

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA135/08
5078823

BETWEEN DARRYN ERNST-RUTHVEN
Applicant

AND WOODLANDS APIARY
LIMITED (In Receivership)
Respondent

Member of Authority: James Crichton

Representatives: Quentin Stratford, Counsel for Applicant
John White, Advocate for Respondent

Investigation Meeting: 24 June 2008 at Dunedin

Determination: 15 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Ernst-Ruthven), alleges that he was constructively dismissed by the respondent, Woodlands Apiary Limited (Woodlands), that Woodlands owes him wages and that because of the default in payment of wages, he is entitled to seek a penalty for the delay in payment and interest.

[2] Woodlands denies the constructive dismissal and says that Mr Ernst-Ruthven resigned of his own motion, agrees that the wages are due and owing, and has now paid those overdue wages.

[3] In the original filing of the statement in reply, Woodlands included a counterclaim of significant magnitude alleging that Mr Ernst-Ruthven had fundamentally damaged the business, for which it sought recovery.

[4] The investigation meeting on 24 June 2008 proceeded exclusively as a hearing of the personal grievance claim of Mr Ernst-Ruthven, I having directed that the

counterclaim would need to be dealt with on a separate occasion with fresh evidence focused on the allegations in the counterclaim. I was not satisfied that the briefs of evidence before me satisfactorily dealt with the issues in the counterclaim.

[5] In the result, and subsequent to the investigation meeting, Woodlands reconsidered its position and determined not to proceed with the counterclaim.

[6] Mr Ernst-Ruthven was employed by Woodlands as a beekeeper on 1 November 2005 and he was to work with bees situated at a number of sites in the south of the South Island.

[7] The employment relationship appears to have been tranquil enough at its early stages, although the evidence from Woodlands was that Mr Ernst-Ruthven needed some additional training to operate the computer system that Woodlands used to maintain information about its bees.

[8] There was an assessment of Mr Ernst-Ruthven's unit set down for 23 May 2006. This process involved the general manager of Woodlands and the managing director meeting with the unit manager (in this case, Mr Ernst-Ruthven) and reviewing progress.

[9] Some 500 hives managed by Mr Ernst-Ruthven came from another beekeeper, Mr Nick McKenzie, who gave evidence at the investigation meeting. Mr McKenzie entered into an agreement with Woodlands to transfer to it some 500 hives which were then managed on Woodlands' behalf by Mr Ernst-Ruthven. Mr McKenzie's evidence (which I accept) was that he received a phone call in April 2006 from farmers *concerned about the state of the apiary sites on their land*. Mr McKenzie visited those sites and was horrified at the situation. In effect, his evidence was that the sites had been grossly neglected since he transferred the management of them to Woodlands.

[10] Mr Ballentyne, who was the managing director of Woodlands and a beekeeper with 34 years' experience, gave evidence for Woodlands. He indicated that Mr McKenzie had contacted Woodlands about the neglected hives in late April 2006. As a consequence, Mr Ballentyne went to visit some of the affected sites in the Clinton, South Otago area, and the evidence is he was distressed at what he saw, particularly as the evidence of the dead and dying bees was at variance to the

management information supplied to Woodlands by Mr Ernst-Ruthven who was in sole charge of those affected sites.

[11] At the meeting between Mr Ernst-Ruthven and Messrs Ballentyne and Hutchinson on 23 May 2006, Woodlands' evidence is that Mr Hutchinson and Mr Ballentyne sought to obtain explanations from Mr Ernst-Ruthven as to the state of the bees and their hives. Mr Hutchinson, the general manager of Woodlands, described Mr Ernst-Ruthven's demeanour at the meeting as *remarkable*. *He was cheerful positive and helpful but he couldn't tell us where the hives were*. In effect, Woodlands' evidence is that there was a disjunct between the physical evidence that Mr Hutchinson and Mr Ballentyne had been able to collect by visual examination of some sites and the information that Mr Ernst-Ruthven had imputed into the Zen apiary computer management system which was inconsistent with the physical evidence.

[12] The Woodlands managers sought from Mr Ernst-Ruthven information about hives that they could look at close by so as to assess their standard. Woodlands told me this was the standard practice and I accepted that evidence. Although there was some dispute between the parties about what happened next, it is common ground that Mr Hutchinson and Mr Ballentyne went to a nearby site to assess the condition of those bees and Mr Hutchinson's evidence is that he indicated to Mr Ernst-Ruthven that while the Woodlands managers were away, Mr Ernst-Ruthven might think about where the remainder of the hives were.

[13] In essence, Woodlands charged that Mr Ernst-Ruthven had been responsible for approximately 1,000 hives, the vast majority of which were duly accounted for on the Zen apiary hive management system, but in reality, on a physical examination of the sites, it appeared that approximately 50% of the hives were not where the Zen management system said they were, and those hives that could be accessed had significant numbers of sick and/or dead bees.

[14] It seems to be common ground that when Mr Ballentyne and Mr Hutchinson returned from their examination of the close by hive sites after approximately an hour, there was further discussion between the parties and there came a point at which Mr Ernst-Ruthven acknowledged that the Zen apiary system was *not accurate*. In his brief of evidence, Mr Ernst-Ruthven said that Mr Ballentyne and Mr Hutchinson ... *began having a go at me about hives not being where they should be as to where they*

were entered on Zen apiaries (the computer system). I tried to explain Zen apiaries would not be accurate as I acknowledged it was not up-to-date.

[15] Mr Hutchinson, in his brief, takes a more jaundiced view of this admission in making the following observation: *Once we found out during our 23 May 2006 assessment meeting with Darryn (Mr Ernst-Ruthven) that the hives were missing and he admitted duping us by making false data entries on the Zen apiary system, it was at this point that we suspended the assessment ...*

[16] I consider later on the question whether the information was deliberately entered into the computer to create the false impression or whether the system was simply not up-to-date. Either way, the fundamental issue for Woodlands was that it appeared to be impossible to find approximately half of the hives entrusted to Mr Ernst-Ruthven's management.

[17] The second part of the 23 May 2006 meeting then continued on the footing that there was now a serious issue about whether Mr Ernst-Ruthven had been guilty of misconduct or not and all parties agree that the matter was discussed on that basis. Even Mr Ernst-Ruthven told me in answer to a question that he agreed that the Woodlands managers said his behaviour could amount to serious misconduct because of the apparent loss of half of the hives that he was responsible for managing.

[18] I am satisfied there was a discussion at about this point which included a number of possible outcomes of an investigation into alleged serious misconduct and that that discussion included a reference to the possibility of Mr Ernst-Ruthven resigning. Mr Ballentyne remembers the discussion in that way and I thought Mr Ballentyne was an honourable and straightforward witness.

[19] During the second part of the meeting, Mr Ernst-Ruthven indicated his intention to resign and was then asked to put that resignation in writing and to include in it certain terms which he subsequently did. It was arranged that Mr Ballentyne and Mr Hutchinson would return to Mr Ernst-Ruthven's home the following day to uplift the letter of resignation and to collect the company's gear which Mr Ernst-Ruthven had been using.

[20] Mr Ballentyne and Mr Hutchinson returned to Mr Ernst-Ruthven's home the following day, as arranged, uplifted certain company property and the letter of

resignation. Then, by letter dated 11 August 2006, Mr Ernst-Ruthven raised his personal grievance.

Issues

[21] The single issue for determination in this case is whether Mr Ernst-Ruthven was constructively dismissed from his employment or whether he resigned as a consequence of an imminent disciplinary investigation into his management of his responsibilities to Woodlands.

Was there a constructive dismissal

[22] Mr Ernst-Ruthven maintains that he was given an ultimatum that he either resign or be dismissed and that therefore his termination came about as a consequence of the first leg of the well known decision *Auckland etc Shop Employees' IUOW v. Woolworths (NZ) Ltd* [1985] NZLR 372 (CA). In the alternative, it is contended that if the Authority does not find the evidence supports that conclusion, then the evidence would certainly support the conclusion that Woodlands embarked on a course of conduct, the dominant purpose of which was to extract from Mr Ernst-Ruthven his resignation.

[23] Conversely, Woodlands denies the constructive dismissal allegation in its entirety and allege that Mr Ernst-Ruthven resigned his position during a unit assessment meeting at which his performance in his role was called into serious question in circumstances where Mr Ernst-Ruthven was quite unable to offer any compelling explanation for the apparent death or disappearance of fully 50% of the bees under his management. Woodlands denies taking any initiative to promote a resignation and denies having designed or participated in any course of conduct which could properly be construed as having, as its dominant purpose, the intention to extract a resignation from Mr Ernst-Ruthven.

[24] In the end, the whole matter turns on a proper construction of the meeting held between the parties on 23 May 2006. Evidence was given before the Authority by the three participants at that meeting and from that evidence I have made judgments about what I believe took place. In part, those judgments are determined by issues of credibility.

[25] Mr Ernst-Ruthven categorised the meeting as *an ambush*. He said that the company representatives had attended at the meeting having already been primed with negative information about his activities in managing the bees in his area and so Woodlands had a bias against him when the meeting commenced and had predetermined the outcome by having already made the determination to get rid of him before the meeting started.

[26] Woodlands says that it attended the meeting with an open mind. The evidence is that the meeting was arranged some three weeks before the date it took place, that the meeting was a standard operational meeting to review the performance of the business unit that Mr Ernst-Ruthven managed and that Woodlands' representatives attended the meeting having already come into possession of some information about the quality of Mr Ernst-Ruthven's management which, as prudent business managers, they were obligated to investigate and seek explanations about.

[27] On the evidence I heard, there is nothing to suggest that the meeting on 23 May 2006 was in any sense *an ambush*. It is true that Woodlands had received some intelligence which was concerning and it had inspected some hives which were in a poor state, but I am satisfied with the evidence of the Woodlands managers that they attended the meeting with an open mind and seeking appropriate explanations.

[28] As I have already noted, Woodlands' position was that there was a disjunct between the information provided by Mr Ernst-Ruthven through the Zen apiary management system and some of the admittedly anecdotal information it was receiving about the state of the various sites, or some of them. In those circumstances, the only prudent course of action for business managers was the one which Woodlands took, namely to talk to the responsible employee and seek his assistance.

[29] Mr Ernst-Ruthven contends that Woodlands sought his resignation. Woodlands managers deny that, although Mr Ballentyne concedes that resignation was one of the outcomes discussed as a consequence of the possible finding of serious misconduct which even Mr Ernst-Ruthven acknowledges was a subject for discussion at the meeting. Mr Ernst-Ruthven agreed in answer to a question from me that the Woodlands managers said *his behaviour could amount to serious misconduct*. Mr Ballentyne said that after he and Mr Hutchinson had identified the difference between the information on the Zen apiary system and the hives that they had

observed with their own eyes, there was a general discussion about possible outcomes ... *that had in it resignation and other options.*

[30] The only evidence that Mr Ernst-Ruthven was subjected to a request that he resign or be dismissed is his own evidence that that is what happened together with the evidence about the subsequent letter of resignation.

[31] As to Mr Ernst-Ruthven's own evidence, I have to say that I found Mr Ernst-Ruthven an unconvincing witness whose recollection of events, in a number of significant respects, I found less reliable than the recollection of the Woodlands managers. Accordingly, I discount Mr Ernst-Ruthven's view that he was presented with an ultimatum because there was no independent evidence of that.

[32] However, Mr Ernst-Ruthven points to the letter of resignation and the evidence that he was effectively told to include particular matters in that letter, during his conversation with the Woodlands managers on 23 May 2006. The evidence of Mr Hutchinson, in particular, was that at the point that it became clear that Mr Ernst-Ruthven was either not properly maintaining the computer records or, alternatively, deliberately falsifying them, the nature of the 23 May 2006 meeting switched from being a normal operational meeting seeking to obtain normal business information from a client to being a meeting potentially identifying evidence that might constitute serious misconduct. Mr Hutchinson's evidence is very clear that at the point at which that position was reached, the meeting was effectively suspended, at least in an operational sense.

[33] Mr Hutchinson puts the matter in this way in his brief of evidence:

While we were concerned about Darryn's (Mr Ernst-Ruthven) conduct, at no stage did we say or suggest such behaviour would mean instant dismissal or instant dismissal unless he resigned. We did however say that his actions may amount to serious misconduct, depending on the results of our investigations.

[34] Mr Hutchinson then goes on to say that while he and Mr Ballentyne were away from the meeting reviewing hives that were close by Mr Ernst-Ruthven's base where the meeting had been taking place, Mr Hutchinson spoke with the company's legal adviser about the process to undertake in terms of the disciplinary investigation. That information, or at least sufficient of it to give a flavour of what might be involved, I hold was passed during the second part of the meeting to Mr Ernst-

Ruthven in the discussion which both parties acknowledge involved an acknowledgment that there might be a finding of serious misconduct. I consider it must have been about this time that there was the discussion about possible outcomes (which included resignation) which Mr Ballentyne refers to in his evidence.

[35] Both Mr Ballentyne and Mr Hutchinson absolutely deny Mr Ernst-Ruthven's contention that when they returned from their assessment of the nearby hives, they asked him what he was going to do about the issue and it was at this point that Mr Ernst-Ruthven claimed to have felt no option but to resign. I simply do not accept Mr Ernst-Ruthven's evidence on this point. I am satisfied that the 23 May 2006 meeting was an operational meeting and not a disciplinary meeting and at the point at which its character changed because of the perception that Mr Ernst-Ruthven had not told the truth about where the hives actually were, it was effectively suspended on the basis that there would be a reconvening of the meeting at which Mr Ernst-Ruthven should have representation. It seems to me inconceivable that, if Mr Hutchinson did indeed call the company's lawyer as he claims (and I have reason to doubt his evidence) that the company lawyer would not have been very careful to ensure that Woodlands did not persevere with the meeting without giving Mr Ernst-Ruthven a proper opportunity to be heard and be represented in a disciplinary environment.

[36] After earnest consideration, I have reached the conclusion that I prefer the evidence of Woodlands to the effect that Mr Ernst-Ruthven resigned his position effectively in the context of having been *found out* for the several failures of his management of the beehives under his care. I do not think the evidence supports Mr Ernst-Ruthven's contention that he was given an ultimatum to resign nor do I think that the evidence supports the conclusion that the meeting was set up with the dominant purpose of effecting Mr Ernst-Ruthven's resignation, as Mr Ernst-Ruthven himself contends.

[37] In my opinion, the meeting was set up as an ordinary operational meeting and at the point at which it became clear in that meeting that Mr Ernst-Ruthven had either *duped* Woodlands (as Mr Hutchinson contends), or at best been incompetent about the maintaining of the records of the hives, the meeting was effectively suspended, Mr Hutchinson and Mr Ballentyne left the meeting to review close by hives, in that time spoke to the company lawyer, and then on returning indicated broadly to

Mr Ernst-Ruthven what a serious misconduct employment investigation might look like.

[38] I am satisfied on the balance of probabilities that that discussion would have included reference to a number of possible outcomes (as Mr Ballentyne's evidence suggests), and the nature of the process that would be required.

[39] In the end, I prefer Mr Ballentyne and Mr Hutchinson's evidence that they did not ask for Mr Ernst-Ruthven's resignation nor did they prepare a course of conduct designed to extract it. Further, when Mr Ernst-Ruthven did in fact resign, Mr Hutchinson acknowledges that he asked Mr Ernst-Ruthven to include in a letter of resignation statements to the effect that the resignation was voluntary. In my opinion, this was a foolish thing for Mr Hutchinson to do as it does rather tend to suggest the very conclusion which Mr Ernst-Ruthven seeks to have me reach, that is, that his resignation was not in fact a voluntary one at all but was one that was effectively *dictated* by the employer. As I have said, I did not find Mr Ernst-Ruthven a convincing witness and I preferred the evidence of Mr Ballentyne and Mr Hutchinson, although, as I say, the decision of Mr Hutchinson to tell Mr Ernst-Ruthven what to put in his resignation was, in my opinion, misguided.

[40] I am reinforced in reaching the conclusion I have by the paper trail which follows immediately after the resignation. Mr Ballentyne and Mr Hutchinson attended at Mr Ernst-Ruthven's residence on 24 May 2006 to uplift the company's equipment, principally they say (and I accept), in order to try and rescue as many of the bees as they could from starvation and/or disease. On that same occasion, Mr Ballentyne and Mr Hutchinson also collected Mr Ernst-Ruthven's letter of resignation and at the same time handed to Mr Ernst-Ruthven the company's letter dated 24 May 2006 which details the allegation of serious misconduct and proposes a meeting at which Mr Ernst-Ruthven could respond to that allegation. The letter in question contains significant detail about the allegation with a degree of particularity which would have enabled Mr Ernst-Ruthven to respond to it with equal detail. In the result, and not unnaturally, Mr Ernst-Ruthven chose not to participate in the disciplinary process, he having just resigned, and his resignation was subsequently accepted by Woodlands, but in effect only after Mr Ernst-Ruthven had declined to participate in the disciplinary process.

[41] If, as Mr Ernst-Ruthven contends, the whole meeting on 23 May 2006 was a set up designed to lever him out of the business and the meeting itself was a disciplinary meeting rather than an operational meeting, and the purpose of that meeting was to get his resignation, then it seems odd that Woodlands would have gone to so much trouble to produce a disciplinary letter setting out its concerns and inviting a response at a meeting which it proposed to hold to discuss the matter.

[42] If the purpose of the 23 May 2006 meeting was to extract Mr Ernst-Ruthven's resignation, then the paper trail after the event relating to the disciplinary process is simply a waste of everybody's time or has been generated after the event to try to shore up Woodlands' position and show it as being desirous of having a disciplinary follow up to its earlier provisional conclusion that there was a serious problem to be investigated.

[43] I do not consider the cynical interpretation of Woodlands' actions to be an accurate explanation of its actions. No doubt it is theoretically possible for Woodlands to have created this paper trail in order to shore up its position, but it is equally possible to see the disciplinary process as absolutely consistent with the evidence it gave about the purpose of the 23 May 2006 meeting and its behaviour at it. Because I believe the evidence of the Woodlands' witnesses and prefer their recollection of events to that of Mr Ernst-Ruthven, I discount the cynical interpretation of its behaviour after the resignation and prefer the view that says that the disciplinary process after the resignation is simply congruent with the evidence from Woodlands' witnesses of what happened on 23 May 2006.

[44] I am reinforced in reaching that conclusion by the fact that the disciplinary letter is dated the day it was delivered to Mr Ernst-Ruthven, very contemporaneous to Mr Ernst-Ruthven's verbal resignation of the day before. No doubt Woodlands could have concocted this approach in such a short timeframe if it was simply cynically designed to shore up its *story*, but as I say, I prefer the honourable view of its behaviour that the letter advising of a serious misconduct allegation simply goes to support the contention that this was an operational meeting which became derailed as a consequence of the provisional findings of that meeting, that the meeting effectively had to be suspended and reopened at a later date with a different focus.

Determination

[45] For reasons which I have articulated above, I am not satisfied that Mr Ernst-Ruthven has been constructively dismissed from his employment. I have reached the conclusion that he resigned his position to avoid going through the disciplinary process which Woodlands' representatives had signalled would be required, given the information that had then become available to them.

[46] I have already made clear that Woodlands has quite properly conceded that Mr Ernst-Ruthven is owed wages for his notice period and that that sum of money has now been paid. Mr Ernst-Ruthven claims interest and, in all the circumstances, he is entitled to recover interest on the overdue sum at the rate of 6% per annum from the date that his resignation took effect down to the date of hearing in the Authority.

[47] Mr Ernst-Ruthven also claims a penalty for the delay in the payment of these wages. The delay was unreasonable and the continued reluctance of Woodlands to pay to Mr Ernst-Ruthven the wages he was due reflects no credit on it, whatever its dispute with Mr Ernst-Ruthven.

[48] In all the circumstances, a penalty of \$1,000 is appropriate and I direct that that penalty is to be paid by Woodlands to Mr Ernst-Ruthven.

Costs

[49] Costs are reserved.

James Crichton
Member of the Employment Relations Authority