

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 1/10
5145529

BETWEEN MARK JOSEPH CROWE
Applicant

AND GREENBURN DAIRY FARM
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Mark Crowe, the Applicant in person
Linda Penno, Advocate for Respondent

Investigation meeting: 19 August 2009 at Christchurch

Determination: 7 January 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Crowe worked for Greenburn Dairy Farm Limited. He was employed as Greenburn's farm manager and started on 21 October 2008. He reported to the company owners, supervised several staff and had full day to day responsibility for the operation of the dairy farm near Fairlie.

[2] Following his involvement in an altercation on 19 November 2008 Mr Greenburn was dismissed, unjustifiably in his view. He sought interim reinstatement but that was declined for reasons given earlier. This determination resolves Mr Crowe's claim of unjustified dismissal.

The altercation

[3] Mr Crowe lived on the property as did other employees. In fact he shared accommodation with David and Tracey Ivory and their young child. Mr Ivory was a farm assistant and Mrs Ivory a relief milker. As well as Mr Crowe, Mr & Mrs Ivory and their child, Mr Ivory's father was also living in the house. This was obviously not ideal. Mr Crowe's evidence is that his employer did not sort out the accommodation

issues in a timely fashion but I do not accept that evidence. There was sufficient accommodation available if Mr Crowe had wanted to move elsewhere on a temporary basis, but he did not.

[4] There was an altercation between Mr Crowe and Mr & Mrs Ivory about the shared living arrangements on the evening of 19 November 2008. Mr Crowe says that he was confronted by Mr Ivory and felt extremely threatened and intimidated. He thought he had to defend himself so he punched Mr Ivory and *grazed* his lip. He says that was necessary to stop Mr Ivory from assaulting him. Next Mrs Ivory came at Mr Crowe *yelling and spitting* so he pushed her away. Mrs Ivory lost her balance and fell over. Mr Ivory then tackled Mr Crowe to the ground and had him in a headlock threatening to kill him. Another employee (Michael Millard) intervened and Mr & Mrs Ivory went inside the house. Mrs Ivory came back out yelling at Mr Crowe but Mr Millard intervened again. Mr Ivory senior came out of the house and confronted Mr Crowe. Mr Millard intervened again. That brought the altercation to an end, one of the owners turned up soon after and arrangements were made to separate Mr Crowe and Mr & Mrs Ivory for the night.

[5] The evidence of Mr Ivory and Mrs Ivory differs from Mr Crowe's account just given. They say that Mr Crowe was the aggressor putting Mr Ivory in a headlock, punching him and pushing Mrs Ivory over before Mr Ivory pushed Mr Crowe to the ground. Mr Millard intervened. When Mr Ivory senior came outside Mr Crowe tried to pick a fight with him too.

[6] Mr Millard no longer works for Greenburn. His evidence helps establish the immediate context for the altercation. Mr Crowe and Mr Millard were drinking at the Mr Millard's accommodation for several hours beforehand. Mr Crowe was expressing annoyance at the lack of building progress and having to live with the Ivory family, their cat, their dog and their budgie. During this time the power went out and they decided to drive to the house to look at the building progress and to see if power was on there. Mr Millard says that after they arrived Mr Crowe *got angry really quickly*. Mr Crowe phoned one of the owners (Kieran Guiney) and told him how unacceptable the living arrangements were. Next Mr Crowe went into the house briefly then came back out and made another phone call. This time he rang a furniture removal company and organised for a removal truck to take the Ivorys' gear to Mr Guiney's place. Mr Crowe rang and spoke to Mrs Guiney telling her that the Ivorys'

gear would be trucked to her place on Friday morning. Mr Crowe then went into the house. Mr Crowe does not dispute this evidence and it accords with Mr and Mrs Guiney's evidence about the phone calls.

[7] Mr Millard was not present in the house to overhear the exchanges between Mr Crowe and Mrs Ivory. I accept Mrs Ivory's evidence about these exchanges. Mr Crowe came inside saying that they needed to talk, she told him that they were about to have tea and he left. He returned a little while later. Mr Ivory was in another room. Mr Crowe told Mrs Ivory *You guys are moving to Leonie and Kieran's on Friday. I've arranged a truck.* Mr Crowe then left. I accept Mrs Ivory's evidence that Mr Crowe was irate, drunk and swearing.

[8] Mr Millard says that when Mr Crowe came back out Mr & Mrs Ivory followed, both of them angry with Mrs Ivory yelling. Mr Ivory yelled *What the fuck's going on Mark?* At that point Mr Millard went inside the garage since he thought this was none of his business. He says he did not see the start of the physical altercation between Mr Crowe and Mr & Mrs Ivory. When he heard Mrs Ivory screaming he came back outside and saw her on the ground *on her butt in a sitting position* and Mr Crowe and Mr Ivory wrestling. Mr Millard saw that Mr Ivory had a bleeding lip. Mr Ivory wrestled Mr Crowe to the ground and Mr Millard intervened by sitting on Mr Crowe to prevent him getting up. The situation cooled down and Mr & Mrs Ivory went back inside. Mr Millard had to deflect Mrs Ivory and Mr Ivory senior from inflaming things and Mr Guiney arrived soon after.

[9] Although Mr Millard says he did not see it, there is no dispute that Mr Crowe punched Mr Ivory and pushed Mrs Ivory causing her to fall over.

[10] Once things had cooled down, Mrs Ivory rang Mr Guiney who went to the property with another farm manager. I accept Mr Guiney's evidence that Mr Crowe was swearing, very aggressive and drunk and required careful management to keep him under control. Mr Guiney eventually convinced Mr Crowe to go to Mr Millard's place for the night. He also saw that Mr Ivory was bleeding from the lip and had another mark on him.

The dismissal

[11] On 20 November 2008 Mr Guiney got some advice from Federated Farmers about how to proceed. Arrangements were made to interview Mr & Mrs Ivory and Mr Crowe. Mr Crowe was cautioned that it was a serious situation which might result in dismissal. Mr Crowe was interviewed last by Mr & Mrs Guiney and Ron Smith (another company owner). After being cautioned again Mr Crowe said he was happy to proceed with the interview as arranged. He gave his account of what happened. He admitted punching Mr Ivory but claimed that Mr Ivory came at him as if to have a shot. When asked if he had pushed Mrs Ivory over he said that she might have got mixed up in the mêlée. Mr Crowe was asked if he had a problem with drink and said he had been *pushing it lately*. Mr Crowe admitted to involvement previously in a violent incident but said he was never charged by the police over that matter. His explanation overall was that he had had enough, that the place was not his own, that he had been *used and abused* and let down by his employer. Mr Crowe refused to accept he was at fault.

[12] After speaking to Mr Crowe, the owners spoke to Mr Millard who gave his account of events as above. Mr Millard did not shed any light on whether Mr Crowe needed to defend himself. The owners then decided to dismiss Mr Crowe. Mr Smith phoned Mr Crowe at about 5.00pm and told him that he was dismissed for punching Mr Ivory, that being serious misconduct. Mr Crowe was also told that this would be confirmed in writing.

[13] On 23 November 2008 Mr Crowe found in his car a letter dated 21 November that Mr Guiney had put there. It sets out the reasons for the dismissal.

[14] On 21 November 2008 Mr Crowe visited a solicitor who sent an email that day to Mr Smith asking for the dismissal to be reconsidered. That did not cause any change in the company's position.

Justification for the dismissal

[15] Justification for the dismissal must be determined on an objective basis by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[16] There was a written *Farm Managers Agreement* and letter of offer. The offer letter made clear that there would have to be a temporary arrangement for accommodation for Mr & Mrs Ivory who were employed at Mr Crowe's request, he having worked with them elsewhere. Neither document made provision for termination of the employment, but I accept that there must be implied into the agreement the contractual right for the employer to summarily terminate the employment for serious misconduct.

[17] Although not raised by Mr Crowe during his interview, his statement of problem says that that the altercation took place outside of the work environment and outside of work hours. That is correct in that neither Mr Crowe nor Mr & Mrs Ivory were performing any work at that time of the evening. However, this was an incident between the manager and two staff members supervised by him at the accommodation on the farm provided as part of their employment. There was clearly a sufficient nexus with the employment for the altercation to be regarded as misconduct within the employment: see *Smith v Christchurch Press Company Limited* [2000] 1 ERNZ 624.

[18] A substantial part of Mr Crowe's complaint is that Greenburn failed to provide adequate housing for all the staff thus allowing the tension caused by them all living together to develop and escalate. Any reasonable employer would have rejected that explanation, as did Greenburn. It was known from the outset of the employment that a temporary arrangement was required pending the completion of building work to accommodate Mr Crowe's request for Mr & Mrs Ivory to be employed. There was another solution available but at Mr Crowe's initiative Mr & Mrs Ivory moved in with him. Greenburn also did not accept that the cramped accommodation provided any justification for Mr Crowe's violence. That too was a conclusion that any reasonable employer would have reached.

[19] Mr Crowe admitted hitting Mr Ivory and says that he was simply defending himself. Greenburn did not accept that explanation and in the circumstances nor would any reasonable employer. Mr Crowe caused the altercation by arriving drunk, swearing at Mrs Ivory and telling her that he had organised a truck for them to move. He hit Mr Ivory and pushed Mrs Ivory over. Neither action was required for Mr Crowe's reasonable defence of himself.

[20] There are some complaints about how Greenburn acted. Mr Crowe says that he was not given any advance notice of the agenda for the meeting on 20 November

and did not have a proper opportunity to respond during the meeting or the chance to organise representation.

[21] In *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35, the Labour Court said:

The minimum requirements can be said to be:

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over-indulgent person

[22] On the findings above, Greenburn met these minimum requirements. There were several communications with Mr Crowe on 20 November before the meeting and he knew clearly what the meeting was for. At the start he was specifically told that it was serious and could result in a dismissal and he agreed to proceed knowing what was at stake. The evidence establishes that he had a real opportunity to explain and that Greenburn properly considered his explanation. There was no predetermination.

[23] I find that Greenburn's decision to dismiss Mr Crowe and how it acted at the time were the actions of a fair and reasonable employer. Mr Crowe was justifiably dismissed.

Summary

[24] Mr Crowe does not have a personal grievance.

[25] Costs are reserved. Any application should be made within 28 days by lodging a memorandum with the Authority and serving it on Mr Crowe who may lodge a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority