

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 321
5325511

BETWEEN CHRIS SEXTON
 Applicant

AND SILVER FERN FARMS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: A Hammond, counsel for applicant
 A Golightly, counsel for respondent

Investigation meeting: 31 May 2011 at Whangarei

Additional information 7 and 13 June 2011
provided:

Determination: 20 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chris Sexton says his employer, Silver Fern Farms Limited (SFFL) demoted him unjustifiably from his position as team leader.

[2] SFFL says the associated personal grievance was not raised within the 90-day period specified in s 114(1) of the Employment Relations Act 2000. It also denies that it demoted Mr Sexton unjustifiably. Both matters were heard together.

Background

[3] SFF operates a beef processing plant in Dargaville. It employed Mr Sexton as a cleaner commencing in or about 2000, and appointed him as team leader for the clean-up team in or about 2004. Mr Sexton replaced a team leader who had left.

[4] It was common ground that Mr Sexton was employed on an individual employment agreement whose terms were similar to those in the Silver Fern Collective Employment Agreement for the Dargaville plant (the cea). The cea provided for a cleanup team, with Section B Part II setting out a useful summary of the team's staffing and duties:

3. Wages of Production Employees

...

(c) Clean up team

This sub-clause describes the particulars of the post-production cleaning function. The duties of this team are to clean all surfaces and equipment in the slaughterfloor, boning room, offal and casings room to the required hygiene standard. It does not include the general cleaning of overheads and other areas of the plant.

The team consists of 4 permanent employees plus 4 casual cleaners for an 8 hour shift and an additional 2 casual cleaners for a 9 hour shift. The cleaners work from the time the last animal slaughtered for the day has left the sticking area and continue for approximately 6 hours or until the required standard is met. Employees in this team are paid \$19.74 per hour worked and not less than \$118.44 per day.¹ ...

4. Payments per grade

...

(d) Team leader rate will increase by 3% from 1 March 2008 to \$10.30 per day then increase by 2% from 1 March 2009 to \$10.51 per day.

[5] SFF said the team leader function at Dargaville was allocated by nomination and was discretionary, and there was no standing team leader's position in the clean-up team. Even so the extra payment of \$10.51 per day above processing rates was made in recognition of the quality assurance and administrative functions carried out by the team leader. The team leader was also paid for one additional hour a night to carry out the necessary administrative duties. By agreement with the New Zealand Meat Workers Union, team leaders did not carry out any supervisory or disciplinary functions.

[6] As part of his team leader's duties Mr Sexton would check the cleaning, noting any defect in the cleaning and of who had cleaned the area in question. He would incorporate this information in a 'cleaners weekly review sheet' each week, together with a note of any remedial action to be taken.

¹ Rates contained in the agreement dated 1 March 2008 – 31 October 2009

[7] Supervisors would grade the defects recorded as ‘minor’, ‘major’ or ‘critical’, and it was expected that defects be addressed so they did not recur. Too many ‘critical’ grades could attract the attention of the New Zealand Food Safety Authority (NZFSA) and MAF. As part of an overall process of maintaining standards at the plant a vet engaged by the NZFSA carried out monthly reviews, in which she would among other things conduct her own hygiene checks, review the defects noted by the company’s checkers, note any remaining defects and review any remedial action taken. Continuing poor outcomes could have a significant effect on the company’s classification, with serious implications for its continued operation.

[8] The NZFSA monthly review for January 2010 noted that standards were generally acceptable, but that more vigilance was needed on pre-operational (preop) checks. Preop checks covered the activities of the clean-up team. The February review recorded that the preop standard was acceptable, but noted that a number of minor defects had been missed and recorded one critical and two major defects.

[9] There was a significant deterioration in March. The cleaners weekly review for the week ending 20 March 2010 listed 13 critical defects, with 5 critical defects listed in the following week and 8 in the week after that. Similarly high numbers of critical defects continued into the first half of April.

[10] Serious concerns were reflected in the NZFSA review dated 25 March 2010. The resulting report opened by saying:

The standard pre-op hygiene verified this period was noticeably less acceptable than usual. There were a number of critical and major defects missed during cleaning and inspection...

The company has been identifying the pre-op issues and recognises the requirement to keep the bar of pre-op standard higher. An internal CAR was issued by the TCM for repetitive issues found in pre-op. Being in overtime at this stage may prove to be a disadvantage to achieve the required outcome, however should not hinder the operator to cope and explore smarter measures for resolution to prevent escalation.

[11] In a further note dated 30 March the reviewer referred to a revisit on 23 March and an agreement to improve the pre-op programme, and recorded:

‘The operator has laid out plans of action for focusing mainly on re-structuring of cleaning staff and review of the cleaning programme with realistic target date. While

the operator is fully aware of the problem and expressed commitment to a full and long-time resolution, the need to raise the quality of internal verification was also identified. There are concerns that the 3-monthly internal verification is not very effective in identifying [obscured] of compliance.... The weekly pre-op checks would need to be identifying more significant defects and taking meaningful management of issues.

[12] During the early part of 2010 the plant manager, Dean McNaught, and the then-technical compliance manager (TCM), Laurie Davies were aware there were shortcomings and had begun to implement changes in order to remedy them.

[13] Significant among these was a change discussed at a team meeting on 18 March 2010. Mr Davies had reviewed the deployment of cleaners and decided cleaners were to be allocated their own areas, rather than all of them working their way through the plant without anyone having any identifiable responsibility if a defect was found. Mr Davies was concerned that Mr Sexton subsequently reverted to the previous system of his own motion and without Mr Davies' authority.

[14] Mr Davies had other concerns about Mr Sexton. As beef processing manager Mr Davies took over the cleaning-up team in April 2010. He said he did so because the team appeared to be dysfunctional and poorly managed. In addition to his view of the poor standard of cleaning he believed there was disharmony in the team, and problems with arguments between Mr Sexton and certain members of the team. He was also concerned that excessive hours were being worked, in particular by Mr Sexton, and believed the communication between cleaners, the team leader and management was poor.

[15] A number of changes were to be notified to the clean-up team at a meeting with them on an afternoon in early April. One of the changes was the removal of Mr Sexton as team leader. It was common ground that Messrs McNaught and Davies met with Mr Sexton before this meeting and outlined the issues set out above. Mr McNaught said Mr Sexton was asked for suggestions as to how the issues could be addressed, but merely shrugged his shoulders in response. Both Mr McNaught and Mr Davies believed Mr Sexton had lost interest, although they acknowledged he was a very good cleaner.

[16] The meeting with Mr Sexton ended with the announcement that another employee would take over as team leader on an interim basis effective that night. The team leader's position was later advertised.

Raising the grievance

[17] The dispute about the raising of the grievance centred on:

- (a) precisely when a letter said to have raised the grievance was given to Mr McNaught; and
- (b) the date of the April meeting.

[18] Mr McNaught said he was given the letter in question on or about 5 July 2010, while Mr Sexton said it was provided on 3 June 2010.

[19] Unfortunately for Mr Sexton he did not deliver the letter himself, rather a colleague named Phil Ashby helped in its preparation and handed it to Mr McNaught. Mr Ashby was summoned to give evidence on the matter to the Authority, but failed to answer the summons. He could not be contacted when enquiries were made as to his whereabouts.

[20] Evidence about the letter itself was also unhelpful. In particular, although a copy dated 3 June 2010 was produced in the Authority I am not persuaded a dated version was given to Mr McNaught, let alone that the letter was handed to him on 3 June. I say this because an undated copy of the letter was attached to the statement of problem filed on 8 November 2010. The statement in reply also referred to Mr McNaught's receiving an undated letter. There was an undated but signed version in the bundle of documents SFF prepared for the investigation meeting. The dated copy, annexed to Mr Sexton's statement of evidence, was not signed.

[21] Overall it is more likely that the undated but signed version was the one given to Mr McNaught.

[22] The signed version also included an annotation '*received 4-7-10*'. Mr McNaught said the annotation was in his handwriting and he made it when he

received the letter. On balance I do not accept Mr Sexton's statement that the letter was handed to SFF on 3 June. Even so there remained a lack of clarity about when the letter was received. The statement in reply stated the date of receipt was 16 July, the annotation showed the date as 4 July, and Mr McNaughton said at the investigation meeting that he believed the actual date of receipt was probably 5 July. In those circumstances I fix the date as the date most favourable to Mr Sexton, namely 4 July.

[23] I turn now to the date of the April meeting. Messrs Davies and McNaught said it occurred on Thursday 1 April, or immediately before the Easter break. Mr Sexton was adamant that it was on Tuesday 6 April, or immediately on the return from the Easter break. If Messrs Davies and McNaught are correct, the letter was provided out of time. If Mr Sexton is correct, the letter was provided in time.

[24] There was relatively little additional information capable of verifying the date. A planning note prepared for the purposes of the meeting was headed 'cleaners' issues 01/04/2010'. Mr Davies also produced a notebook in which he recorded his handwritten notes of meetings with the clean-up team. It included an entry headed 1 April, which he said contained the relevant notes.

[25] Mr Sexton said he was notified of the meeting by email on 6 April. While the fact of notification by email was accepted during the investigation meeting, the date of the notification was not. The company was unable to retrieve the email and it was not produced.

[26] Finally, the date on which the interim replacement for Mr Sexton commenced her duties did not assist because the record indicated the person took leave over the Easter period.

[27] On balance, I find it more likely that the meeting occurred on 1 April.

[28] These findings as to the date on which the events giving rise to the grievance occurred, and the date on which the letter was given to Mr McNaught, mean I find no grievance was raised within the 90-day period specified in s 114(1) of the Employment Relations Act.

[29] A further matter, which was not the subject of argument, arises out of Mr McNaught's evidence that he put the letter aside until he received a letter from Sexton's solicitors dated 11 October 2010. That was because, although the letter was headed 'personal grievance' and set out Mr Sexton's view of the facts, there was no indication of what Mr Sexton wanted the company to do to remedy the matter. The letter ended with a heading 'resolution being sought', but nothing appeared under the heading. Mr McNaught said Mr Ashby did not elaborate on the matter when he was asked. In that respect it is unlikely that the letter was sufficient to raise a grievance even if it was received within 90 days.

The merits of the grievance

[30] Since I have found that the grievance was not raised in time, and there has been no application for leave to raise the grievance out of time, I do not proceed to determine the merits of the grievance.

Costs

[31] Costs are reserved.

[32] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority