

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 16  
5546686

BETWEEN            JOHN SEARLE  
                                 Applicant  
  
AND                    DEADEYE DICK'S SHOOTING  
                                 SUPPLIES LIMITED  
                                 Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:        Kelly Coley, Advocate for Applicant  
                                 Tracy Short, Advocate for Respondent  
  
Investigation Meeting:    5 November 2015 at Levin  
  
Determination:            5 February 2016

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]    Mr Searle was employed as a farmhand/calf rearer on a farm owned by Deadeye Dick's Shooting Supplies Limited (Deadeye Dick's) for approximately 17 months until his employment ended on 26 February 2015. Mr Searle claims to have been unjustifiably dismissed and unjustifiably disadvantaged.

[2]    It was acknowledged during the investigation meeting that the unjustifiable disadvantage related to perceived procedural flaws in the dismissal process.

[3]    The sole director of Deadeye Dick's, Tracy Short, denies dismissing Mr Searle. He claims Mr Searle's loss of employment resulted from his walking off the job on 26 February 2015.

[4]    Mr Short also claims Mr Searle caused damage to a tractor and a new calf shed during his employment for which he wishes to counterclaim.

**Issues**

- [5] The issues to be determined are:
- (a) Whether Mr Searle was dismissed;
  - (b) If so, whether that dismissal was unjustifiable;
  - (c) Whether viable counterclaims exist.

**Was Mr Searle dismissed?**

[6] Both parties agree that Mr Short had a conversation with Mr Searle on 18 February 2015 regarding a change to the terms and conditions of Mr Searle's employment. They also agree that the following day Mr Short gave Mr Searle a letter confirming the changes. They disagree about other aspects of the conversation on 18 February and the import of the letter of 19 February.

[7] The letter informed Mr Searle that there would be no full-time position available for him for the 2015 season, because of Mr Short's intention to scale down his calf-rearing operation and take on more of the farm work himself. It noted that there was a casual position available offering the same or similar hours to those Mr Searle was currently working, although hours could be reduced between seasons and when work levels dropped. Mr Short's letter referred to the "*slightly different*" tasks the casual position entailed from those Mr Searle was currently performing and it expressed Mr Short's belief that "...*you would be more suited to the position if you wish to apply*" (underlining added).

[8] Mr Searle claims Mr Short made his position redundant on 18 February and confirmed that in writing the following day. He says he was verbally given two weeks' notice of the termination of his employment.

[9] Mr Short says he consulted with Mr Searle on 18 February over changes to his employment which he said were necessary because he had decided to purchase fewer calves for the autumn season due to their high price. His evidence is that he had had at least three prior discussions involving Mr Searle about taking on fewer calves in the autumn season. He says he had no intention of terminating Mr Searle's employment but thought that, because he intended to change the nature of employment, he had to give notice that that position would no longer exist. In his

view nothing would have changed, at least in the short term, for Mr Searle. Mr Short also says he offered Mr Searle the changed position and he readily accepted the offer on 18 February 2015.

[10] Mr Searle denies that the earlier discussions had taken place or, if some discussions along those lines had occurred, they had not entailed making his position redundant and he had no cause for concern. He denies agreeing to accept a different position and says he told Mr Short he would need to discuss the matter with his wife. He was concerned that any change would affect his ability to pay his mortgage.

[11] I am satisfied from the evidence that, although a discussion took place on 18 February between Mr Short and Mr Searle, this fell well short of the consultation required before a change to employment conditions of the nature proposed by Mr Short could occur.

[12] In any event, I do not accept that Mr Searle was offered the restructured position. It is clear from Mr Short's undated letter given to Mr Searle on 19 February 2015 that he could "*apply*" for that position if he wished. It was not made clear in the letter that the position would be Mr Searle's if he did apply. The letter referred to the employer having "*many applicants for the position*".

[13] Mr Short's partner, Grace Sevilla, was present on 19 February when Mr Short gave the letter to Mr Searle. She says he told Mr Searle he could apply for the job and let him know. Ms Sevilla's evidence was that Mr Searle had confirmed he would apply for the position and would accept it. Mr Searle could not remember whether Ms Sevilla had been present on 19 February when he was given the letter but says he did not accept any job.

[14] Mr Short acknowledged he had advertised on *Trade Me* for a permanent part-time farm hand, with a possibility of becoming full-time, a week before having the conversation with Mr Searle about changes to his terms and conditions of employment. The advertisement had been withdrawn on 19 February, the day Mr Short gave the letter regarding his restructured position to Mr Searle.

[15] Mr Searle sought advice from an employment advocate, Ms Coley, who contacted Mr Short by email on 25 February 2015, noting the deficiencies in the redundancy process he had undertaken with Mr Searle, requesting wage and time records, and proposing mediation to enable the matter to be dealt with "*as amicably*

*as possible*". Ms Coley enclosed an authorisation signed by Mr Searle for the release of the information she had requested. She ended her email by asking Mr Short to ensure that all communication regarding the matter were directed to her as Mr Searle's authorised representative.

[16] Mr Searle says that the following day Mr Short approached him in an aggressive manner in the workplace. Mr Short denies this. He and Ms Sevilla say that Mr Searle was mixing milk for the calves wrongly and in a way that could harm them. When Mr Short remonstrated with Mr Searle over this, Mr Searle walked off the job.

[17] Mr Short's account that he did not raise his voice during the encounter was confirmed by a farm hand, Kylie Thomas, who had seen that Mr Searle had started to mix the milk for the calves incorrectly and was trying to help him. She says Mr Searle walked away after Mr Short asked him how many times he had mixed the milk powder and why he hadn't put the hot water in first. Mr Searle had said he couldn't do anything right and if it made things easier he would pack his things and go now. Mr Short responded that this was fine by him, and Mr Searle replied that he only wanted to make things easier for everyone and didn't want any trouble. By Ms Thomas' account, Mr Short then said that Mr Searle had already made enough trouble and that, if he wanted to leave, he did so "*on your own account nothing else*".

[18] It was Mr Short's submission that if Mr Searle had not walked away that day he would still be employed, although he would not be working with the calves. Mr Short said he had evidence of Mr Searle treating calves cruelly and this was a reason for restructuring his position to remove him from putting the calves in danger. The claim that Mr Searle had mistreated calves was partially confirmed by the evidence of Kalina Lynn, a farm hand who worked for the respondent. She regarded Mr Searle as being dangerous with vehicles and animals, more through incompetence than intent. In her view Mr Searle required supervision at all times when he was working with calves.

[19] Mr Short acknowledged he had not put any of his concerns over performance matters to Mr Searle in a formal manner although he had raised issues informally as they occurred or came to his attention. Mr Short said he had intended to have a more formal discussion with Mr Searle about his performance concerns in 2014.

However, when he called Mr Searle in, the employee had apologised for some errors and had explained that his doctor had made him aware of a health issue which affected his memory. Mr Short said he was unsure how to deal with this. He felt sorry for Mr Searle and thought it would be inappropriate to continue with a disciplinary discussion in the circumstances.

[20] I do not accept Mr Short's submission that Mr Searle ended his employment by walking off the job on 26 February 2015 after the milk mixing incident. Mr Searle had already been told his position was not available for the 2015 season and had verbally been given two weeks' notice from 19 February. He was working out that notice period at the time he left the job on 26 February. I find Mr Searle received notice of his dismissal on 19 February 2015 with the dismissal to take effect two weeks later on 5 March 2015. Mr Searle's departure on 26 February 2015 cut short that notice period by one week.

#### **Was Mr Searle's dismissal unjustifiable?**

[21] Whether or not an action is justifiable is determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[22] It seems from Mr Short's evidence that the real reason for giving Mr Searle notice stemmed from performance concerns which had not formally been raised with the employee. While the motive may have been to spare Mr Searle embarrassment, the result was unfair to him. Mr Searle was denied the opportunity to respond to his employer's concerns and have his responses taken into account before any decisions regarding his future employment were made.

[23] In considering whether Mr Searle's dismissal was unjustifiable, I have taken into account the scale of the employer's retail and farming operation and its ability to access appropriate human resource and legal advice. Dead Eye Dick's is not a large-scale employer but there was no evidence that it could not access appropriate professional advice before deciding to embark on the course of action it did. To the contrary, during the investigation meeting Mr Short acknowledged he had taken

professional advice on the proper way to treat his concerns with Mr Searle. He had decided not to follow the advice he had been given.

[24] There was no process, other than a short, informal conversation with Mr Searle on 18 February, before Mr Short gave his employee a letter the following day notifying him that his current full time position was no longer available, and that he could apply for a casual position with a number of different duties including working at different locations.

[25] In all the circumstances I find Mr Searle's dismissal to be unjustifiable.

### **Does the respondent have viable counterclaims?**

[26] Mr Short claims Mr Searle was responsible for damage to a tractor and to a new calf-rearing shed. Mr Short provided photographic evidence of the damage and quotes for repairs. He said he did not discover the damage to the new calf shed until the day after Mr Searle had "*walked off the job*". He had been prepared to let the matter lie but stated that "*if John feels that he deserves compensation for his so called unfair treatment then I feel its (sic) only fair that I can seek compensation for some of the unnecessary damage caused by John*".

[27] Mr Searle denies doing the amount of damage Mr Short claims he was responsible for and says he was not the only worker who used the tractor. He does acknowledge causing some limited damage to the cow shed, but says it involved breaking a part of one of the calf pens. He had not informed his employer of the damage.

[28] The only witness at the investigation meeting who claimed to have seen damage caused by Mr Searle was Ms Lynn, who had commenced parental leave in late January 2015. Ms Lynn said she had concerns over Mr Searle's treatment of calves and the careless way he drove the tractor. She had reported those concerns to Mr Short.

[29] Ms Lynn's evidence was not sufficiently specific to link the particular damage for which Mr Short obtained quotes. In any event, the quote for repair of the tractor is dated 3 June 2015, and for repair of the calf shed is dated 18 May 2015. This is more than three months after Mr Searle's employment had ended. The

photographs are undated and I have no way of knowing whether all the damage was caused before or after Mr Searle was dismissed.

[30] In these circumstances I am unable to consider Mr Short's counterclaims further.

### **Remedies and contribution**

[31] I have found Mr Searle to have been unjustifiably dismissed. He is seeking compensation of \$8,000 for his personal grievance and payment of wages lost as a consequence of losing his position.

[32] Mr Searle gave evidence of the effect his dismissal had on him. He was distressed and worried over the financial implications for his family and, by his account, suffered countless sleepless nights. I accept his evidence over this.

[33] Mr Searle obtained alternative casual work in March 2015 at a lower rate of pay. He seeks the difference between the amount he would have received if he had remained in his full time employment at Dead Eye Dick's and the remuneration he earned in the 13 weeks following the termination of his employment. He calculates that sum to be \$7,983.16 gross. Bank statement evidence was provided to verify the income received by Mr Searle in the period between 26 February and 1 June 2015.

[34] I am obliged to consider whether Mr Searle's actions contributed to the situation that led to his personal grievance.<sup>1</sup> I find there was contribution. By his own acknowledgement, Mr Searle's memory was affected by the medical condition from which he suffered. Despite having written instructions available to him regarding the mixing of milk for the calves, and despite having done it many times before, he did it incorrectly on 26 February. Mr Short's exasperation on that, and previous occasions, was understandable.

[35] In her evidence Ms Sevilla described an incident she had been involved in with Mr Searle where a calf was poorly treated by him. Mr Searle acknowledged the incident under questioning but denied he had been cruel to the calf. I am satisfied on the basis of Mr Searle's account that he had been at the very least rough in his treatment of the animal and unconcerned by the effect on it. That evidence accords

---

<sup>1</sup> Section 124 Employment Relations Act 2000.

with the concerns expressed by Ms Lynn over Mr Searle's treatment of the calves his employer was rearing.

[36] Taking that, and Mr Searle's admission that he had damaged part of the calf shed and had not informed his employer of the damage, I find there was contribution on his part. While Mr Short's decision not to raise performance issues with Mr Searle was wrong, I accept he made that decision because he believed it would not be appropriate to do so once Mr Searle had confided his health situation to him. Nonetheless he had genuine grounds for concern over his employee's performance. I assess Mr Searle's level of contribution as being 30%.

### **Determination**

[37] Mr Searle's dismissal was unjustifiable and it is appropriate he be awarded remedies. I have discounted 30% from the remedies I would otherwise have awarded, to take account of Mr Searle's contribution to the situation that led to his personal grievance.

[38] Deadeye Dick's Shooting Supplies Limited is ordered to pay the following sums to Mr Searle:

- a. \$4,200 as compensation for hurt and humiliation under s.123(1)(c)(i) of the Act;
- b. \$5,588.21 as lost wages under s. 123(1)(b) of the Act;
- c. reimbursement of the filing fee in the sum of \$71.56.

### **Costs**

[39] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority