

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 223  
5425465

BETWEEN DALE FRANKLIN  
Applicant

A N D C W LUDWIG LIMITED  
Respondent

Member of Authority: M B Loftus

Representatives: Greta Keenan, Counsel for Applicant  
David Jackson, Counsel for Respondent

Investigation meeting: 24 October 2013 at Oamaru

Submissions Received: At the investigation meeting

Date of Determination: 30 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Dale Franklin, claims he was unjustifiably dismissed by the respondent, C W Ludwig Limited (Ludwigs), on 28 January 2013.

[2] Ludwigs deny the claim and contend Mr Franklin left of his own volition.

[3] Ludwigs also responds with a counterclaim seeking the payment of various sums it contends Mr Franklin owed, but did not pay, on departure. They relate to the costs of:

- (a) repairing damage to a tractor;
- (b) repairs to a four wheel motorbike; and
- (c) cleaning the accommodation occupied by Mr Franklin after he left.

## Background

[4] Mr Franklin was employed by Ludwigs in March 2012. He says he was engaged as a dairy farm manager. Ludwigs say he was a farm hand. The difference is irrelevant to the issues I must decide.

[5] There is also a dispute as to whether or not Mr Franklin misrepresented his medical condition when engaged but it need not be resolved for the purpose of determining the issues before me. They are whether or not Mr Franklin was dismissed and whether or not he owes money to Ludwigs.

[6] Those questions arise from the events of 28 January 2013. Mr Franklin lived in accommodation supplied by the Ludwigs. He had two dogs. Ludwigs claim they were domestic pets. Mr Franklin says they were registered as working dogs and assisted him occasionally. Ludwigs response is rubbish – the registration was only because it's cheaper to register them as working dogs but, in reality, these weren't.

[7] About 28 January Mr Ludwig says:

*The guts of it is ... the applicant walked out on the job following my request that he remove his dogs from the respondent's property. The dogs had killed my poultry on more than one occasion and despite my requests that he control them, the applicant had done nothing.*

*As a result I decided that the dogs were a nuisance and had to go. ...*

*Basically, when I asked the applicant to remove his dogs, he responded by saying "that he would have to go and sort some things out". It was not a heated discussion at all but I was firm with him that the dogs had to go. He accepted that, or appeared to at least, then he left and never returned to the job at all.*

[8] Mr Franklin's version of events is:

*On the morning of January 28 2013 a chicken was found dead by the farm manager, Mr Ludwig and a dead feral cat was also found nearby. Although I had made numerous complaints to Mr Ludwig about the roosters neither I nor my dogs were responsible for the chicken's death.*

*I advised Mr Ludwig that in my view the chicken had been killed by the feral cat which in turn had been attacked by my dogs. Mr Ludwig then told me and my dogs to leave and not to return.*

*I immediately left the property as I did not want to inflame the situation more. I was not contacted by Mr Ludwig in the days*

*immediately following my dismissal other than to advise that my number plate was falling off.*

[9] That day Mr Franklin visited a solicitor who immediately wrote to Ludwigs raising a claim of unjustified dismissal. The letter was received on 31 January.

[10] In the interim Mr Franklin had returned to the property to remove his possessions. He says Mr Ludwig called in while he was there and in the ensuing discussion Mr Ludwig waived the need to repay the cost of repairing the tractor. Mr Franklin says Mr Ludwig also commented positively on the cleanliness of the property which, he says, undermines the subsequent claim for cleaning.

[11] Mr Ludwig's response is *what conversation?* Mr Ludwig says the only contact between the two after Mr Franklin departed on 28 January was the text he (Ludwig) sent advising Mr Franklin the number plate was falling off his car.

[12] Mr Ludwig says the comments about the accommodations cleanliness occurred during a property inspection weeks before Mr Franklin's departure. He says that after the departure he discovered carpet stains and dog mess which he had not noticed in the previous cursory inspections.

### **Determination**

[13] There is an onus on an applicant to establish, *prima facie*, a case that requires answering. For the following reasons I conclude Mr Franklin has failed to do so.

[14] The prime issue is whether or not Mr Franklin was dismissed. He says he was, having been told both he and his dogs had to go. Mr Ludwig says no - it was only the dogs. There were no witnesses to the pertinent conversation which they agree was short and conducted in a civilised manner.

[15] On the key issue of what was said I prefer the evidence of Mr Ludwig.

[16] Mr Franklin's evidence was marred by a number of oral assertions which were either not in, or inconsistent with, the written brief. An example was the alleged conversation while Mr Franklin was cleaning the accommodation (paragraphs 10 to 12 above) which is at odds with the written brief which says contact was limited to the text. There were also inconsistencies in the oral evidence with one example relating to various answers given about the extent to which the dogs worked on the farm.

[17] There is then Mr Franklin's claim he took the chicken carcass to a vet who confirmed the injuries were consistent with a cat attack as opposed to a dog. This is an investigative process and I am obliged to pursue such a lead but Mr Franklin undermined the claim by being unable to identify the vet.

[18] Finally I noted a degree of reticence about giving direct answers to questions with an example being the evasive way Mr Franklin responded to questions about a previous occasion upon which one of his dogs had killed a chicken.

[19] Opposed to this was Mr Ludwig's evidence which remained consistent throughout. There is also his assertion that when he went to feed the chickens on the morning of 28 January the cat was already dead while two chickens that had not returned to the coop the previous evening were roaming the yard. When he returned fifteen minutes later one of them had been killed. This evidence went unchallenged as did his claim he found Mr Franklin a good worker he could ill afford to lose. These unchallenged assertions provide both a reason for concluding Mr Franklin's dogs were responsible and suggest it was only them Mr Ludwig wanted to remove.

[20] The preference for Mr Ludwig's evidence leads to a conclusion Mr Franklin was not dismissed on January 28. Nor was he dismissed at a later point. Before Ludwigs had time to consider some form of action that may have amounted to a sending away such as completing a final pay or claiming an abandonment it had the lawyers letter claiming unjustified dismissal. It responded by advising there had been no dismissal but Mr Franklin chose not to pursue this and see whether or not he could remain.

[21] For the above reason I conclude Mr Franklin was not dismissed and his claim fails.

[22] Even if the above conclusion is wrong and Mr Franklin was dismissed it would not assist him to any great extent. His evidence would only support minimal remedies, if any at all. It would be unsafe to make an award of lost wages given evidence Mr Franklin received unspecified amounts for work performed soon after leaving Ludwigs and within weeks became unable to work by reason of the re-inflammation of an old injury. His evidence regarding hurt was limited to the *inconvenience* of having to find alternate accommodation. That would not support anything other than a minimal award under s.123(1)(c)(i).

[23] Turning to the counter claims. The claim regarding tractor repairs must fail. While the evidence is Mr Franklin accepted responsibility, it also suggests the amount was paid. In early January he paid \$200 which was sufficient to cover both that and two outstanding telephone accounts.

[24] Similarly the claim for cleaning fails. The ability to recover that sum was said to have been granted by schedule E to the employment agreement. That faces three impediments. First the agreement was never signed. Second the version I have contains typographical errors and the relevant provision is omitted. Third, and in the absence of an enforceable provision in the employment agreement, I conclude s.77 of the Residential Tenancies Act 1986 provides jurisdiction in respect to this claim more properly sits with the Tenancy Tribunal.

[25] Finally there is the issue of the bike which required repairs costing \$1,033.57 after Mr Franklin collided with a strainer post. The evidence of both parties is an employee may be liable in instances of carelessness or improper use. Liability is decided through discussion. In this instance there was no such discussion. There was not, therefore, a concession of liability from Mr Franklin and the fact the employment agreement was unsigned means no ability to arbitrarily deduct. Add the fact I have insufficient evidence to establish a level of impropriety by Mr Franklin such that he should be liable which leads to a conclusion he is not liable for this amount either.

[26] For these reasons the claims Mr Franklin owes money to Ludwigs also fail.

### **Conclusion**

[27] For the above reasons I conclude Mr Franklin has failed to convince me he was dismissed, let alone unjustifiably. His claim is dismissed.

[28] Also for reasons outlined above I conclude the claim Mr Franklin owes money to Ludwigs also fails.

[29] Costs are reserved.