Mr Stevenson says he told Mr Jones that Mr Roper had no authority to let him take any wood, adding that he would take the matter up with Mr Roper and that he was not questioning Mr Jones' honesty.

[14] Mr Roper denied giving Mr Jones permission to use the wood and denied splitting wood with him. Mr Stevenson raised the issue with Mr Roper's representative in letters dated 26 and 28 June 2007, and in particular he raised the information he had

received from Mr Jones on Mr Roper's role with the firewood. Mr Roper's representative replied on 26 June 2007 and 6 July 2007 denying any wrong-doing.

[15] On 16 July 2007 Mr Stevenson sought further answers to questions on the issues from Mr Roper, particularly in regard to his fence maintenance and "*the diversion of labour*" over grazing cattle and using the neighbour's property on Colonial Knob.

[16] Mr Roper's representative replied on 18 July with Mr Roper's explanations and answers. Mr Stevenson raised more matters on 27 July 2007 and sought Mr Roper's reconsideration of his answers to the earlier questions. He also put forward his conclusions about the firewood matter for Mr Roper to comment on. Mr Stevenson did not accept Mr Roper's flat denial. He preferred Mr Jones's reply that Mr Roper's denial was untrue. The letter reads verbatim as follows:

27 July 2007

Dear Graeme,

RE: PIKARERE FARM LIMITED – DISCIPLINARY MATTERS

Two further matters require response from Gary in light of your 6 July letter and after further information has very recently come to light in this investigation process.

I regret the delay caused by the loss of the woolshed and the time required to clean up the site.

1. The Arrangement with David Fogarty

1.1 *Further to my letter of 16 July in which fundamental elements of the alleged breach of trust were raised including:*

1.1.1 *Going behind my back to make a secret arrangement concerning farm property (the boundary fence and the fence dividing Fogarty's land which was provided by Pikarere Farm Limited).*

1.1.2 *Undermining Pikarere Farm's legal rights and obligations.*

1.1.3 *Concealing the nature of the arrangement until it became obvious it was about to become uncovered.*

1.1.4 *Diverting farm resources and material to a private benefit, both as regards to fences and allowing his cattle to graze on Pikarere Farm.*

I must emphasise that the secret arrangement with Steve Fogarty is of itself been considered as grounds for dismissal.

1.2 *The arrangement in allowing his cattle on Pikarere Farm could be considered serious misconduct which fundamentally undermines the relationship of trust and*

confidence which must exist between Pikarere Farm and Gary.

2. The Firewood

- 2.1 *There has been a serious development with regard to Gary's alleged lying during the investigation over the firewood issue. This issue goes to the matter of trust and confidence in the employment relationship.*
- 2.2 *Gary's responses in the correspondence are clearly matters which have been carefully considered by Gary after advice from you and are accordingly of great significance to me.*
- 2.3 *In my letter of 28 June I pointed out that David Jones had earlier stated that Gary could use the firewood.*
- 2.4 *This was made after the 16 March meeting where firewood supplies were a topic, and Gary made no mention of David Jones using the wood.*
- 2.5 *Gary has also twice prior to the 16th March meeting, told Pru directly that no-one else was using firewood.*
- 2.6 *Gary, at the 16th March meeting, in regard to a question, acknowledged that George Cherrington had taken wood during the winter.*
- Gary knew of this but did not mention the fact when asked about the wood prior to 16 March.*
- 2.7 *Your response of 6 July has a flat denial that Gary gave permission to David Jones for the wood to be taken or that he knew of its use. This is a significant statement.*
- 2.8 *David Jones has recently indicated to me that Gary's denial is untrue.*
- He has confirmed that Gary explicitly gave him permission to take firewood and Gary had seen him take firewood.*
- This advice was left as a recorded message on my voice-mail, which I have retained.*
- I have no reason to doubt David's word.*
- 2.9 *Accordingly I would ask you to put these matters to Gary and suggest he reconsider the answers he earlier gave in your letter of 6 July.*
- 2.10 *The above information from David Jones directly refutes Gary's assertions of your 6 July letter. I regard this matter of apparent lying during the investigation of one which goes directly to the issue of Gary's integrity and the question of trust and confidence which is essential for our continuing employment relationship.*
- 2.11 *I wish to give Gary a further opportunity to respond to this accusation and more generally, to others taking firewood with his knowledge, and will consider all he has to say before forming a final view on all matters.*
- 2.12 *You may wish to cover what consequences are appropriate and why, if Gary were to be guilty of serious misconduct.*
- 2.13 *Any other comments you may wish to make on the issues or the process would be welcome.*
- 2.14 *All views expressed here are tentative. I will make a decision after the receipt of your reply.*

[17] A reply was provided by Mr Roper's representative on 6 August 2007, essentially rejecting that there had been any misconduct by Mr Roper and that he knew nothing about Mr Jones using firewood.

[18] By letter dated 11 August 2007 Mr Stevenson dismissed Mr Roper for serious misconduct. He delivered the letter to Mr Roper's home in a sealed envelop, but as Mr Roper was not at home, Mr Stevenson left the envelop with Mr Roper's wife. The letter reads as follows:

“PIKARERE FARM LTD-SEROUS MISCONDUCT

- i. I refer to the extensive correspondence between the parties generated by my investigation into several allegations of serious misconduct.*
- ii. It is not necessary in the letter to go over the detail again but I will refer briefly to the background.*

Background

- iii. By letter dated 31 May 2007 I wrote to you about my concerns relating to several matter:*

2.1 Colonial Knob

2.2 Gary's stock on Pikarere Farm

2.3 Colonial Knob key

2.4 Salmonella next door at Papanui

- 4. At the time I made it clear that these matters were taken very seriously and, if the allegations were established and in the absence of a satisfactory explanation, a potential outcome was the termination of your employment.*

- 5. Subsequent to my letter of 31 May 2007, further serious issues arose:*

5.1 David Fogarty arrangement

You disclosed on 6 June 2007 your arrangement with D Fogarty to graze cattle on Fogarty's land including the repair and maintenance of the boundary fence between Fogarty's land and Pikarere Farm jointly owned by Fogarty and the Company.

5.2 Firewood

On 27 June 2007 the issue of the firewood arose when I found David Jones taking firewood from the farm firewood stack.

- 6 These additional allegations were put to you for a response.*

My Decision

- 7 I have now given full and careful consideration to your responses made through correspondence between Employment Contract Services Limited and the Company.*

8 *My View is that the allegations have been established.*
9 *In those instances I believe that your conduct has amounted to serious misconduct which has destroyed the relationship of trust and confidence between you and the Company.*

In particular I find that:

7.1 *Colonial Knob*

You lied as the ownership of the cattle. You initially said that the cattle belonged to Steve, the manager of Papanui Farm, and on the next day on you admitted that the cattle actually belonged to you. I do not believe your subsequent explanation that you thought we were talking about different cattle.

7.2 *Firewood*

I find that you lied to me about giving David Jones permission to take firewood. I believe David when he says that you told him that he could.

7.3 *D Fogarty Agreement*

You did not inform me of your agreement with D Fogarty at the time you made it, at the time of D Fogarty's phone call, or indeed, until it became obvious that it was about to emerge.

I find that you used your position as farm manager for personal gain and you did so without first seeking my permission. You entered into a side deal; which benefited you even though half the responsibility for the fence rests with the Company. You had no right to do a deal with the neighbour on that fence when the Company owns 50% without consulting me.

Your position requires you to work autonomously and without close supervision. A high level of trust is placed in you, and your actions in regard to the boundary fence without consulting me first have significantly affected my ability to trust you.

Moving Forward

10. *The purpose of this letter is to inform you that I have decided to dismiss you for serious misconduct. I believe that each of these instances in its own right is sufficient to justify your dismissal.*

11. *Further I give you notice in terms of clause 17.1 of your Employment Agreement that your dismissal for serious misconduct is effective from 5.00 pm today.*

[19] The letter also put in place a requirement for Mr Roper to find alternative accommodation and vacate the tenancy on the farm by mutual agreement.

[20] The parties attended mediation services provided by the Department of Labour. The Authority has been asked to determine the matter.

[21] The employer has also put forward evidence concerning Mr Roper's conduct after the dismissal that it has relied upon in the event that Mr Roper has a personal grievance and for the information to be considered in regard to remedies.

Determination

[22] The background in the employment relationship involved a performance matter between Mr Stevenson and Mr Roper. That matter was not the reason for the dismissal. However, the performance matters have confused the situation because they have been referred to by Mr Stevenson.

[23] Mr Stevenson says he decided to dismiss Mr Roper because:

- a. he could no longer trust Mr Roper,
- b. he no longer had any confidence in him for lying about the ownership of cattle,
- c. Mr Roper lied about whether or not (Mr Stevenson) gave permission for the farm's tenant to use the farm's firewood and whether or not the tenant cut wood with Mr Roper. Mr Roper says that the tenant did not cut wood,
- d. Mr Roper failed to inform him of the arrangement with the farm's neighbour to graze cattle and mend the boundary fence in return for the grazing arrangement.

[24] Mr Stevenson is relying on the above to conclude there has been serious misconduct. He has to establish that he relied on the above reasons.

[25] I now turn to each of the reasons. However, first I find that each of the issues was put to Mr Roper. Second Mr Roper had an opportunity to reply and chose to do so through his representative and this involved communications being put in writing. There was no issue taken about that part of the process, except the submission made that Mr Stevenson pre-determined the outcome. I will return to that point later.

[26] Mr Roper admitted to Mr Stevenson that the cattle were his, and says he disclosed it because he later considered his answer that he gave to Mr Stevenson the day before needed clarification. Given that Mr Stevenson was led to believe that they belonged to “Steve” the day before by Mr Roper it was open to Mr Stevenson to conclude that Mr Roper had not been frank and honest. He did not have to accept Mr Roper’s explanation that his cattle had nothing to do with the employment relationship, and I will return to this shortly in my discussion about Mr Roper being required to be open, communicative and responsive. Suffice to say that Mr Roper’s arrangement on the grazing with a neighbour does have a relationship with his employment requiring him to act responsively and in good faith. A failure to act in good faith is a breach of the applicant’s obligations in his employment relationship.

[27] This led to Mr Stevenson’s request for Mr Roper to provide the Colonial Knob key. It also led to Mr Stevenson’s enquiry with the neighbour about what was going on at Colonial Knob, and Mr Stevenson found out about the grazing arrangement. Mr Roper’s failure to disclose the arrangement was considered by Mr Stevenson to be serious. Also, there was the background issue of the whereabouts of the Colonial Knob key, but that was not a central reason relied upon by Mr Stevenson, although he concluded that Mr Roper had not disclosed his responsibility over the possession of the key when it was not returned to Mr Roper by a person he lent the key to.

[28] The Employment Relations Act requires employees and employers to be open, communicative and responsive. This was alluded to in the employment agreement. Mr Roper was not open, responsive and communicative over the grazing arrangement, and it was entirely reasonable for Mr Stevenson not to accept Mr Roper’s explanation that Mr Roper believed that the grazing arrangement was a private matter and had nothing to do with his work. Because Mr Roper held the position of farm manager, the arrangement involved Pikarere Farm’s neighbour, and included, as part of the arrangement, an agreement for Mr Roper to repair the boundary fence, and that there

was an issue about the state of the repair of that fence, Mr Stevenson could reasonably expect his farm manager to inform him of such an arrangement and to conclude that Mr Roper was being “*secretive*”.

[29] I am satisfied that the references that Mr Stevenson made in his conclusion that there was a breach of trust and confidence over such matters was not a pre-determination of the matter because the letters were also qualified to enable Mr Roper to comment, reply and put forward any mitigation of any possible conclusion reached by Mr Stevenson on the broader allegations of trust and confidence, and that Mr Roper was put on notice that there was a possibility of being dismissed.

[30] I find that Mr Stevenson’s conclusion that Mr Roper had lied about the cattle was a conclusion open to a fair and reasonable employer because Mr Roper’s arrangement had not been disclosed earlier, and if it had been disclosed Mr Roper would not have had to go back to clarify what he said to Mr Stevenson earlier. Further, the grazing arrangement and ownership of the cattle was a matter a fair and reasonable employer would expect a farm manager to be open, communicative and responsive about. The failure to do so by Mr Roper was serious enough to concern Mr Stevenson.

[31] Mr Stevenson believed Mr Jones on the firewood issue. He concluded that Mr Roper was lying and gave his reasoning in the letter dated 27 July 2007. Mr Stevenson did not accept Mr Roper’s flat denial and preferred Mr Jones’s reply that Mr Roper’s denial was untrue. Also, Mr Jones confirmed to Mr Stevenson that Mr Roper “*explicitly gave [Mr Jones] permission to take firewood*” and Mr Jones left a recorded message on Mr Stevenson’s voice mail, which Mr Stevenson kept, and Mr Stevenson decided that he had no reason to doubt Mr Jones’s word.

[32] Mr Stevenson added during the Authority’s investigation that he saw Messrs Jones and Roper cutting the firewood. This is the first time Mr Stevenson raised that he witnessed them, although his evidence is consistent and I find he alluded to it in his letter of 27 July, and that he agreed Mr Jones could have a load of wood on one occasion. If that was the case Mr Roper had a right to know at the time Mr Stevenson was relying on his witnessing the event and to afford Mr Roper an opportunity to comment, reply and respond. I find the failure to afford him that opportunity was unfair. However, such unfairness is outweighed by Mr Stevenson’s conclusion to

prefer Mr Jones's information at the time because of Mr Roper's failure to disclose the grazing and fencing arrangements and the ownership of cattle on the neighbouring property, which had also been raised. Mr Roper had every opportunity to provide a reply as to why Mr Stevenson should not believe Mr Jones. Thus the outcome would not have been any different, I hold.

[33] Also, I am satisfied that Mr Stevenson thought about the matter in reaching his conclusion and put to Mr Jones Mr Roper's denial. Mr Stevenson did not, however, go back to Mr Roper for any further comment that a fair and reasonable employer would have done before deciding not to accept Mr Jones's version. Moreover, Mr Stevenson had made the comment that he was not questioning Mr Jones's honesty prior to going back to Mr Roper and before investigating the matter even although there was a credibility issue. A fair and reasonable employer would not have reached such a conclusion on credibility at that point and before investigating it properly. Therefore given a main credibility issue emerging Mr Stevenson has left him self open to a criticism of not displaying an open mind, although it was open to him to say that because he had no reason not to believe Mr Jones, I hold. That situation, although potentially unfair has not been fatal, I find.

[34] Substantial fairness applies where overall the evidence justifying the conclusions outweighs the unfair procedural inadequacies. The allegations were serious allegations and a fair and reasonable employer would have concluded that there was a loss of trust and confidence.

[35] Next, the manner in which Mr Stevenson conveyed the decision to dismiss Mr Roper is open to criticism because he conveyed the decision in a letter and left the letter with Mr Roper's wife. This is not the way a fair and reasonable employer would have acted. Mr Stevenson knew that Mr Roper was represented and he was dealing through Mr Roper's representative. A process for conveying any decision should have been agreed. It would have been preferable for the decision to have been delivered in a better way although Mr Stevenson tried to maintain some privacy with the sealed envelope, but since Mr Stevenson was dealing with a representative he should have conveyed the decision in best practice by a mutual arrangement with that representative. It was not sufficient to have just alerted the representative that he would

be making a decision as he did in his letter of 27 July 2007, and then deliver a sealed envelope to Mr Roper via Mr Roper's wife.

Conclusion

[36] Mr Roper has not established that he has a personal grievance, and Mr Stevenson has been able to justify the conclusions he reached.

[37] Even if I was to find in Mr Roper's favour (only on procedural inadequacies that would not have impacted on the substance) his contributory fault was such that there would have had to have been deductions on any remedies available to him (s 124 of the Act applied). Mr Roper's actions and omissions in the situation giving rise to a personal grievance would have involved considerable deductions. Also, I am not required to make any findings on Mr Roper's alleged behaviour after his dismissal to consider in any assessment of the remedies under s 123 of the Act because there is no personal grievance.

[38] Mr Roper's claims are dismissed.

[39] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority