

**BETWEEN**

**ACF Ltd**

**APPLICANT**

**AND**

**ZXY**

**RESPONDENT**

Date of Order:

27 June 2013

Referee:

Referee Robertshawe

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZXY is to pay to ACF Ltd the sum of \$9,580.20 within 28 days.**

### **Facts**

[1] On 18 July 2012, ACF Ltd (through its director, LR) contracted ZXY to administer drench capsules on a conveyor to approximately 4,200 lambs. ZXY brought two workers with him and completed the job on that day with some assistance from LR and LR's son, CQ.

[2] Unfortunately, over the next three months, approximately 135 lambs died from the incorrect administration of the capsules.

[3] ACF Ltd has filed a claim against ZXY for \$15,000.00, being the value of the lambs lost plus additional costs.

[4] ACF Ltd holds ZXY liable for the loss on the grounds that it was one of ZXY's employees, CK, who was administering the capsules wrongly. ZXY defends the claim on the basis that it is not proved who did it, and if it was, that LR was the boss on the day and in charge of the situation, that he had seen CK administering the capsules wrongly and had intervened by attempting to train him, and that LR should have called a halt to proceedings to prevent the loss.

### **Issues**

[5] The issues to be decided are:

- (i) Does ZXY have liability to ACF Ltd for the loss?
- (ii) If so, what is the loss?
- (iii) Has LR contributed to the loss, and if so to what degree?

### **Decision**

*Does ZXY have liability to ACF Ltd for the loss?*

[6] I find that ZXY does have liability to ACF Ltd for the loss for the following reasons.

[7] Whilst there cannot be certainty about who administered all the capsules wrongly, the evidence establishes that it was probably CK who was responsible. In a civil claim, probability proves liability. There were four people on the conveyor belt that day. ZXY, LR and CQ were all experienced in administering the capsules but CK had never administered the capsules to lambs before. He had administered capsules to ewes for one day on the season before, but it was his first day at work for ZXY.

[8] ZXY is liable to ACF Ltd not only vicariously, for the acts of his employee, but also directly, as ZXY owed a duty of care to ACF Ltd to ensure that CK was adequately trained to perform the job.

[9] I have had regard to ZXY's view that LR and his son may have administered about 1,000 capsules between them, but whilst a small discount should be made for uncertainty, I am satisfied that there is insufficient evidence that anyone else was to blame. Each of the others had done so many before that it was probably the novice that was at fault. This is particularly so given that LR had noticed in the morning that CK was not administering the capsules correctly, gave him a demonstration, and then needed to talk to him again several times during the day. Either that demonstration was unsuccessful, or CK had already administered over 130 capsules incorrectly. In either scenario, ZXY had a duty to train and supervise his workers and is liable to ACF Ltd for his part in it.

[10] I have had regard to the fact that LR usually administered the capsules from the other side of the conveyor. However, as LR is left-handed, ZXY accepted that this should be discounted as a potential cause of the loss.

[11] I also had the benefit of hearing from CK himself. He is confident that he did not administer the capsules incorrectly, but the weight of evidence is against him. I also note that whilst he stated he had had training from ZXY before the job started, he acknowledged that he had found the technique he was using to be "awkward", but on ZXY's instructions, kept going without further training. I find that, regrettably, he was not aware that he was sometimes releasing the capsules before they were fully inserted, and that this was the likely cause of most of the deaths that ensued.

*What is the total loss suffered as a result of ZXY's breach?*

[12] The first loss suffered is the value (sale price) of the lambs at the day they died. LR produced sale sheets that establish that his lambs were each worth between \$100.00 and \$115.00 (plus GST) at the time they died. He has claimed the lesser value of \$100.00 which, given uncertainties about actual size and weight at the dates in question, is reasonable in the circumstances.

[13] ZXY pointed out that not every lamb was subjected to a post mortem, but it was clear from how many the vet viewed, the high numbers and from the timing of their death that the capsules were the cause. It is possible that a small number would have died anyway, or did die, from natural causes, and it is also possible that one of the other operators could have administered one or two capsules incorrectly. The administration of capsules is a specialised job, and several thousand were done in one day. It is not uncommon for the odd lamb to die without known cause or without being noticed. It is only fair in these circumstances to discount the number attributed to CK by a small figure, which I set at four per cent (five lambs), reducing the total attributed to CK to 130.

[14] LR also suffered a loss of \$286.00 (excl GST) on the capsules administered into the lambs that died, and a \$278.25 (excl GST) vet bill to confirm the cause of death. He also lost the cartage on the lambs from the sale to his property, as he had only owned the lambs for about six weeks before they died (approximately \$150.00 excl GST). Whilst this would not normally be calculated as part of their value at the time they died, LR sought this cost on the basis that it was a direct financial loss, and given his assessment of each lamb's value at the lower end of the scale, I am persuaded that it is fair in the circumstances to include it.

[15] Having discovered what had happened after the event, ZXY quite properly did not seek payment from ACF Ltd for his services, pending resolution of the dispute. However, whilst ZXY has some responsibility for the loss, he still completed the rest of the job, for which there should be a set-off. The sum of \$1,440.00 was due, which I have rounded down to \$1,400.00 to take out a part-charge for the drenching of the lambs that died.

[16] On this basis, LR's losses amount to:

Value of lambs lost (130 x 100)	\$13,000.00
Capsules lost (130 x \$2.20)	\$ 286.00
Vet bill	\$ 278.25
Cartage	\$ 150.00
<b>Sub total</b>	<b>\$13,725.25</b>
<i>Less ZXY's account</i>	<i>\$ 1,400.00</i>
<b>Total</b>	<b>\$12,325.25</b>

*Has LR contributed to the loss, and, if so, to what degree?*

[17] Having given close consideration to all the evidence about what happened on the conveyor belt that day, I find that ZXY is primarily, but not entirely, responsible for what went wrong.

[18] I have assessed ZXY's responsibility at 80 per cent, and LR's at 20 per cent, which reduces the sum payable by ZXY by \$2,745.05 (20 per cent of \$13,725.25). He is accordingly liable to pay ACF Ltd the sum of \$9,580.20.

[19] I have reached this conclusion for the following reasons.

[20] ZXY was contracted to complete the job, and had a primary duty to look after LR's interests. He failed to do so by inviting CK to accompany him, who was clearly not adequately prepared for the role. ZXY ought to have known that the administration of capsules is an inherently risky job that requires skill and experience, particularly with lambs. Whilst CK stated that ZXY had trained him at the start of the day, CK still clearly found the job awkward after that training. After LR had demonstrated another technique to assist CK, CK advised ZXY that he was still finding the job awkward. ZXY simply told him to "stick with it, as that is the way LR wants it done". This was a negligent attitude to take, and was likely to have increased LR's loss. ZXY was responsible for CK and should have stopped the conveyor until he was satisfied CK was administering the capsules competently.

[21] I have had regard to ZXY's view that LR was not experienced in administering capsules on a conveyor, and that he gave CK the wrong technique and then allowed him to struggle with it for the rest of the day. ZXY believes that LR's intervention either caused the loss, or created a delegation of duty for CK's actions. From the point of the demonstration, ZXY considered that LR was effectively the boss of the situation and is responsible for what happened. I disagree. ZXY has the onus of establishing that LR took over the situation or caused the loss by giving a demonstration. As a matter of law, CK remained ZXY's responsibility, as his employee, regardless of LR's assistance. Also, I could not find that LR assisted CK incorrectly. The parties did not agree about the timing of LR's demonstration. ZXY said it happened before CK had done about 20 lambs. LR thought it had happened after about an hour, when CK would have already done enough lambs for all that died to have been treated. In any case, I cannot make a finding that LR's demonstration made CK's technique any worse. As a result, whilst LR's demonstration may have made no difference, or have caused more loss, or have mitigated a far larger loss, ZXY ultimately remains responsible for CK's lack of proper training.

[22] However, LR's participation on the day was sufficiently close that he must have known that CK was struggling, and that there was a risk he was releasing the capsules too soon. That this is so is established by the demonstration he gave early in the day, and his several other reminders to CK during the day. As the owner of the stock, and ZXY's customer, LR could have requested that CK stop administering the capsules, or that the operation be stopped altogether. He states that he did not take this step because he was not aware of the dangers of releasing the capsules too soon. He had thought that the capsule would just be coughed up, and thus wasted, but did not know that it would kill the lamb. I have stated that ZXY ought to have known this, but LR ought to have known this also. He is the farmer, and it is his choice to use this form of drench. The slow release capsules have been developed as a labour saving device, but they clearly come with animal health risks. LR referred to at least one other significant stock loss in the area in recent times from incorrect application.

[23] I am sure if LR knew then what he knows now, he would not have allowed CK to continue. ZXY acknowledges he should never have invited CK to be there on the day, and CK's failings, along with ZXY's mistaken view that LR was in charge is the primary cause of the loss. However, LR could well have lessened the loss if he had known of the risks of the

activity and stopped the job. There are uncertainties in this, as CK may already have done some or all of the damage by the time LR first intervened. For these reasons, I find any part he played in it to be at the lower end of the scale. However, given LR's continuing concerns during the day, I consider that both parties had a chance to stop what happened and that it is fair in the circumstances for LR to bear 20 per cent of the loss.

### **Conclusion**

[24] For these reasons, I find that ZXY is liable to pay ACF Ltd the sum of \$9,580.20 within 28 days.