

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 266/08
5080332

BETWEEN GREGORY BOURKE
 Applicant

AND JOHN BUNNIK
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Mr John Bunnik for Respondent

Investigation Meeting 14 July 2008 at Hamilton

Determination: 23 July 2008

DETERMINATION OF THE AUTHORITY

[1] In a statement of problem lodged in the Authority on 5 March 2007 Mr Bourke claims was not paid for the two weeks he worked for Mr Bunnik and was unjustifiably dismissed from his employment as a Farm Assistant on 22 November 2007.

[2] Mr Bunnik did not lodge a statement in reply and so by Memorandum of 16 May 2008, I directed the matter proceed to an investigation meeting to be held on 14 July 2008. Due to difficulties in delivering documents to Mr Bunnik's address, the applicant was required to undertake personal service of the documents pertaining to the investigation meeting. I am satisfied that on 1 July 2008 the documents were served on Mr Bunnik, who had avoided service up to that time.

[3] Mr Bunnik appeared at the Investigation Meeting and sought leave to defend the application. I granted leave to Mr Bunnik because it is always preferable that an application be dealt with on its merits and because I did not appreciate there would be any prejudice to Mr Bourke in granting that leave.

[4] Mr Bunnik denies Mr Bourke's dismissal was unjustified.

Background

[5] Mr Bourke applied for a position advertised on the Student Job Search website. The position was for a Dairy Farm Worker to work on a temporary basis from 13 November 2006 until 31 January 2007. The advertised position requires someone with farming knowledge/background. The hours stipulated in the advertisement are from 8.00am to 5.30pm each day for six days a week.

[6] Mr Bourke contacted Mr Bunnik by telephone to express his interest in the position. Mr Bourke says he told Mr Bunnik that he was inexperienced. Mr Bunnik's recollection is that Mr Bourke indicated he did have farming experience and that his father owned two farms. I am satisfied it is more likely than not that Mr Bourke indicated to Mr Bunnik that his father had two farms and that he was inexperienced. However, I have concluded that Mr Bunnik was willing to overlook the inexperience, probably believing that Mr Bourke had undertaken some work for his father even though Mr Bunnik was aware Mr Bourke had been brought up in the city and not on the farm.

[7] The parties signed a written employment agreement on 8 November 2008. The Agreement is a template agreement from Federated Farmers. The terms of the written agreement vary from the job advertised in respect of the following:

- the term of the agreement is specified as ending on 15 February 2007 rather than 31 January 2007;
- the hours of work are specified as being bank working days and from 8.00am to 6.00pm rather than six days a week and ending at 5.30pm each day; and
- the hourly rate is \$11.00 per hour in the employment agreement rather than \$11.25. The rate of \$11.00 per hour is stated to include holiday pay.

Arrears of wages

[8] Mr Bunnik does not dispute that he has not paid Mr Bourke for the two weeks he worked. However, Mr Bunnik says that he has been waiting for Mr Bourke to provide him with a timesheet listing his hours. At the investigation meeting it became clear that Mr Bunnik does not operate with the use of timesheets and that his current employee, Rochelle Brumby provides Mr Bunnik with a piece of paper with a list of her hours on it.

[9] However, I am not satisfied Mr Bourke was aware of this obligation. In the absence of any evidence to the contrary I am satisfied that Mr Bourke is entitled to payment of his wages for the two weeks. I am also satisfied that the amount due to Mr Bourke is \$796.95.

Mr Bunnik is ordered to pay to Mr Bourke the sum of 796.95 plus interest as arrears of wages within 28 days of the date of this determination.

Events leading to dismissal

[10] An employer's actions must be assessed in terms of events that took place at the time and for the reasons given at the time (s.103A refers). Dismissal for serious misconduct is different from dismissal for misconduct, such as for poor performance. In the case of a dismissal for poor performance warnings and notice must be given. In *Trotter and Telecom Corp of NZ Ltd* [1993] 2 ERNZ 659 the Employment Court set out the following conditions in relation to dismissal for poor performance:

- Did the employer in fact become dissatisfied with the employee's performance of his or her duties?
- If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work as far and an objective statement of standards requiring to be met?
- Was a reasonable time allowed for the attaining of those standards?
- Following the expiry of such a reasonable time, and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected?

[11] Mr Bourke says he received no proper training and the expectations of Mr Bunnik with regard to the work that he could undertake was unrealistic. Mr Bunnik

disputes this and says that Mr Bourke was incompetent. He says despite him spending time supervising Mr Bourke's work and providing instructions on how to do many aspects of his work Mr Bourke was simply unable to do them.

[12] By way of example, it was common ground that Mr Bourke spent a lot of his first week of employment clearing thistles from the farm. Mr Bunnik says Mr Bourke had to do this using a spade, as Mr Bourke could not operate the farm motor bike.

[13] Mr Bunnik asked Mr Bourke to spread Urea on the farm paddocks. Mr Bourke says he was told to spread the urea on only one paddock. Mr Bunnik says he gave Mr Bourke an envelope on which he had listed the paddocks Mr Bourke was to spread the urea on. Instead of spreading the Urea on all the paddocks, Mr Bourke spread it all on only one paddock.

[14] Mr Bunnik says even though he showed Mr Bourke what to do, he opened a gate at the wrong end of a paddock, caused a problem for the Vet when he changed the gates in the milking shed, and could not drive the tractor even though he had spent time showing him what to do and how to do it.

[15] On 22 November, at the end of the milking Mr Bunnik handed Mr Bourke a letter in which he states (verbatim):

You have been coming here just on 2 weeks. This last week you clearly have been unable to follow simple instructions and routines both supervised by me or on your own.
It does not take 10 weeks to learn how to operate a bulk milk vat wash and set the cowshed up ready for milking.
You have asked me at least 24 times how to open a tap.
Spreading urea is simple. You are the 1st person ever unable to do it.
For your own safety it is better to find an other job more suitable to your ability.

[16] At the investigation meeting Mr Bourke conceded that the job was more difficult than he anticipated and that he did not ask enough questions when things were unclear.

[17] It is clear on the evidence, that Mr Bunnik did become dissatisfied with Mr Bourke's performance. However, he did not express his dissatisfaction to Mr Bourke in a way that Mr Bourke could respond to meet improvements. Mr Bunnik has failed

in this case to meet any of the requirements of dealing with poor performance and dismissed Mr Bourke in the absence of any notion of procedural fairness.

[18] Mr Bourke was unjustifiably dismissed and is entitled to remedies for his personal grievance.

Remedies

Reimbursement for wages lost as a result of the dismissal

[19] Mr Bourke seeks reimbursement of wages covering the period from the date of his dismissal until the expiry of the fixed term agreement. The Employment Relations Act provides for reimbursement of the whole or any part of wages lost as a result of the grievance. Mr Bourke was employed a week after his dismissal at the same rate of pay as he was on when he was working for Mr Bunnik. Mr Bourke lost one weeks wages as a result of his dismissal and should be reimbursed.

Mr Bunnik is ordered to pay to Mr Bourke the sum of \$398.47 gross plus interest pursuant to s.123(1)(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Interest

[20] In a statement provided to the Authority prior to the investigation meeting Mr Bourke sought payment of interest on the arrears of wages and the reimbursement of wages as a result of the dismissal.

[21] Exercising the discretion to award interest under clause 11 of Schedule 2 of the Act, I think it fit to order Mr Bunnik to pay to Mr Bourke interest at the rate of 10 per cent on the arrears of wages of \$796.95 and the wages lost as a result of the dismissal of \$398.47.

[22] Interest is to be calculated from 22 November 2006 until the date the sum is paid to Mr Bunnik.

Mr Bunnik is ordered to pay to Mr Bourke interest at the rate of 10 per cent on the arrears of wages of \$796.95 and the wages lost as a result of the dismissal of \$398.47.

Compensation

[23] Mr Bourke claims compensation for hurt and humiliation. Mr Bourke gave no specific evidence of hurt and humiliation suffered as a result of the dismissal. This is a case where it is appropriate to take a global approach to remedies. Taking into account the short tenure of Mr Bourke's employment and the fact that he took on a job which by his own evidence was more difficult than he thought it would be, and for the injury to feelings inherent in being subject to a dismissal found to be unjustified, I award Mr Bourke the sum of \$1,500 compensation under s.123(1)(c)(i) of the Act.

Mr Bunnik is ordered to pay to Mr Bourke, within 28 days of the date of this determination, the sum of \$1,500.00, pursuant to section 123(1)(c)(i) of the Employment Relations Act.

Costs

[24] Mr Bourke was unrepresented at the investigation meeting. However, I am aware that he has incurred legal costs in the course of pursuing his personal grievance. In that case, costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority