

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 24
5354102

BETWEEN MICHAEL
 CRACROFT-WILSON
 Applicant

A N D MOUNT HUTT STATION
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jonathan Smith, Counsel for Applicant
 Paul Brown, Counsel for Respondent

Investigation meeting: 4 December 2012 at Christchurch

Submissions Received: At the investigation

Date of Determination: 4 February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Michael Cracroft-Wilson, claims he was unjustifiably dismissed by the respondent, Mount Hutt Station Limited (Mt Hutt) on 7 June 2011.

[2] Mr Cracroft-Wilson also claims he was unjustifiably disadvantaged by the process adopted by Mt Hutt when dismissing and it breached the duty of good faith owed pursuant to s.4 of the Employment Relations Act 2000 (the Act).

[3] Mt Hutt accepts it dismissed Mr Cracroft-Wilson but contends its actions were justified. It denies the other claims and responded with a counterclaim.

[4] The counterclaim is based on the following proposition:

It is an implied term in the individual employment agreement that the Applicant will carry out his duties with all reasonable care and skill. It is also expressly stated in the job description of the Applicant "That he is fit and capable of undertaking the work required of him in this position" and the Applicant "will demonstrate good stockmanship and stock handling at all times". The Applicant has breached both the implied and expressed terms of employment. The Respondent has suffered serious financial losses due to the negligence of the Applicant. ...

[5] The loss is quantified at \$20,703.50. That amount is sought.

Background

[6] Mr Cracroft-Wilson was engaged as an assistant manager though the parties' have different views about what that entailed. Mr Cracroft-Wilson says he was nothing more than a farmhand – *a labour unit*. He says his every act was instructed and he was unable to exercise initiative. Mt Hutt claims Mr Cracroft-Wilson was in charge of one of its two properties (the Hoodlands Block) and required to make a number of *day-to-day calls* about issues such as the placement and feeding of stock.

[7] The written employment agreement (which was signed by Mr Cracroft-Wilson but not the employer) has a job description appended. It lists nine requirements of the employee. Included therein are the following three:

2. *To demonstrate good stockmanship and stockhandling at all times.*
4. *To ensure that he understands clearly all instructions given to him as part of his employment and if he does not to ask questions for clarification.*
7. *To work on the farms operated by the owner or such other farm property as directed by the owner.*

[8] The employment continued for some two years without incident and it would appear from Mt Hutt's evidence Mr Cracroft-Wilson was considered an effective and capable employee.

[9] There was, however, one event pertinent to this claim. It involved an outbreak of the disease Yersinia which occurred at an unspecified point in 2010. Yersinia is an infectious disease capable of killing young deer if left untreated. The evidence would suggest it is prevented by either sound stock management or vaccination. The evidence of Mr Keith Hood (an industry pioneer and director of Mt Hutt), is around 40% of the country's flock is vaccinated but that approach is not used by Mt Hutt.

[10] Mr Cracroft-Wilson claims in his written brief that up until the event which led to his dismissal he had no experience of Yersinia. Mt Hutt says otherwise. Mr Bruce Hood (a manager of Mt Hutt and Keith Hood's son (referred to herein as Mr Hood)) refers to an event which occurred during 2010 – it was most likely in May. Mr Cracroft-Wilson brought six weaner carcasses in for the Hoods to look at. Mr Hood says they attributed the deaths to Yersinia and explained its symptoms and treatment to Mr Cracroft-Wilson. Mr Cracroft-Wilson denies that and has no recollection of bringing six dead weaners in. That is, however, undermined to some extent by his admission during the disciplinary interview of 1 June that he had seen Yersinia in his first year on Mt Hutt and an acceptance he recalls a brief discussion about a Yersinia outbreak. That said he claims to have had no involvement in its resolution and says he was taken out of the loop and subsequently told Mr Hood had solved the problem. That is not disputed.

[11] The events that gave rise to the dismissal arose at the beginning of May 2011. On 3 May, Mr Hood instructed Mr Cracroft-Wilson to drench two mobs of fawns (young deer). Mr Cracroft-Wilson expressed concern at the instruction as he felt the weather was inappropriate for drenching. Notwithstanding Mr Cracroft-Wilson's reticence, Mr Hood confirmed the instruction and drenching proceeded over the next couple of days. Here it should be noted Yersinia has an incubation period of around two weeks and an animal's susceptibility increases with stress. It is Mr Cracroft-Wilson's view the stress created by drenching in inappropriate weather may have been the cause of what later occurred.

[12] On Saturday, 14 May 2011, Mr Cracroft-Wilson discovered five dead fawns (one in each of five different herds) while feeding the animals. He took the carcasses back to the station. On returning he attempted to telephone Mr Hood but was unable to make contact. He left a message on an answering machine asking Mr Hood to take a look at the dead fawns so as to ascertain why they died. He says he suspected an attack of worms but did not really know. Mr Hood subsequently saw the fawns and claims it was immediately obvious they had succumbed to Yersinia. He tried to telephone Mr Cracroft-Wilson but again contact was not made. Mr Hood says:

I left a message on Mike's answerphone stating that it was Yersinia and that it was just like the cases that he had seen last year. I also asked if there were many more animals affected, and if not I would talk to him on Monday. Mike did call back on Sunday night and said he thought the rest looked alright. On Monday morning Mike started

early as he had to load out cattle and some hinds. He later fed grain to the weaners so he would have had a good look around at the mobs. As Mike did not report back to me about the condition of the stock on Monday, I thought that we did not have a major problem.

[13] Mr Cracroft-Wilson accepts he was told to keep an eye on the animals but is adamant he did not feed them on the Monday. He says feed was not required and as he now knew stress could increase an animal's susceptibility to Yersinia he chose not to enter the paddocks but simply observed as he drove past. He saw no further dead animals or other possible concerns. He also thought Mr Hood had been to check.

[14] Mr Cracroft-Wilson adopted a similar approach on 17 May. He looked from afar and noted nothing amiss. He saw no more dead animals and says *they were a mob* which meant the absence of another key sign of Yersinia.

[15] On 18 May, Mr Cracroft-Wilson went into the paddocks to feed the animals. He noted one or two were lagging behind. A lack of *mob* behaviour is a sign of Yersinia and these observations were communicated to Mr Hood as was a view more fawns could be lost. That aside, he saw no other issues of concern and once again there had been no further losses. He thought the issue was resolving itself.

[16] Mr Hood, however, retained concerns. He asked his father to have a look at the mob which he did on 19 May. He says:

As we went into a paddock with a mob of weaners I started to see fresh carcasses around. On driving past the bodies it was very clear to me that they had clinical signs of yersinia. Upon further checking on the weaners that were still alive I could see very clear signs of a mass infection at all levels in the herd.

Being highly concerned I checked on the other mobs of weaners counting at least 20 dead and numerous more with considerable weight loss.

[17] Keith reported his findings to Mr Hood and advised he act quickly. This was done with the assistance of a vet.

[18] On 21 May, Mr Cracroft-Wilson collected 24 dead animals, though there is some debate as to what they were. Mt Hutt says they were predominantly yearlings that had succumbed to Yersinia. Mr Cracroft-Wilson disagrees. He says there were some 20 hinds, but some had been dead for a considerable period of time and there were only three new fawns among the tally. That is, however, contradicted by his diary which records he picked up *about 24 dead deer mainly fawns from stress.*

[19] Mr Cracroft-Wilson was on leave from Monday, 23 May to Sunday, 29 May inclusive. Upon returning on 30 May, he was approached by Mr Hood and handed a letter. It reads:

We are writing to advise you of the seriousness of the situation which has been brought about through a "lack of management" and "good stockmanship".

We are having a meeting on Wednesday 5pm at our house to investigate this matter.

We view this as serious misconduct that MAY justify summary dismissal.

We encourage you to attend this meeting to work through these issues.

As this meeting is directly related to your employment I recommend you bring a support person with you.

No conclusions have been made at this stage but we look forward to discussing this matter with you.

[20] The meeting occurred as scheduled. Mr Cracroft-Wilson was accompanied by his wife and Mr Rob Stevenson, the manager of a company providing recruitment and employment advice along with representation services to both employers and employees. Mt Hutt was represented by Mr Hood, his wife and Mr Matt Jones, another employment advocate. Detailed notes were taken by Mrs Hood.

[21] The meeting was followed by a letter dated 3 June and signed by Mr Jones. It is headed "Re: Disciplinary meeting" and reads:

This letter follows up from the disciplinary meeting, held on 01/06/11. At that meeting we discussed the recent deaths of stock, and the reasons for that, and your explanations. It is our view that someone in your position should have been able to identify the declining health of the stock, and taken action to ensure the good health of the stock concerned.

The opposite occurred. After some stock had died, you did not take any measures to prevent more deaths, under stated the condition of the stock or seek assistance if the matter was out of your experience and knowledge. The result was further stock died, unnecessarily in our view.

Therefore we have come to the conclusion that the lack of judgement shown by you amounts to serious misconduct, justifying summary dismissal.

Before we make a final decision, we offer you one more opportunity to make any further comments, should you want to do so.

We would like to have one final meeting with you, on Tuesday 7/06/11 at 9 am. If you have any further comments to make, we will consider them. If not, we will make our final decision at this meeting.

[22] The meeting occurred as scheduled. It was extremely short with the notes recording it lasted two minutes. Mr Cracroft-Wilson states he had read the letter of 3 June as notice of dismissal and saw no value in any making further comment.

[23] The meeting was followed by a 20 minute adjournment during which a further letter was prepared. It was again signed by Mr Jones and handed to Mr Cracroft-Wilson. It reads:

Re: Outcome of Disciplinary meeting.

We have considered the further comments you have made at today's meeting. We have also considered whether or not termination of your employment is the appropriate response.

We have decided that your conduct is such a serious breach of trust and confidence that we had in you, that termination of employment is justified

Therefore, with immediate effect, your employment is terminated. You will have until the 26th June to move out of the accommodation.

Determination

[24] As already said Mt Hutt accepts it dismissed Mr Cracroft-Wilson. In doing so it also accepts it is required to justify the dismissal.

[25] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] 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 dismissal ... occurred.

[26] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[27] I have considered the issue of resources and note Mt Hutt was assisted by a professional representative. It therefore has a duty to get things right. I conclude it didn't.

[28] Mt Hutt faces two major problems. The first is the evidence suggests Mt Hutt concentrated on the outcome and not the reason for the events occurrence. Despite some disagreement about the exact extent of Mr Cracroft-Wilson's knowledge of Yersinia his evidence it was limited was not disturbed. At best it would appear he had had observed one instance which resulted in a short briefing and he was excluded from the process of resolution.

[29] A failure to practice processes or to apply limited or lacking knowledge is not serious misconduct. It is poor performance and Mt Hutt was urged to adopt this approach by Mr Stevenson. Here I must also note Mr Hood's comment when questioned that he *assumed* Mr Cracroft-Wilson would be aware of Yersinia given his time in the industry and this was the only explanation for failing to consider Mr Cracroft-Wilson's assertions to the contrary. It is, I conclude, unacceptable to rely on assumption in the face of contrary assertions instead of investigating the issue further and undermines the substantive justification for the decision to dismiss.

[30] The employment agreement between Mr Cracroft-Wilson and Mt Hutt contains a detailed process to be applied when addressing issue of performance. It requires warnings so as to allow the employee to take remedial steps. It does not allow Mt Hutt to move straight to a dismissal.

[31] The second major deficiency is the letter of dismissal states a significant factor in the decision to dismiss was a loss of trust and confidence. Indeed, Mr Hood said when answering questions it became his prime concern. In essence the points in 26

(b) to (d) above summarise that which has long been required – an employer is required to put issues in its mind, allow an explanation and consider them.

[32] There is no evidence the issue of trust and confidence was expressly put to Mr Cracroft-Wilson for comment and here I must note it is not mentioned in the letter of 3 June. The only comment which comes close is an observation by Mr Hood during the meeting of 1 June he had been losing faith in Mr Cracroft-Wilson over the proceeding weeks. Aside from the possibility that may be indicative of a predetermined outcome, there is no evidence Mr Hood took steps to address his concerns and similarly there is no evidence he considered the situation so acute he should act with alacrity to Mr Cracroft-Wilson's report of 18 May more may be lost.

[33] The above deficiencies must lead to a conclusion the dismissal was unjustified and that leads to a consideration of remedies. Mr Cracroft-Wilson seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[34] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. With the exception of some minor casual work (1 or 2 days) in October Mr Cracroft-Wilson remained unemployed until the beginning of December 2011, at which point he obtained a replacement job. That said, he was on a sickness benefit for the period 1 August to the end of November and was therefore deemed unable to work. The circumstances outlined in the investigation indicate he would have been so indisposed had he remained in Mt Hutt's employ so I conclude any award of wages must end with the commencement of his illness as he would not have been earning from Mt Hutt in any event. He could not therefore have incurred a loss.

[35] The period in question is just under 8 weeks. That is less than three months and the amount involved is, given the salary recorded in the employment agreement, \$7,307.69. That is payable.

[36] Mr Cracroft-Wilson also seeks compensation for hurt and humiliation though this was not quantified. He did, however, support his claim with evidence of the hurt he felt though I must be cognisant there were other serious issues which also contributed to his state of mind at the time. Having considered the evidence I conclude an approximately average award of \$5,000 is appropriate.

[37] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Cracroft-Wilson contributed to his dismissal in a significant way. His failures, such as they are, can be attributed to his lack of knowledge about Yersinia. As already said, his claims in this respect withstood scrutiny and the deficiency is one Mt Hutt both could, and after the first event should, have addressed comprehensively. There is no evidence they did and Mr Cracroft-Wilson can not be blamed for that. I conclude there is not, therefore, evidence upon which I can base a finding of contribution.

[38] Finally there is Mt Hutt's counter claim. Mr Smith furnished comprehensive submissions on the issue and, obviously, argued the claim should be dismissed. His submissions went largely unchallenged and I accept them. Even if that were not the case I note my earlier findings in respect to knowledge and contribution. Again it is hard to consider a failure to apply skills never obtained amount to the type of negligence required for a finding that would support a claim of damages. The counter claim is therefore dismissed.

Conclusion and Orders

[39] For the above reasons I conclude Mr Cracroft-Wilson has a personal grievance in that he was unjustifiably dismissed.

[40] As a result the respondent, Mt Hutt Station Limited, is ordered to pay the applicant, Mr Michael Cracroft-Wilson, the following:

- i. \$7,307.69 (seven thousand, three hundred and seven dollars and sixty nine cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[41] Mt Hutt Station Limited's claim for damages is dismissed.

[42] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority