

THE USE OF DISPUTE RESOLUTION PROCEDURES IN DAIRY DISPUTES

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Introduction

Disagreements often arise between the people working together in farming businesses. Usually, these disagreements are able to be resolved through discussion or negotiation, or with the assistance of others in the farm team or external advisors. Sometimes, however, people find themselves in the middle of what seems to be irreversible conflict as a result of an incident that took place or an attitude of someone working on the farm. Often there has been more than one incident, or a range of problems and disagreements which have built up and bring the conflict to a head.

Disputes cannot always be avoided, but an increased knowledge and understanding of agreements (or, as they are commonly referred to, contracts) and their provisions can provide those affected with a better opportunity to manage breaches of those contracts at an earlier stage in the conflict. This can avoid the need for costly and lengthy dispute resolution processes further down the track. Often parties to a farming agreement are unsure how to exercise their rights under a particular agreement. This paper will cover some of the practical aspects of the dispute resolution procedures available to parties where the terms of an agreement have been breached.

Agreements

An agreement is a bargain between two or more people, commonly referred to as ‘the parties’. Each party to the agreement promise to contribute or do something to achieve the purpose of the agreement. For example, in the case of an employment agreement one party provides their time and effort in return for remuneration, such as wages. Another example is a sharemilking agreement. Under these agreements the parties each agree to make contributions to the farming operation and, in turn, share in the farm’s milk proceeds.

While an agreement does not necessarily need to be in writing, written agreements provide far more certainty for the parties than verbal arrangements since the terms of the agreement are obviously set down on paper for all to see.

Types of agreements

There are various types of agreement used in farming which cover a range of activities. As well as the more common sharemilking and employment agreements there are also agreements for livestock leases, independent contractors, grain contracts, crops for silage, land leases, sale and purchase agreements, and dairy cow grazing agreements.

Form of agreements

Some of these agreements are what we call '*standard form*' agreements. These are generic agreements written for a particular type of farming relationship. The parties to the agreement simply complete their details on the form, amend where necessary, sign and date. There is some danger in using standard form agreements if parties do not understand their mutual obligations under the agreement.

The other types of agreement are '*one-off*' agreements which are drafted specifically for the people who are party to the agreement. Often these agreements are prepared by a lawyer and are necessary to address the very specific circumstances of the parties or their requirements.

Legal aspects of an agreement

The rights and obligations of the parties are set out in the particular agreement. In a written agreement these are detailed in 'clauses', which collectively form the arrangement between the parties. A well drafted agreement should be easily understood by both the parties to the agreement and an independent audience. Some agreements are drafted in a legalistic style, but that does not necessarily mean that they are any better than an agreement using everyday language. The fundamental requirement when drafting an agreement is to ensure that it meets its purpose, is clear and is easily understood by the reader. Where details such as the names of the parties and the date of the agreement are required to be inserted at the time of signing, it is important that these details be completed and correct. The importance of correctly recording contracting party is sometimes overlooked with terrible consequences, for example you may have thought you were dealing with a party as an individual only to discover the agreement is signed off and lists a company as the contracting party.

Contract law principles apply to every agreement. These principles have been gathered over the years from decisions reached by judges in certain cases and apply to an agreement even though they are not necessarily included in its terms. The principles of contract law give an agreement meaning, assist with interpretation, and even fill some of the gaps in detail. For example, where an agreement is partly drafted and partly verbal it is generally accepted that the agreement is made up of both the written and verbal terms.

In relation to Employment Law there are a number of pieces of legislation which need to be read in conjunction with the Agreement itself. The main statute which deals with employment relationships in this country is the Employment Relations Act 2000 (“ERA”). This objective of this Act is “to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship”. Along with the ERA the following are some examples of other statutes which also affect employment agreements. Consideration must therefore be given to the provisions of the following Acts when entering into employment agreements with employees, however please note this list is not conclusive:

- Holidays Act 2003
- Minimum Wage Act 1983
- Wages Protection Act 1983
- Parental Leave and Employment Protection Act 1987
- Health and Safety in Employment Act 1992
- Injury Prevention, Rehabilitation and Compensation Act 2001
- Privacy Act 1993
- Human Rights Act 1993.

Procedural aspects of an agreement

As well as the technical or legal terms in an agreement there are also provisions which deal with procedural matters. Clauses relating to procedure set out the ‘how to’, or the steps a party must follow, for example when renewing, reviewing or terminating an agreement. Dispute resolution clauses are also procedural and establish the procedure required when a party to an agreement breaches its terms. Such steps will include how and when to give notice to the other party, the required timeframe for the other party to fix the breach, and what to do if the problem is not rectified. Dispute resolution procedures are included in an agreement to set out the process the parties must follow when problems or disputes arise out of an agreement, and where the parties are unable to resolve these between themselves.

In an employment context failure to follow the procedure outlined in the employment agreement can prove as costly as getting the substantive matter wrong.

Dispute resolution procedures

As outlined above, most agreements contain provisions relating to dispute resolution which set out the steps to be taken in the event of a dispute. However, in the first instance parties should attempt to resolve any disagreement amicably through discussion and negotiation. Where a dispute is not able to be resolved in this manner the dispute resolution clauses will provide the parties and their advisors with certainty as to what is necessary.

Types of dispute resolution procedures used

Mediation, conciliation, and arbitration are examples of commonly used dispute resolution processes. While there are similarities, each of these courses of action have their own particular features. We will now summarise these briefly:

- Mediation is a process where a mediator is appointed to assist the parties to reach a solution or agreement. A mediated agreement is usually committed to writing and signed by the parties. The mediator's role is to help the parties find their own solution and the mediator is not able to make a decision in relation to the dispute. If a dispute is not resolved at mediation the matters are usually referred to conciliator or arbitration.
- Conciliation is a process where a conciliator is appointed to assist the parties to resolve their dispute in a similar way to mediation. However, if the dispute is not resolved by agreement at the conciliation meeting, the conciliator is usually authorised to prepare a written recommendation as to solution of the dispute which will become binding by default if the parties do not reject the recommendation.
- Arbitration is a process where an arbitrator is appointed to make a decision in relation to the dispute for the parties. The arbitration is carried out in accordance with the Arbitration Act 1996 and the arbitrator's decision (the award) is binding on the parties.
- The Courts are the last resort for dispute resolution. Depending on the type of dispute and the amount involved, disputes may end up before the Disputes Tribunal, District Court, High Court, Employment Relations Authority or the Employment Court. Not all disputes will end up in the Courts as many are resolved by other means. In the case of an agreement which stipulates arbitration then those disputes must be resolved by arbitration. One exception is the Disputes Tribunal. Any party may take a dispute to the Disputes Tribunal provided that the amount being claimed is within the limit allowed at the Disputes Tribunal. For further information see www.justice.govt.nz/tribunals/disputes-tribunal

Where and when to use the dispute resolution procedures

Where a conflict arises in relation to a contract the dispute resolution procedure to be followed will be set out in that document. Usually more than one dispute resolution procedure will be referred to and there will be a prescribed order in which the procedures must be followed. For example, employment agreements often set out that a party must bring the issue to the attention of the other party, who will then usually attempt to resolve the dispute

Second tier dispute resolution procedures tend to be mediation or conciliation. If the party alleging the dispute has carried out the steps required in the first tier procedure (for example, as set out in the paragraph above) and the dispute has still not been resolved the dispute can be referred to mediation or conciliation (depending on what is set out in the particular agreement).

Mediation or conciliation will involve an independent person assisting the parties to reach a solution and bring the dispute to an end.

In situations where the dispute remains unresolved after mediation or conciliation, there is usually another step involving the courts or a tribunal. In the case of employment matters, disputes that are unsuccessful at mediation may be referred to the Employment Relations Authority. For many other farming agreements the next step may be arbitration which is a form of private tribunal.

Dispute case study 1 – employment case

Once you have an employment agreement in place, the next biggest hurdle is handling an Employee when they are not doing what they ought to be doing. When disciplining an Employee, an Employer needs to consider both the substantive matter, i.e. what has actually happened, together with the process to be followed in taking action against an Employee.

The disciplinary process from both an Employer's and Employee's perspective will now be considered.

Scenario

Brad works on a farm. It has been reported to Brad's employer by his fellow worker, Jennifer, that Brad has been mistreating animals. She is the only witness and believes it has been going on for some time.

Disciplinary meetings – preparation for the meeting

Employer's perspective

1. Is the meeting a fact finding investigation or could the employee's answers result in disciplinary action?
2. Check the employer's policies and the employment agreement for a specific procedure required to be followed.
3. Ensure all relevant facts have been obtained.
4. Check the employee's personnel file for:
 5. length of service
 6. past work history
 7. any previous disciplinary action
8. Check past practices regarding similar matters to ensure there is no disparity of treatment of employees (through the disparity of treatment is now less of a concern than it once was).
9. Assess credibility of witnesses during the investigation, particularly personal relationships with the employee in question.

10. Ensure any rules or policies which are being relied upon are well known to the employee and have not recently changed.

Employee's Perspective

1. Does the employee know the nature of the allegation that they are answering? This should be specific including date, time and sufficient details to enable the employee to know exactly the nature of the allegation faced.
2. Must know the identity of the witness.
3. Do you have all of the evidence being relied upon by the employer?
4. Obtain a copy of the employment agreement and consider the definition of misconduct.
5. Is it best to admit to the allegation and argue mitigation, or is there a prospect of defending the allegations?
6. Determine whether it is best to prepare a written statement prior to the meeting and circulate it.
7. Determine who will answer the allegations, either through the representative or by the employee directly.
8. Find out as much about the employer as you can. Also try and find out whether there have been other or similar incidents.

The meeting itself

Employee's perspective

1. The employee must decide on a strategy as to whether to build bridges or to take the employer head on. This will depend on whether the employee wishes to remain in employment.
2. Make sure the employer knows that you are taking full notes of the meeting and do not hesitate to stop the employer from speaking while notes are made of important points.
3. Raise any issues that you may rely on later in terms of the employer's procedure. Having raised them and having had your points rejected, move on.
4. One strategy if the procedure is so flawed is to ask for an adjournment and say that you are halting the process and applying to the authority as you believe the process has been so flawed that it has led to unjustified disadvantage.

Employer's perspective

1. Has the employee been given sufficient detail of the employer's concerns to enable them to properly prepare for the meeting? Has the employee been told that disciplinary action could be a consequence?
2. Where should the meeting be held?
3. Who will be attending the meeting?

4. Has the employee been advised in advance that he/she has the right to bring a support person/representative.?
5. Do they know who will be attending from the employer's side?
6. Will the decision maker be present to hear and assess the employee's explanations?
7. Ensure that good notes are taken.
8. The employer should explain to the employee the purpose of the meeting, the fact that the employee can adjourn at any stage to talk with his representative and the potential outcomes of the meeting.
9. Give the employee a full opportunity to comment.
10. If it appears there are procedural irregularities in the investigation to date that are pointed out in the meeting and/or further information that should really have been gathered before now – should the employer adjourn the meeting to try and patch up the process?

Further investigation required

1. Having heard the employees explanation or comments, is further investigation required?
2. Has the additional information/results from further investigation been put to the employee for comment?

Adjourn meeting

It may be appropriate to adjourn the meeting to consider what the employee has said and to take time before any decision about disciplinary action. There are no set rules as to how long an adjournment should continue however, generally an overnight adjournment is sufficient unless there are significant further enquiries to be made.

If further action/meetings are required, consider how this will be communicated.

The decision

How should it be delivered? – In person? In writing?

1. Before making the decision, have the employee's explanations been considered with an open mind and in the context of all the surrounding circumstances?
2. Is the decision sustainable?

What if the employee offers to resign?

An employer should not generally accept a resignation immediately (if it has been offered during a disciplinary process), as this could constitute constructive dismissal. Tell the employee to go away and think about it overnight.

Dispute case study 2 – sharemilking dispute

This case study relates to disputes arising out of breaches to a variable order sharemilking agreement under the Sharemilking Agreements Order 2001.

The various stages of the dispute resolution process will now be considered.

Scenario

Kate and Kim entered into a sharemilking agreement with the owner of the farm, Bob. The agreement is in the form of a copy of the Sharemilking Agreements Order 2001. The parties have inserted the necessary details, such as their names, the number of cows, percentage share of milk proceeds, expenses the sharemilkers are to pay, percentage share of shared expenses, and various other requirements regarding herd management, animal health and farm maintenance. They all signed and dated the agreement at the beginning of the season.

It has been a stressful spring with very wet and cold weather conditions and a difficult calving period with high losses of calves. Kate and Kim are exhausted and haven't been keeping on top of the shed cleaning and milking plant hygiene. They have had a few grades which has alerted Bob that there may be a problem.

At the last farm meeting things got a bit heated. Bob arrived on the farm to see that the yard hadn't been washed down, the milk had been collected so he could see that the vat looked pretty grimy on the inside and dead calves were stacked at the side of the tanker track for all to see. Bob said that he was going to deduct the costs of the graded milk from the sharemilkers next milk cheque and he also told Jim and Kim that they needed to do a better job or he will be looking for another sharemilker to replace them.

Farm owner's perspective

Bob was quite shocked at the state of the dairy shed. He knew it had been a difficult spring but he didn't realise that Kate and Kim were struggling so much and not keeping on top of the farm basics.

Bob hadn't been surprised that they had received a few grades and hadn't been too concerned at that. However, after seeing what a state the dairy shed was in and how tired and run down Kate and Kim look he was really concerned that they were not going to cope during the remainder of the season. He was thinking that perhaps he should cut his losses now, fire the sharemilkers, and get a contract milker in for the remainder of the season.

Sharemilkers' perspective

Kate and Kim were upset and angry with Bob's reaction and his threats. They had been working so hard and hadn't taken any time off since the day they arrived on the farm. Things had got really bad, but they figured that if it just stopped raining for a couple of days and if they could get the next

weeks calving behind them without more catastrophes then things would get better, and they could have a good catch up with cleaning in the dairy shed.

They were even more stressed now. Financial penalties for grades would hit them hard since they were already operating in overdraft. And, could Bob really terminate their contract and replace them before the end of their agreement?

What are the issues?

An issue is the substance of what a person wants or needs to have or happen. Issues are usually linked to an incident that has happened, or an allegation by one person against another. In the scenario Bob has raised three issues; these are:

1. the graded milk and financial penalty on the sharemilkers
2. the standard of cleanliness and hygiene in the dairy shed and surrounds, and
3. the threat to terminate the sharemilking agreement.

What is in dispute?

To sort out what is in dispute we first need to identify the issues, as above. We then need to check whether there is agreement or disagreement about these issues. Where there is no disagreement over an issue then there is no dispute.

For example:

Bob has stated that Kate and Kim have incurred milk grades from substandard milk they supplied to the dairy company. Bob has further stated that he will be deducting his share of the milk penalty from the sharemilkers next milk cheque. Kate and Kim accept that this is the case and although they are worried about the financial implications of this happening they know that Bob is entitled to deduct the money because it says so in the sharemilking agreement. Therefore there is no dispute as to issue 1 above.

However, Kate and Kim have disputed the allegations that they have not kept clean the dairy shed and milking plant and equipment. They say that it was just a one-off bad day when Bob turned up on the farm and this is not a fair example of how they operate the farm. They also question whether Bob can terminate the agreement before the end of the season when the agreement comes up for renewal.

Dispute procedures under the Sharemilking Agreements Order 2001

Must give notice

The person alleging the breach of the agreement must give notice of the dispute to the other party. The notice must give full details of those things alleged to be in breach. The person (or persons) giving notice is referred to as the claimant, ie: the person claiming that the other party has breached

the agreement. Note that the agreement has a time limit on the time allowed for a party to give notice of a dispute. If they give notice later than the time limit they are at risk of the claim being time barred and therefore being excluded and not able to be heard.

The other party must respond or reply to the notice of dispute within 10 working days of the notice being served. This party is referred to as the respondent, ie: the person who is the subject of the allegations and the person who allegedly has or has not done something.

Type of notice

The notice must be in writing. The usual form of a notice is an email or hand or type written note or letter setting out what the person has done wrong. The notice should also refer to the relevant clauses of the sharemilking agreement and state what steps are to be taken to rectify the breach. A time limit allowing reasonable time should also be put in the notice.

If breaches not rectified

If the respondent does not reply within 10 working days, and if the breaches have not been rectified within the time limit set out in the notice of dispute, then the dispute should be dealt with according to the dispute resolution procedures in the agreement. The procedures have time limits attached to each dispute resolution stage so that if the dispute is not resolved at an earlier stage then a party can initiate the next stage process.

Negotiation - first stage dispute process

In the first instance, the parties must negotiate in good faith and co-operate to resolve the dispute. Often at this stage the farm consultant will be asked to help the parties sort things out and reach an agreement. The parties may also engage an independent third person, such as a mediator, to assist them to resolve the disputed issues.

If the negotiation is successful and the dispute is resolved any resulting agreement should be recorded in writing and signed by the parties.

Conciliation - second stage dispute process

If the dispute is not resolved by negotiation then one or both parties might decide to appoint a conciliator. The role of the conciliator is to assist the parties to resolve the dispute and if they reach an agreement then the conciliator will record that agreement at the conciliation meeting for the parties to sign. The signed agreement is binding on the parties and can be used by either party to enforce the outcome.

If the matters are not settled at the conciliation meeting then the conciliator makes a recommendation to the parties as to a settlement. This recommendation is in the form of a proposal for determination. The parties are not required to sign the proposal but if neither party rejects the proposal within 7 working days of receiving the proposal then it becomes, by default, a decision or

determination and may be used by either party to enforce the outcome set out in the determination. If one or both parties reject the conciliator's proposal, then the dispute goes to arbitration.

Selection of a conciliator

If the parties agree to conciliation and agree on a conciliator they may select whoever they like to assist. However, it is always advisable to appoint only an experienced and accredited conciliator so that the conciliator knows what their obligations and responsibilities to the parties are. Selecting a trained and accredited person ensures that the conciliator is competent to be able to facilitate negotiation of the issues and write a proposal for determination in a form that is capable of being enforced in the courts.

If the parties are unable to agree on a conciliator then either party can ask the Chairperson of the National Panel of Conciliators to appoint one for them. The list of conciliators on the National Panel of Conciliators can be found at www.aminz.org.nz and www.fedfarm.org.nz

Arbitration - third stage dispute process

The third and final dispute process is arbitration. The circumstances by which a dispute might end up at arbitration is any of the following:

1. if the parties agree to submit the dispute to arbitration
2. if more than 21 working days has lapsed from the time that the notice of dispute was served by one party on the other, or
3. if one or both parties reject the conciliator's proposal for determination within the set time.

Arbitration is a process where an arbitrator is appointed to decide the dispute. The parties will be required to set out in writing their claims and responses. The respondent may also have some counterclaims against the claimant. The procedures and evidence is usually more formal for arbitration than for the earlier dispute processes. There is usually a hearing where the parties present their case before the arbitrator. Sometimes witnesses and experts are called to give evidence at the arbitration hearing. Sometimes a site meeting is held, usually at the farm, to see some of the evidence in person.

Parties may choose to be represented at the arbitration by a lawyer or disputes advocate, although this is not absolutely necessary. If parties do choose to represent themselves at arbitration it would pay for them to seek legal and procedural advice as to their case.

After the hearing the arbitrator will make a decision as to the dispute. This decision is called an award and will usually be in writing and signed by the arbitrator. The parties are bound by the award and if a party fails to deliver what the award requires the other party may apply to the Courts to have the award enforced. There are limited grounds for appealing an award or having an award set aside by the courts.

The Arbitration Act 1996 sets out the rules and procedures for arbitration and it is important when selecting an arbitrator to select someone who is experienced and has suitable qualification to act

as arbitrator. For further information about arbitration and where to find a suitably qualified arbitrator, see the website of the Arbitrators' and Mediators' Institute of New Zealand Inc., www.aminz.org.nz

Termination

Termination of a sharemilking agreement should only happen on rare occasions. The only grounds for terminating a sharemilking agreement before the end of the agreement term are for serious breaches that cannot be rectified. Most breaches that occur under a sharemilking agreement are able to be rectified, therefore do not provide justifiable grounds for early termination of the agreement. The proper procedure for terminating an agreement is set out in detail in the agreement.

If a party intends to terminate and is not sure whether the breaches are serious enough to warrant termination, they may wish to consider first submitting the question to conciliation or arbitration for a decision as to whether the agreement can be terminated.

A more practical way to seek an early termination is to enter negotiation or conciliation for the purpose of seeking an early termination by mutual agreement. If the parties agree to terminate the sharemilking agreement prior to the date of its expiry they should then record their agreement in writing and sign it.

References

Arbitration Act 1996. www.legislation.govt.nz.

Disputes Tribunal. www.justice.govt.nz/tribunals/disputes-tribunal.

Employment Relations Service. www.ers.govt.nz.

Green & Hunt. Arbitration Law and Practice (Thomson Brookers). Chapter on Rural Arbitrations. (24/11/08) 4-1 to 4-57.

Mudford P. 2009. The Relevance of ADR in a Global Recession: dispute resolution in commercial enterprise contracts. www.resolutionworld.co.nz/articles

Mudford P. 2008. Review of Federated Farmers NZ Herd Owing Sharemilking Agreement.

Spiller P. 2003. The Disputes Tribunal of New Zealand.

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