IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 44
5553914

BETWEEN	BERNARD REIHER and KIRSTIN MORGAN Applicant
AND	KERSHEVIN FARMS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Anna Oberndorfer, Advocate for the Applicants Judith Jones, Advocate for the Respondent
Investigation meeting:	8 December 2015 at Christchurch
Further evidence:	18 December 2015 and 18 January 2016 from the Respondent 22 December from the Applicants
Submissions:	22 December 2015 from the Applicants 18 January 2016 from the Respondent
Determination:	14 April 2016

DETERMINATION OF THE AUTHORITY

A. Kershevin Farms Limited unjustifiably disadvantaged and unjustifiably dismissed Kirstin Morgan and Bernard Reiher

B. Within 28 days of the date of this determination Kershevin Farms Limited must pay Bernard Reiher:

(i) Unpaid holiday pay, unpaid wages and final pay of $7,378.76 nett, and

(ii) $6,000 compensation for humiliation, loss of dignity and injury to feelings.

C. Within 28 days of the date of this determination Kershevin Farms Limited must pay Kirstin Morgan also known as Reiher:

(i) Unpaid holiday pay, unpaid wages and final pay of $2,528.66, and

(ii) $6,000 compensation for humiliation, loss of dignity and injury to feelings.

D. The Authority dismisses Kershevin Farms Limited's counter-claims.

Employment relationship problem

[1] Kirstin Morgan was employed to work on Kersehvin Farms Limited's (KFL) Leeston farm from 1 June 2013 for the 2013/2014 dairy season as the farm manager. Bernard Reiher, her partner, was employed as assistant manager. They reported to Judith Jones, one of the directors and shareholders of KFL.

Ms Morgan and Mr Reiher's claims

[2] Mr Reiher says for the entire duration of his employment he worked every day except one. He says he was unjustifiably disadvantaged by having to work without days off and has not been properly paid for the days worked.

[3] The applicants both claim they were unjustifiably disadvantaged when Mrs Jones made unannounced frequent visits to their home even after they requested her to arrange visits in advance.

[4] Ms Morgan says she was unjustifiably disadvantaged in her employment by Mrs Jones' attempts to force her to return to full work duties while she was recovering from a caesarean operation. She also says she was unjustifiably disadvantaged by Mrs Jones threatening a salary reduction or to replace her if she took maternity leave.

[5] On 31 October 2013, the applicants say they were advised indirectly, by email, that the farm had been sold at auction on 30 October 2013 and that their employment would therefore be terminated. On 26 November 2013, Mrs Jones gave them written notice of termination of their employment to end on 10 January 2014.

[6] The applicants had been aware that the farm was for sale but they claim that KFL did not follow a fair process and breached its duty of good faith to them. In particular, they claim KFL did not adequately consult them or provide access to information relevant to the continuation of their employment and allow them an opportunity to comment on it before the decision was made to make them redundant.

[7] Ms Morgan and Mr Reiher also say that they were not paid their holiday pay entitlements and outstanding wages at the end of their employment. They say that the wages and time records provided are inadequate and do not match the payments made to their bank accounts.

[8] The applicants seek compensation for humiliation, loss of dignity and injury to their feelings and payment of outstanding wages and holiday pay.

[9] The applicants also sought a penalty for breach of s 4(1A)(c) of the Employment Relations Act 2000 (the Act). However, the penalty was sought out of time and I cannot consider this claim.

KFL's response and counter-claims

[10] KFL says there are no grounds for personal grievances. KFL says it kept the applicants well informed about the sale of the farm, which was financially necessary.

[11] KFL agrees that it did not pay the last fortnight of the applicants' pay or holiday pay. Mrs Jones says the applicants cost KFL a significant amount of money. KFL counter-claims:

- $60,000 for stress and humiliation the applicants caused. At the investigation meeting, I explained that the remedy of compensation for humiliation, loss of dignity and injury to feelings is only available when a personal grievance is proved. An employer cannot bring a personal grievance claim. In addition, a company, not being a natural person, cannot suffer stress, humiliation or loss of dignity. I cannot consider this claim.

- Replacement cost of four rising 3 year old cows at $1,950 each at a total of $8,970.

- Nineteen cows dried off which cost KFL $49,000 loss of payment for milk solids at 400 kg milk solids per cow x $6.50 per kilo. At the investigation meeting, Mrs Jones orally changed this claim to 300 kg of milk solids per cow at $8.00 per kilo totalling $45,600. After the investigation meeting Mrs Jones sent an email and other documents stating that the pay-out for the 2013/2014 season was $8.30 per kilo of milk solids and the expectation of each cow under a well fed and managed dairy farm was 320-350 mls of milk solids per kilo.

- Vet bill of $115 for putting a ring on a bull calf.

- Cost of cleaning house and grounds after vacation of tenancy - $600.

Did Kershevin Farms unjustifiably disadvantage the applicants?

Working on days off?

[12] According to their IEAs, the applicants were to work on a 12 days on and 2 days off roster during mating and calving and on an 11 days on and 3 days off roster for the rest of the year.

[13] One person could operate the dairy shed. When the applicants accepted their jobs, they were told that there was a relief milker who could work on their days off.

[14] At the investigation meeting, Mrs Jones said that the applicants dismissed the relief milker. She says she offered herself as a relief milker but that the applicants refused to let her assist with milking.

[15] The applicants say that KFL dismissed the relief milker once they were employed. They explain that Mrs Jones' had what they considered an inappropriate way of dealing with some of the cows and they preferred her not to be in the milking shed.

[16] The claim is restricted to considering Mr Reiher's unpaid wages for working on his days off. Ms Morgan acknowledges that she had some rostered days off and that she had an allowance of up to ten days off without pay during her pregnancy. She took those days off and has set them off against other days she worked which should have been rostered days off.

[17] I accept that Mr Reiher worked on his rostered days off. From early September until 11 December 2013, Ms Morgan hired relief milkers to assist when she was unable to work due to her pregnancy and the birth of her daughter.

[18] The applicants' evidence is that they did work around the farm before any stock arrived which included fencing and getting the farm and milking shed ready for the season.

[19] I have read the transcript of a recorded conversation between Mrs Jones and Mr Reiher. During that conversation Mrs Jones told Mr Reiher she expected him to work on his days off. She said that he took the *job on knowing that's the way it was*. Mrs Jones agrees she said that but her expectation was only for Mr Reiher to work every day after calving started.

[20] Mrs Jones says that there was no stock on the farm during June and July and therefore although the applicants were paid they had no work to do. I understand she told me that to justify telling Mr Reiher that he would have to continue to work on his rostered days off.

[21] It is inherently unlikely that KFL would have employed and paid Ms Morgan and Mr Reiher for the two months of June and July with no expectation that they would work. I accept the applicants' evidence that they did work over this time.

[22] I also accept the applicants' records of days worked by Mr Reiher. I consider the time records supplied by KFL to be insufficient. I also accept the reconciliation the applicants have done between wages and time records provided by the respondent and their bank accounts showing payments made.

[23] I do not accept the applicants accepted the jobs knowing that they would not be able to take their rostered days off work. I find that the expectation that Mr Reiher would work every day was of disadvantage to him and was unjustified in that it was not an expectation that a fair and reasonable employer could have in all the circumstances at the time.

[24] Mrs Jones says that from the time Ms Morgan went on light duties in September 2013 due to her pregnancy she did no work on the farm. Ms Morgan says she still undertook management duties but agrees she did not carry out the more physical tasks.

[25] I consider Ms Morgan continued to work and to earn her wages right up until she went into labour. In addition, she continued undertaking management duties once she was home with her daughter from hospital. Because she had a caesarean, she was unable to carry out physical farming duties after that. However, she engaged a relief milker to do some of those duties on her behalf.

[26] I accept the applicants' calculations of how much final pay and holiday pay is due.

[27] I accept that KFL should pay Mr Reiher for the 35 days he worked that should have been his rostered days off. KFL must pay those amounts.

Did KFL unjustifiably disadvantage the applicants by disregarding their tenancy rights?

[28] The applicants say that Mrs Jones breached their right to quiet enjoyment of their tenanted premises by frequent unannounced visits. I accept that Mrs Jones felt she was entitled to call in at any time on the applicants in their home because it was on the farm.

[29] The applicants' house was a part of their overall employment package. I am satisfied that Mrs Jones felt she had the right to approach the applicants' home at any time on any day to talk about farm issues. I am satisfied that she would not have done that if the applicants lived off the farm.

[30] I consider the applicants' right to quiet enjoyment of their home to be an implied term of their employment agreement.

[31] After the first few months, the working relationship broke down. It is clear that there were a number of differences between the applicants' way of farming and how Mrs Jones considered they should be farming.

[32] The applicants wrote to Mrs Jones asking for her in the first instance to use email and text messages and only to ring them in emergencies. They also put a notice up on their door asking visitors to email them to make an appointment instead of calling in to their home. Ms Morgan says one reason for the notice was that during her pregnancy she had trouble sleeping and would often need to nap during the day.

[33] Mrs Jones demanded the sign be removed and told Ms Morgan the sign was illegal.

[34] Mrs Jones says that it was unacceptable to her that she could not talk to the applicants about work whenever she wished. She believed she had the right to call in on the applicants without making an appointment. She considered the applicants should speak to her whenever she wished to speak to them. She called the police because she felt so strongly about this.

[35] Mrs Jones says that on 7 November she went to the house to speak to Ms Morgan. However, she says Ms Morgan physically pushed her backwards and would not speak to her. Ms Morgan denies that and says she was in hospital in labour on 7 November. I do not need to decide whether Ms Morgan pushed Mrs Jones. However, I accept that Mrs Jones made an unannounced visit to the house even though she and Ms Morgan had an appointment to meet the following day.

[36] I consider Mrs Jones repeated presence at the house in contravention of the applicants' expressed wishes about how she should communicate with them was of disadvantage to the applicants. It is not how a fair and reasonable employer could have acted in all the circumstances.

Did KFL unjustifiably disadvantage Ms Morgan by threatening a salary reduction or by attempting to have her return to full duties after her caesarean operation?

[37] I accept that there was discord between Mrs Jones and Ms Morgan when Ms Morgan had to go onto light duties during her pregnancy. Mrs Jones threatened to either stop or reduce Ms Morgan's pay about three weeks before her daughter was born. She did not stop paying Ms Morgan but her threat made Ms Morgan more stressed than necessary. I accept that this was an unjustified disadvantage in that it was not how a fair and reasonable employer could have acted in all the circumstances.

Final wages and holiday pay withheld

[38] Mrs Jones agrees that she led the applicants to believe KFL would pay their final pay, including their holiday pay, and that it has not done so. She says she withheld the pay because according to clause 11.5 of the IEAs the employer was able to deduct any money owed by the employees from their wages.

[39] Mrs Jones says she withheld the amounts because of the counter-claims KFL has made.

[40] If employees have given written permission for specified amounts to be deducted from their wages the employer may do so. In this case, the applicants do not agree that they owe KFL any money and have not given any written authority for their final pay and holiday pay to be withheld.

[41] KFL was not entitled to withhold the applicants' final pay and holiday pay.

Unjustified dismissal

[42] KFL dismissed the applicants on the grounds of redundancy because the farm was sold and the new owners did not wish to keep them on as employees.

[43] The Employment Court has said it is insufficient, when an employer is challenged to justify a dismissal, for the employer simply to say that this was a genuine business decision and to say the Authority is not entitled to enquire into the merits of that decision. The Authority will need to do so to determine whether the decision, and how it was reached were what a fair and reasonable employer could have done in all the relevant circumstances.[1]

[44] Section 4(1A)(c) of the Employment Relations Act 2000 (the Act) is also important in assessing whether a dismissal for redundancy was justified. It requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on an employee's continuation of employment:

- provide to the employee access to information relevant to the continuation of employment, and
- an opportunity for the employee to comment on the information before a decision is made.

[45] The applicants knew that KFL had put the farm on the market. They were asked to give the real estate agents access a number of times and had to present their house in good condition.

[46] Mrs Jones says the company was in debt and had no option but to sell the farm.

[1] *Michael Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [54].

[47] KFL did not consult the applicants as to how a sale could be averted. The decision to sell did not necessarily mean the applicants would be out of work because a purchaser may have kept them on. However, it did mean uncertainty for them and that KFL would no longer be their employer.

[48] There have been two previous Authority determinations in which KFL did not meet its obligations to the staff that it made redundant. In both cases, there were decisions against KFL for failing to use a proper, fair process in making its decision to make its employees redundant. KFL was well aware that it got the process wrong in those cases. Therefore, its employees could expect it to get the process right in this case.

[49] However, there was no attempt to consult with the applicants about their prospective redundancies. KFL did not provide any information to the applicants that was relevant to its decision to sell the farm.

[50] KFL did not provide any financial information for this investigation either. I tend to believe Mrs Jones that the business was in crisis. However, the complete lack of respect for the process makes the redundancies decisions that a fair and reasonable employer could not have made in all the circumstances. KFL's actions were also in breach of its duty of good faith. The applicants were unjustifiably dismissed.

[51] The farm sold at auction on 30 October 2013. That day Mrs Jones sent Ms Morgan a text saying she needed to have a meeting with her because the farm had been sold. On 31 October 2013, Mrs Jones' daughter sent the applicants an email on Mrs Jones behalf saying KFL had sold the farm at auction. It gave the applicants four weeks' notice and notified them the new owners would take possession on 6 December 2013.

[52] Clauses 12.9 and 12.10 of the IEAs provide what the employer should do in the event of a sale of the farm. They oblige KFL to make reasonable endeavours to obtain agreement from a potential new employer to employ the current employees. The purpose is to minimise the impact of change on the employees.

[53] Clause 12.11 appears to conflict with the previous two clauses because it allows the employer to:

> *retain absolute discretion to decide whether to conclude an agreement with a potential New Employer about any matter concerning a proposed Restructuring.*

[54] The farm was sold at auction. KFL would not have known who the potential purchaser was to be before the auction was completed. Mrs Jones said she did not ask the new owners if they could keep the applicants on. In any event, the new owners did not intend to operate the farm as a dairy farm.

[55] Although KFL could not contact prospective owners, I consider it failed to make reasonable endeavours to obtain the agreement of the new employer to retain the applicants. It should have asked the new owners if they intended to keep the applicants on.

[56] On 26 November 2013, Mrs Jones sent the applicants another written notice confirming the sale of the farm and their redundancy.

KFL's counter-claims

Payment for replacement of four cows

[57] Mrs Jones entered into a stock lease contract with Glenn Jones for a number of cows. Ms Morgan was aware of this lease as she was the witness to the signatures. However, she was not a party to the agreement. The farmer named in the agreement is Mrs Jones, in person, rather than KFL.

[58] The claim is based on an invoice from Glenn Jones for the replacement of 4 rising three-year-old cows at a value of $1,950 per cow.

[59] KFL was the employer, but Mrs Jones entered into the agreement to lease the stock. KFL, rather than Mrs Jones, makes these claims against Mr Morgan and Mr Reiher. That means that I do not have jurisdiction to determine this claim. However, I set out my reasoning in case I am wrong about that.

[60] Mrs Jones says three of the replaced cows were numbers 14, 60 and 61 and she does not remember the other cow's number. There is a letter from the vet who examined a number of cows on 8 November 2013. He wrote that cows numbered 14, 60 and 61 *should be fit for next season*.

[61] I find it more likely the four cows Mr Jones wanted to be replaced were numbers 12, 15, 24 and 38 two of which the vet wrote were *definitely not fit for*

another dairy season and the other two were *unlikely to be fit for another dairy* season.

[62] Number 12 had post-calving paralysis which I am unable to find was due to any mismanagement by the applicants.

[63] Cow 15 had a chronic injury/dislocation of the left hip joint. That is not proved to be due to any mismanagement by the applicants.

[64] Cow 24 probably had *chronic mastitis*. That is not proved to be due to any mismanagement by the applicants.

[65] Cow 38 also had *chronic mastitis*. That is not proved to be due to any mismanagement by the applicants.

[66] There is no proof those four cows needed to be replaced because of any mismanagement of the applicants. This claim is dismissed.

Are the applicants responsible for the lack of earnings per dried off cow?

[67] At the investigation meeting, Mrs Jones gave oral evidence of what Synlait was paying in the relevant year. Later she sent in a photocopy of a Synlait newsletter without a date on it. The dates during which the applicants were employed are June to December 2013 for which the pay-out appears to have been $4.50 - $5.00 per kilo of milk solids, with retrospective payments of $8.20 - $8.40 per kilo of milk solids.

[68] Mrs Jones gave oral evidence that there were 19 cows dried off wrongly. I have no other evidence of the cause of the drying off. I have no objective evidence that 19 is the correct number or when KFL discovered the cows were wrongly dried off.

[69] There is an email from Mrs Jones to Ms Morgan dated 19 December 2013 in which Mrs Jones refers to heifers which *arrived in picture perfect condition but left in a disgusting state with 9 dried off or ruined*.

[70] There is insufficient proof that the cause of any cows being dried off was mismanagement by the applicants let alone proof of $40,000 or more loss to KFL. This claim is dismissed.

Should the applicants pay for the castration of a bull calf?

[71] Mrs Jones says the castration of the calf was unnecessary because KFL intended to give the calf to the IHC. She says the IHC do not require calves to be castrated.

[72] Mrs Jones also says that even if the calf required castrating the applicants should have been able to do this. They should not have engaged the vet. Mrs Jones sent in a copy of the vet's invoice showing a cost of $113.00 to castrate a calf on 12 December 2013.

[73] Ms Morgan says that Mrs Jones did not tell them the calf did not need to be castrated. They called the vet and he told them the calf would need to be surgically castrated because of its age. However, when the vet arrived he said rings could be used so he did the job.

[74] There is insufficient proof that the decision made by the applicants was an unreasonable one in all the circumstances. I dismiss this claim.

Are the applicants liable to pay the cost of cleaning up the house and grounds?

[75] Mrs Jones says it cost her $600 to clean the house and its grounds after the applicants moved out on about 19 December 2013. The applicants say they asked Mrs Jones to conduct an inspection at the end of the tenancy. She did not conduct a formal inspection but looked inside and told them the house was fine.

[76] I have also heard a voice recording of Mrs Jones saying the house was *fine, yeah cool*. That was not at the end of the tenancy but in advance of an open day when the farm was for sale.

[77] There are no photographs and there is no property inspection report from the beginning or the end of the tenancy. There is no receipt proving that KFL paid anyone to do cleaning and tidying work at the end of the tenancy.

[78] I dismiss this claim.

Remedies

Compensation

[79] The applicants claim compensation of $10,000 each for humiliation, loss of dignity and injury to their feelings for the unjustified disadvantages and unjustified dismissal. I will award a global amount taking into account all the proved personal grievances.

[80] As far as Mr Reiher is concerned, I take into account the stress and emotional difficulty of working on what were supposed to be his days off. I consider both applicants suffered some compensable distress for the way Mrs Jones repeatedly called at their house. I assess Ms Morgan's distress at this as greater as Mrs Jones sometimes interrupted her daytime rests. I assess Ms Morgan as suffering specific additional stress when Mrs Jones threatened to stop or reduce her pay. In relation to the unjustified dismissal, I consider both applicants suffered the same amount of stress and uncertainty about whether and when they might loses their jobs and their home.

[81] I have also taken into account the fact that Mr Reiher found another role quite quickly, with which came a house. By 2 November 2013, the applicants had arranged at least one job interview. On 2 December 2013, they had an interview for Mr Reiher's current position. The applicants moved and Mr Reiher began work on 19 December 2013.

[82] I consider compensation of $6,000 for each applicant is reasonable.

Contribution

[83] The applicants did not contribute to the situation leading to their personal grievances in any blameworthy way. There is no reduction of the compensation due to them.

Costs

[84] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[85] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is $3,500. The investigation meeting ran from 10am until approximately 4.30pm**.** We took a shorter

lunch adjournment to accommodate the respondent, its witness and its advocate who needed to travel back to the West Coast that day.

[86] If no agreement is reached any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply. The parties should identify any factors that they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority