New Zealand Employment Relations Authority Decisions

D v M CA 128/07 (Christchurch) [2007] NZERA 837 (1 November 2007)

Last Updated: 23 November 2021

ATTENTION IS DRAWN TO PARA [1] PROHIBITING PUBLICATION OF CERTAIN INFORMATION CONTAINED IN THIS DETERMINATION

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IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 128/07 5043271

BETWEEN D

Applicant

AND M

Respondent

Member of Authority: Paul Montgomery

Representatives: Grant Slevin, Counsel for Applicant

Brian Nathan, Counsel for Respondent Investigation Meeting: 22 and 23 May 2007 at Christchurch

Submissions received: 22 June 2007 from Applicant

21 June 2007 from Respondent

Determination: 1 November 2007

DETERMINATION OF THE AUTHORITY

Introduction

> [1] In an application lodged with the Authority on 11 May 2007 Counsel for the applicant sought permanent suppression of the names of the parties, of all witnesses and any details likely to lead to their identification, including the location in which the events occurred. Counsel for the respondent consented to this course. Accordingly, I order the above details of this matter to be permanently suppressed.

Employment relationship problem

[2] D, the applicant, says he was unjustifiably dismissed by M from his employment as a farm worker. D had been employed by the respondent on or about 6 June 2005 until his dismissal on 21 September 2005. The employment relationship was not governed by a written employment agreement, however, the applicant says he was remunerated by receiving accommodation in a farm sleepout, power, fuel for his vehicle, lunches, farm-killed meat, a carton of cigarettes each week and $350 cash wages each week.

[3] D seeks remedies of a declaration from the Authority that his dismissal was unjustified. He also seeks a written apology, payment for lost remuneration and interest for 12 months following his dismissal, payment of outstanding holiday pay and interest, compensation for hurt and humiliation in the sum of $35,000 and costs.

[4] M denies D was unjustifiably dismissed and says genuine reasons existed justifying summary termination of D's employment on 21 September 2005. The respondent declines to grant the applicant the remedies he seeks. The parties have made several attempts to resolve the issues between them, including attending mediation. However, they have been unable to reach a settlement.

How the problem arose

[5] The respondent operates a mixed cropping farm. While there was a dispute between the parties over D's starting date, there is no issue that he was employed as a farm hand by the respondent and it appears that was on or about 6 June 2005.

[6] No written agreement was made between the parties and the remuneration of the applicant is in dispute. D says the package he agreed to was accommodation in a sleepout with power supplied at no cost to him, fuel for his vehicle, a carton of cigarettes each week, lunches, meat from the farm and $350 per week in cash. The respondent says there was no arrangement regarding cigarettes or meat and that these were of the nature of a *perk*.

[7] M alleges that a number of verbal warnings were given to D. One related to punctuality in the first week of employment, another to not having the employee's young son in the sleepout and another to keeping his distance from both the children. The applicant says he was never issued with warnings on any of these issues.

[8] The respondent says that the latter warning resulted from two specific incidents. The first is said to have occurred in early September when the employer says he saw his son come out of the applicant's sleepout in a distressed state. The employer says the applicant told him he was showing the boy his knife. The applicant denies the incident occurred and said the only occasion on which he and the boy were in the sleepout was when the applicant had agreed to take the boy fishing with his parents' permission, and he was packing gear for that trip.

[9] The second incident involved the employer's 2½ year old daughter. The applicant was regularly in the employer's home for lunch and consequently saw the two children while there. The employer says that the two children were playing on the floor and that the applicant removed his daughter's nappy. The respondent says that the applicant was warned to stay away from the children and that he was told *it was not necessary for him to be with the children in order for him to carry out his responsibilities as a farm hand*. The applicant strenuously denies removing the child's nappy and further that the incident occurred at all. He also denies ever being given a warning. The respondent says the incident occurred soon after the first incident, early in September 2005.

[10] On Wednesday, 21 September 2005, the employer, the employer's son and the applicant went skiing. The respondent's evidence was that he and his young son had been skiing for half a day on Wednesdays and that the applicant *would often come with us*. On this day, the employer said his son was:

... anxious prior to leaving. He was unusually upset and crying on the way.

[11] Later in the evening after returning home, around 7pm, the employers say that their son disclosed to them that the applicant had sexually molested him.

[12] The father says he rang the Police about 8.30pm, rang their solicitor at around 10pm and had a close, older male friend, R, come to the farm. The friend arrived around 10.30pm. The two men went to the sleepout, knocked on the door. The lights went on, the applicant opened the door and the two men went in. The older man spoke to the applicant stating that the boy had made accusations of sexual abuse and that D was to leave the property immediately.

[13] The employer's evidence was that D denied the allegations. He said he loved the boy like his own son but that he understood why he was being asked to leave. Further, he said that he would do the same if it were his own children. (D has two sons from a previous marriage). The employer said:

I had given him a cheque for one week's wages. D left the farm and we saw his car drive towards town.

[14] The following morning, the applicant advised his other employer, for whom he worked part-time, of the allegation and later that morning went to the local Police station and advised the Police of the allegation and asked for advice.

[15] The allegations were fully investigated by the Police who found there was insufficient evidence to support a prosecution.

[16] The local people became aware of the allegations soon after they were made. The parties each deny being responsible for this. However, the applicant clearly suffered verbal abuse, a physical assault and damage to his vehicle in the wake of the allegations becoming known.

[17] The respondent says a telephone call was received from the applicant about one week after the incident in which M said D told him he, D, was *going to get him*. The respondent took out a trespass order against D.

[18] M said in his evidence:

On 2 October 2005 I rang D and told him that the boy had said nothing to the Police and that he was, as a result, off the hook. D thanked me saying 'thanks mate'.

Issues

[19] To determine this matter, the Authority needs to resolve the following issues:

- What was the nature of the applicant's employment with the respondent; and
- What were the agreed terms of the employment; and
- Was the applicant dismissed by the respondent on 21 September 2005; and if so was the dismissal justified in all the circumstances; and

- If not, what remedies are due to the applicant; and
  - Did the applicant contribute to the circumstances giving rise to the dismissal?

The test

[20] The applicable test in this matter is set out in s.103A of the Employment Relations Act 2000. It requires that the Authority consider objectively whether the actions of the employer, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time the alleged dismissal occurred.

The investigation meeting

[21] At the investigation meeting, the Authority heard evidence in person from both principals of the respondent and received a statement from R who was present at the sleepout on the night of Wednesday, 21 September 2005. It also heard evidence in person from a qualified and specialist counsellor who became involved with assisting the respondent's children in mid-October 2005.

[22] The applicant's evidence was presented by the applicant and his partner in person. Two other witnesses provided statements and each was questioned by the Authority and counsel by way of conference call.

[23] While the atmosphere was somewhat tense, given the nature of the case, all participants behaved appropriately and the Authority was assisted in its task by this. I wish to record the Authority's appreciation of the professionalism of counsel and of the strenuous efforts made prior to the investigation to resolve the issues

between the parties.

Analysis and discussion

[24] Two significant difficulties arise for the Authority in this matter. The first is the total absence of any written documentation covering the terms of the relationship and of the alleged warnings. The other is the extent to which the allegations by their very nature have affected the objectivity of the parties in respect of the employment-related issues.

[25] The evidence of M was at times imprecise and at others, contradictory. He told the Authority that the respondent and the applicant were *getting along okay* prior to the nappy incident and the boy's complaint. He then told the Authority that he and his wife were *scared of him* [D] *from the word go*. M told the Authority he had earlier warned D to stay away from the children but agrees he took the boy and D skiing on 21 September 2005, the day of the boy's complaint.

[26] Another issue on which he was clearly in error was the supply of cigarettes to the applicant. In his written statement, M said *I did purchase two cartons of cigarettes for him on the farm partnership's account ... prior to our holiday and then provided some duty free cigarettes after that on my return. This was not however part of his remuneration*. Copies of the accounts provided to the Authority clearly indicate that regular purchases of the brand that D smoked were made on the farm account until September 2005.

[27] Another concerning assertion was that made by both Mr and Mrs M. Mr M said *he* [D] *picked up our daughter ... and for reasons that I do not understand removed her nappy*. Mrs M said *the very next day D, as usual, was in our house for lunch. He picked up* [the child] *who was then 2½ and removed her nappy. This was for reasons that completely escaped me*. Significantly, in reply to a question from counsel, Mrs M said she did not see the nappy removed by D. In this context, Mrs M said the two children were running around at the time of the incident. Mr M was unsure whether he saw D remove the child's nappy.

[28] Another issue is the ski pass purchased by the respondent for the applicant. Mr M said this was in place of D's holiday pay while D said the pass was offered without any reference to it being in lieu of his holiday pay entitlement.

[29] On the nature of the employment agreement between the parties, Mrs M's evidence, supported by her husband, was the employment would end after the lambs were sold, after which time there would be no need for D's ongoing services. From this the Authority was asked to accept that the agreement was a fixed term arrangement. The difficulty facing the respondent is the requirement set out in s.66 of the Act, and in particular with subsection (4) which reads:

> *(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing:*

(a) The way in which the employment will end; and
(b) The reasons for ending the employment in that way.

[30] The respondent has been unable to provide any substantial evidence that it complied with these requirements.

[31] I turn to the events of the night of 21 September 2005 following the child's disclosure to the parents. Without question, the parents were justifiably alarmed at what they were told by their son and needed to act in the light of those allegations. They contacted R who came to the property to assist. They contacted the Police to ask for guidance and before going to the sleepout rang their solicitor for advice. The details of the legal advice given were not overly clear. However, it is evident that the need to have D leave the property was uppermost in the parents' minds. There was clear evidence of a discussion between Mr and Mrs M and R. R's evidence was

I advised M that it was important that he pay D what was owed to him and after working out what money was due, M wrote out a cheque.

[32] There is little conflict of evidence relating to the events at the sleepout. Mr M's evidence was:

R and I both went in. R spoke to D about what [the boy] had said stating that the boy had made accusations of sexual abuse. D was told to leave immediately. As I have said our concern was to have him off the property.

[33] D denied the allegations and said he loved (the boy) like his own son. D was told he was going to have to leave. He said that that was alright and that he would do the same thing if it was his own child. D packed up his gear and left in about half an hour. Mr M's evidence was:

I had given him a cheque for one week's wages. He left the farm and we saw his car drive towards town

.

It had not been our intention to dismiss D ... My wife and I knew it would not be possible for D to be on the farm with the boy having made the statements he had made. It was difficult for me to even look at D given what the boy had said let alone have any trust in him as an employee. I did however, believe that the employment situation would be sorted out in a couple of weeks and that was the purpose of paying him one week's wages.

[34] The parties each blame the other over how the allegations became public. The applicant says he told only two people of his situation. One was the manager of the business where he had a part-time evening job, the other being a work colleague who

offered D accommodation. Both told the Authority that they had told no one, but had local people tell them of the allegations.

[35] The respondents say they told no one apart from R, the Police, the counsellor and their solicitor. There is little doubt that word was out very smartly and that the applicant was meted out some, generally verbal, rough country justice by some of the local people.

What is to be made of the events of the night of 21 September 2005?

[36] There is no doubt that D's leaving the farm was at the direction of the employer and solely because of the untested allegations made by the respondent's young son. Mr and Mrs M both say they did not intend to dismiss D, their sole concern being to ensure the safety of their children. Mrs M's evidence goes on to say:

Our sole focus however was not on terminating his employment but on removing him from the workplace which of course meant he was in and about our house on a regular basis. It was not possible for that to continue.

[37] It was not disputed that D's accommodation was provided as part of his employment terms and was provided free of charge, nor was the issue of lunch being provided to him each working day contested.

[38] Returning to the issue of the one week's wages paid on the night of 21 September 2005, and with regard to M's evidence above that he thought the employment situation would be sorted out within a couple of weeks, it is clear from the evidence that M rang D on 2 October 2005 and told the applicant that *it looks like you are off the hook* and that D replied *thanks mate*. The evidence was that about a week after 21 September 2005, D rang M and told M he was *going to get him*. There was some debate around this point, particularly as to what was meant. However, it appears likely that D was referring to his intention to pursue his employment rights rather than threatening personal injury.

[39] While I accept the parents were still focused on the child's allegations and the effects of those allegations, as employers they failed to address the employment situation at all.

[40] Clearly, there was no investigation by the employer at any time into the events that led to D being sent away. In the circumstances, such investigation could have

proceeded after the *off the hook* message was relayed to D by M. But nothing was done to attempt to resolve this outstanding matter. It was simply not addressed by the respondent which casts some doubt on the evidence by M that he believed the employment situation would be sorted out after a couple of weeks.

[41] With the completion of a thorough investigation by the Police of all avenues of inquiry, including DNA sampling, the substantive basis for D being sent away from his employment was eroded very significantly. That

said, I accept the parents were very seriously distracted from their obligations as employers and I also conclude that their local solicitor was most likely focused on the safety of his clients' children when advising them. He or she appears not to have recommended suspension on pay, and appears, given R's evidence, not to have considered the issue of wages payment to D at all.

[42] The Authority received well researched and comprehensive submissions from counsel for each party. I will not traverse these in detail except to acknowledge that I have seriously considered Mr Nathan's submission that:

This is an exceptional case in which the discretion not to award remedies should be exercised. In the circumstances where an employment relationship has been terminated, and that termination was inevitable, it would be unjust for any remedies to be provided.

[43] I accept this submission was made honestly and it would have had some force but for the fact that the employer took no steps to address the applicant on how the inevitable termination could be resolved. As observed above, the respondent took no steps at all to reach an agreed settlement when such was open to it on the basis of the undisputed evidence that D told R and M, in the sleepout, that in their situation, he would have done the same thing if it were his own children's safety in question.

[44] D's statement to M and R does not absolve the respondent of its obligations. It simply acknowledges that D understood why he was being asked to leave the property. Nothing more.

[45] There was considerable debate over the provision of farm-killed meat to the applicant as part of his remuneration. Having considered the evidence and in particular the limited cooking facilities available to D in the sleepout, as well as the evidence that very little meat was killed on the farm, I am of the view that this was not an integral part of the remuneration agreement.

The determination

[46] Returning to the issues set out above, in the light of the test for justification:

- I find the employment of the applicant was not on a fixed term but was permanent until terminated on reasonable notice by either party.
- I find that the terms of employment were:
  (a) Payment of $350 net per week;
  (b) Payment of holiday pay entitlement in accordance with the Holidays Act. I do not accept that the ski pass was in lieu of holiday pay as there is no provision for parties to contract outside the Holidays Act;
  (c) Provision of a carton of cigarettes per week to the applicant;
  (d) Provision of fuel for the applicant's vehicle.
- I find the applicant was unjustifiably dismissed from his employment by the respondent.
- I find, on the evidence before the Authority, that D did not contribute to the circumstances that gave rise to his dismissal.

Remedies

[47] Having determined the applicant was unjustifiably dismissed by the respondent, I turn to the remedies to which he is entitled.

[48] However, before addressing the remedies due to the applicant, it needs to be made clear to the parties that, after close scrutiny of the evidence, I am unable to determine, even on the balance of probabilities, which party was responsible for the allegations being noised abroad in the local community. Each party told others in whom they had confidence, yet the news was in general circulation very promptly. I am simply unable to determine which party's confidence in those to whom they spoke was misplaced.

[49] I also observe that in the circumstances it is accepted that the relationship was irretrievable. That does not relieve the respondent of its obligations to do whatever is fair and reasonable for the applicant. This is particularly so given that following two evidential interviews with the Police Child Abuse Unit on 26 and 29 September, the child did not disclose any sexual abuse and Mr M telephoned D to tell him this adding that D was *off the hook*.

[50] The applicant, by his counsel, seeks the following remedies:

- Lost remuneration for a period of 12 months;
- Reimbursement of work-related benefits for 12 months;
- Compensation for hurt and humiliation in the sum of $35,000;
- Costs.

[51] Mr Slevin urged the Authority to consider and take into account when determining remedies that the applicant remained in the town in order to attempt to clear his name and to obtain further work. He submits that after 12 months, D saw this as unachievable and so moved elsewhere.

[52] Before the Authority was a letter written to the respondent by D's solicitor at the time, on 1 November 2005. That letter notifies the grievance and sets out the remedies D required, including a written apology. The period for which the applicant sought lost remuneration set out in that letter was four months.

[53] The reply from the respondent's solicitor three days later states:

We have taken instructions from Mr M that he does not know the truth of and therefore denies the allegations affecting your client and will take such steps as he may be advised to take to oppose any Court proceedings that may be brought against him by your client.

[54] It must have been clear to D from that reply that the requested written apology retracting the accusation made by the respondent was not to be given to D, and thus could not be used to clear his name.

[55] If there was any lingering doubt in D's mind over the respondent's views on dealing with the alleged grievance, the service of the non-trespass order with respect to the respondent's farm ought to have extinguished it. The order is dated 4

November 2005, the same date as the letter from M's solicitor. In the light of this, D's decision to remain in the town for a year rather than seek employment elsewhere, is difficult to justify.

[56] In setting out the remedies in this case, I have also carefully considered Mr Slevin's detailed submissions, calculations and case references in context of the remedies issue. Given the respondent has not challenged the basis of the calculations provided to the Authority and they appear to be well-founded, I employ them to calculate the remedies to which they apply.

[57] Section 128(2) of the Act sets out the duty of the Authority when considering reimbursement of remuneration lost through the grievance. Section 128(3) provides the discretion for the Authority to award more than the three months' reimbursement set out in s.128(2).

[58] This is a case in which that discretion needs to be exercised although not to the extent of 12 months. I set the period for which D is to be reimbursed at four months (17 weeks).

[59] The respondent is ordered to pay the applicant the following sums:

Lost remuneration

[60] The applicant earned, including non-taxable allowances, the net sum of

$616.80 per week during the employment period. I calculate the gross weekly payment would have been $764.42 per week based on an annual income of $39,750 gross.

[61] Over the 12 month period following his dismissal, D earned $19,648.73 gross. This equates to $377.86 per week. The loss per week is therefore $386.56 gross. The loss over 17 weeks is $6,571.52 gross.

[62] The respondent is to pay the applicant the sum of $6,571.52 gross under s.123(1)(b) of the Act.

Holiday pay

[63] For the purposes of calculating holiday pay, the applicant's gross earnings must include the cash value of accommodation, power and food provided under the

employment arrangement. Inclusive of these, other allowances and the weekly cash payment, the applicant's gross income for 20 weeks of employment was $15,288.40 based on a pre-tax weekly payment of $764.42.

[64] Six percent of $15,288.40 is $917.30 gross. The respondent is to pay the applicant this sum.

Interest

[65] Compound interest is awarded on the holiday pay and lost wages from 21 September 2005 until the date of issue of this determination. The applicable rate is 9.5% per annum.

Compensation

[66] The applicant has suffered serious humiliation, loss of dignity and injury to feelings in this matter. The failure of the respondent to address the employment situation and to attempt to negotiate an exit arrangement is a significant lapse. The applicant was simply abandoned to his own devices in a hostile social environment. Once the outcome of the Police evidential interviews were known in early October 2005, a fair and reasonable employer would have provided an exit payment and certainly the holiday pay due to enable D to move to another place to find alternative employment.

[67] Having regard to all the issues in this case, I order the respondent to pay the applicant the sum of $12,000 under s.123(1)(c)(i) of the Act.

[68] The Authority is unable to entertain the applicant's request that he be provided with a written apology as it lacks the jurisdiction to make such an order.

Costs

[69] Costs are reserved.

Paul Montgomery

Member of the Employment Relations Authority