

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 31/08
5089245

BETWEEN SUZANNE MARIE BARR
Applicant

AND P AND L BYRNE FARMING
PARTNERSHIP
Respondent

Member of Authority: Helen Doyle

Representatives: James Firth, Advocate for Applicant
Rachelle Lamb, Counsel for Respondent

Investigation Meeting: 7 December 2007 at Timaru

Determination: 31 March 2008

DETERMINATION OF THE AUTHORITY

Identity of respondent

[1] It was agreed during the directions conference with the Authority on 5 October 2007 that the respondent originally cited as Paul Byrne should be P and L Byrne Farming Partnership.

Employment relationship problem

[2] Mrs Barr has been employed for the 2006/2007 dairy season from June 2006 until 31 May 2007 by sharemilker Roland Linde as a relief milker. Mrs Barr also job shared with her husband Richard Barr who was employed in a full time position as farm hand/milker when he was unable to work for whatever reason. There was no additional cost to the employer when Mrs Barr performed her husband's duties.

[3] During Mrs Barr's employment with Mr Linde she resided with her husband and family in a farm house on the farm on which she worked known as 186 Glenavy-Tawai Road Waimate. I shall refer to the house from hereon as House 186.

[4] Mr Linde advised the Barrs that he would be leaving the farm at the end of 2006/2007 dairy season. Mr and Mrs Barr would therefore no longer have employment with Mr Linde.

[5] The respondent P and L Byrne Farming Partnership (the Partnership) had been offered a position of lower order sharemilker on the farm by the owners Murphy Farms Limited for the 2007/2008 dairy season.

[6] Mrs Barr says that she was a person intending to work for the Partnership for the 2007/2008 dairy season following a discussion with Mr Byrne at which she was offered work in mid April 2007. Mrs Barr says that her employment did not go ahead and she was unjustifiably dismissed on 14 May 2007 when her husband, Richard Barr, whose employment relationship was the subject of determination number CA 30/08 was dismissed. Mrs Barr said that nothing specific was said to her at the time that her husband was dismissed on 14 May 2007 and she felt that her employment was simply treated as an *add on* to her husbands.

[7] The Partnership say that a job offer was made to Mrs Barr for relief milking for 12 milkings a fortnight which would be paid at \$45 per milking. The Partnership say that any offer to Mrs Barr was conditional on her signing a written employment agreement.

[8] Mr Byrne said he made it clear to Mrs Barr on 31 May 2007 that her job was still there if she wanted it but that the offer would not include the farm accommodation that she was residing in at that time. Mrs Barr said that she confirmed with Mr Byrne at that time that she was still allowed on the farm but that her husband was not. Mr Byrne confirmed that he had no issues with Mrs Barr.

The issues

[9] The Authority has to determine the following issues:

- Was an employment agreement formed between Mrs Barr and the Partnership. Mrs Barr is only entitled to bring a personal grievance if

she was an employee within the definition of employee in the Employment Relations Act 2000. The meaning of *employee* in s.6(1)(b)(ii) of the Act includes the *person intending to work* and defined in s.5 of the Act as *means the person who is being offered, and accepted, work as an employee.*

- If Mrs Barr was a person intending to work for the Partnership then the next issue for the Authority to determine is whether she was dismissed from her employment on 14 May 2007.
- If Mrs Barr was dismissed then the next issue for the Authority is whether that dismissal was unjustified and, if it is found that Mrs Barr was unjustifiably dismissed, what remedies should be awarded to her and what was the effect, if any, on the advice to Mrs Barr that her position was still available for her on 31 May 2007.

Was Mrs Barr a person intending to work?

[10] Mr Byrne accepted that he had made a job offer to Mrs Barr for relief milking at \$45 per milking with a minimum of 12 milkings per fortnight in or about mid April 2007. There was a common element between the offers made to Mr and Mrs Barr as it was agreed that Mrs Barr could fill in for her husband in his full time position if he was unable to work but that Mrs Barr would not be paid extra for doing so. Mrs Barr had been performing both a job share and a relief milking role for Mr Linde. The relief milking would normally commence in about September or October.

[11] At the time that the offer was put to Mrs Barr I do not find that it was conditional on an employment agreement being signed.

[12] I find that this was a situation where the communication of acceptance was simply inferred when Mr Barr accepted his offer from the Partnership – see determination number CA 30/08. Mrs Barr's acceptance of her offer of employment was capable of being inferred in these circumstances because of the common elements that she shared with Mr Barr in terms of his offer, and in essence, Mrs Barr was simply to carry on with the same arrangement she had had with Mr Linde – *Weal v. Leusen Holdings Limited (T/A Heather-Lea Resthomes)* [2002] 1 ERNZ 655.

[13] I do not find the offer made to Mrs Barr was ever made on the basis that it was conditional on an employment agreement being signed. The Partnership is unable to unilaterally impose such a condition after having made an offer and that offer being accepted.

[14] I find that Mrs Barr and the Partnership intended to and did enter into a binding employment agreement with each other.

[15] I find that Mrs Barr was a person intending to work for the Partnership in terms of s.5 of the Employment Relations Act 2000 as a relief milker and on a job share basis with her husband Richard Barr.

Was Mrs Barr dismissed?

[16] Mr Byrne says that he never told Mrs Barr on 14 May 2007 that she would not be permitted to commence working for the Partnership. His evidence is that his conversation was directed to Mr Barr only.

[17] In *Wellington Clerical Union v. Greenwich* [1983] ACJ 965 at 973 Williamson J said that *dismissal is a word with a wide meaning. It should not be construed narrowly ...* . Williamson J described dismissal as a “*sending apart*” or “*sending away*” or “*sending forth*”.

[18] Mr and Mrs Barr lived with their children in House 186 on the farm. Mrs Barr expected to continue living in the house and working for the Partnership along the lines she had been for Mr Linde. When Mr Barr was dismissed on 14 May 2007 Mr Byrne took no steps to advise Mrs Barr that she would continue to be employed. This is notwithstanding that she was present in the house at the time of the conversation with Mr Barr and in fact Mr Byrne’s notes reflect that she contributed at one point to the discussion. Reference was made by Mr Byrne to having *the contracts at home* but he did not give Mrs Barr a contract or take any steps to advise her that she would not be sent away with Mr Barr on 31 May 2007.

[19] Dismissal should not be construed narrowly. I do not intend to do so on this occasion. I conclude that Mrs Barr was dismissed on 14 May 2007 by the Partnership in the absence of specific clarification from Mr Byrne to the contrary.

Was the dismissal unjustified?

[20] The Partnership does not attempt to justify the dismissal. A fair and reasonable employer would not on 14 May 2007 have simply ignored the separate employment arrangements it had with Mr and Mrs Barr. I find that Mrs Barr's dismissal on 14 May 2007 was unjustified. I will take into account Mr Byrne's advice to Mrs Barr on 31 May 2007 in terms of remedies.

[21] I find that Mrs Barr has a personal grievance that she was unjustifiably dismissed before she commenced her employment with the Partnership.

Remedies

[22] Mrs Barr seeks compensation for humiliation, loss of dignity and injury to her feelings by way of remedies. She does not seek lost wages. I accept Mrs Barr's evidence that she felt unimportant and simply an add-on to Mr Barr's employment on 14 May 2007.

[23] I do take into account that Mr Byrne did make it clear to Mrs Barr on 31 May 2007 that her position was available on the farm. I find that such an approach by Mr Byrne on that day must have gone some way towards reducing the humiliation Mrs Barr felt about the treatment she received on 14 May 2007. Case law supports that failure to accept an offer of reinstatement and lost reimbursement can on occasion either fully remedy the grievance or support a finding that rejection of the offer may amount to a failure by an employee to mitigate loss – *Fitzgerald v. Wallace Corporation Limited* [2002] 2 ERNZ 5. Such an approach is also consistent with the object section of Part 9, s.101(ab) of the Employment Relations Act 2000 which was inserted by the Employment Relations Amendment Act (No 2) 2004:

(ab) .to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship;..

[24] In all the circumstances taking into account Mr Byrne's approach on 31 May 2007 I am of the view that there should still be an award made to Mrs Barr to compensate her for her humiliation and loss of dignity but that it should be a moderate

award. I am of the view that an award in the sum of \$2,000 for compensation is appropriate in the circumstances of this case.

[25] There is no issue of contribution.

Costs

[26] I reserve the issue of costs.

Summary of findings and orders made

- I have found that Mrs Barr was a person intending to work for the Partnership;
- I have found that Mrs Barr was unjustifiably dismissed on 14 May 2007 before she could commence her employment;
- I have ordered P and L Byrne Farming Partnership to pay to Suzanne Barr the sum of \$2,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.;
- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority