

[4] Matters came to a head near the end of the day on Friday 21 September 2007, after Mr Murphy asked Mr Gaylor to move some calves out of the calf shed and into a paddock. Mr Gaylor moved some, but not all of the calves before going home for afternoon tea. When Mr Murphy noticed not all of the calves had been moved he telephoned Mr Gaylor, wanting him to move the rest of the calves. There followed what Mr Gaylor described as a meltdown. During the call he told Mr Murphy he could 'stick his job.'

[5] On Monday 23 September Mr Gaylor's wife and his mother visited the farm to advise that Mr Gaylor was ill and would not be able to return to work. Mr Gaylor's wife was also employed at the farm, under a separate employment agreement, and indicated she wished to continue her employment. There was a discussion about Mr Gaylor's mental health. A medical record he produced for the investigation meeting detailed consultations with his doctor commencing on 24 September regarding his depression.

[6] Mr Murphy was so concerned about Mr Gaylor that he sought advice from a representative of Farmers of New Zealand Inc, Bill Guest, and sought a meeting with the Gaylors. Mr Gaylor also telephoned Mr Guest, saying he did not wish to return to work.

[7] The meeting went ahead on Friday 27 September 2007 at Mr Murphy's home. Messrs Murphy and Guest attended, together with Mr and Mrs Gaylor. It was common ground that Mr Gaylor advised he was suffering from depression, was taking medication, and felt he could not cope. He wished to leave. Mrs Gaylor did not wish to leave, but believed she could not stay if Mr Gaylor left.

[8] Mr Murphy and Mr Guest sought to craft a constructive solution. At Mr Guest's suggestion, Mr and Mrs Gaylor prepared a list which included:

- a. a statement of changes they wished to see if they were to retain their employment, including that Mr Gaylor's title would be farm assistant, he would have time off to attend counselling, time off to attend a training course, and time off on annual leave from 24 September 2007 to 8 October 2007;

- b. duties Mr Gaylor believed he needed help with and duties Mr Gaylor believed he performed well;
- c. the negative and the positive aspects of the job.

[9] In a letter dated 27 September 2007 Mr Murphy agreed to the change in job title and to allow Mr Gaylor 5 days' paid sick leave commencing on 27 September. He also required a medical certificate attesting to Mr Gaylor's fitness to perform his duties before Mr Gaylor returned to work.

[10] Mr Gaylor obtained a certificate dated 28 September 2007, stating he would be fit to return to work on 1 October. Mr Murphy did not receive the certificate until after 1 October, with Mr Gaylor eventually returning to work on Wednesday 3 October. He was treated as being on unpaid leave in the interim.

[11] Near the end of the working day on Friday 5 October Messrs Gaylor and Murphy had a dispute about whether Mr Gaylor would work that weekend. Mr Murphy expected Mr Gaylor to work because he had not worked the last two weekends. Mr Gaylor expected not to work because, if the usual weekend on – weekend off rotation was in effect, the upcoming weekend was a weekend off. There had not been any prior discussion or agreement on the point, rather both parties had the expectations just set out.

[12] The parties' employment agreement provided for a dairy manager's hours of work as follows:

“Mon – Fri: 5.30am – 6.00 pm (...)

Sat/Sun: Milking times only ...

...

12 days on – 2 days off”

[13] These provisions also applied to a dairy farm assistant.

[14] The general terms of the agreement provided:

“4.3 In normal circumstances the Employee will be entitled to a minimum of two weekends off each month. The parties agree to discuss variations to the number of weekends off each month. Such variations shall be recorded in the following way: The Employee shall be entitled to two weekends per months, such weekends shall be free of work.”

[15] The discussion about whether Mr Gaylor would work on the weekend of 6 and 7 October deteriorated to a point where both men were angry and shouting. Mr Murphy pointed his finger at Mr Gaylor, probably touching him on the upper lip, in a way Mr Gaylor described as being poked in the face.

[16] Mr Murphy said he told Mr Gaylor ‘you can’t keep carrying on like this’, to which Mr Gaylor replied ‘f- it, I’m out of here,’ and later as he walked out the door ‘I’m not working for a wanker like this, he can stick his job up his arse’.

[17] Mr Gaylor said Mr Murphy told him he would have to ‘make good’ or he would be ‘down the road’, before saying Mr Gaylor was to bring the heifers in the next morning, Saturday. Mr Gaylor pointed out that was a rostered day off. Mr Gaylor said the conversation continued as follows: ‘he said ‘too bad, you are working.’ I said this was never discussed. Joe said too bad, if you don’t work, not to come back on Monday.’ The dispute about whether Mr Gaylor would work in the weekend escalated to the point where the shouting began and Mr Murphy told Mr Gaylor ‘if you don’t like it pack your bags and f-off’. A few seconds later Mr Murphy said ‘with your attitude you can f- off now.’ Mr Gaylor began to leave, also swearing and making the comments attributed to him.

[18] Mr Murphy denied making any statement to the effect that Mr Gaylor was not to return to work if he refused to work the weekend.

[19] Mrs Gaylor was working nearby and heard some of the shouting. Even bearing in mind her likely loyalties I found her a credible witness and accept her evidence that she heard Mr Murphy tell Mr Gaylor not to come back to work if he took the weekend off. I am also influenced in my view because at the investigation meeting both Mr Murphy and Mr Guest still believed that Mr Gaylor had an obligation to work that weekend. It is likely that Mr Murphy reacted angrily on being told that Mr Gaylor did not share that point of view.

[20] Mr Murphy telephoned Mr Guest seeking advice. He did not believe he had dismissed Mr Gaylor. Mr Guest advised Mr Murphy to wait and see if Mr Gaylor returned to work the following Monday. He pointed out that if an employee purports to walk off the job after an angry argument, allowing the employee a cooling down period is advisable before concluding that the employee intends the relationship to end.

[21] Mr Gaylor also telephoned Mr Guest, telling Mr Guest he had been fired and asking what he should do. He denied Mr Guest's evidence that he advised he had told Mr Murphy he could 'stick his job up his arse' and had said he would leave if he could not have the weekend off. However in the light of his view of events and his reaction to them, I consider it likely he did speak to Mr Guest in that way.

[22] Mr Guest advised Mr Gaylor that he should work, since he had already received paid time off. Mr Gaylor said in evidence he felt Mr Guest was on Mr Murphy's side, and hung up. He denied swearing at Mr Guest, but in the circumstances I consider it likely he did so.

[23] Mr Gaylor did not report for work on Monday 8 October. Mr Murphy took the view that Mr Gaylor had abandoned his employment.

[24] The general terms of the employment agreement contained the following provision regarding abandonment of employment:

“20.1 Where an employee absents him/herself from work for a continuous period exceeding 1-1/2 days without notification or consent from the Employer, he/she shall be deemed to have terminated his/her employment.”

Whether there was a dismissal

[25] Underlying this matter is a dispute, as the term is defined in s 5 of the Employment Relationship Act 2000, over whether Mr Gaylor was obliged to work on the weekend of 6 and 7 October. That is, there was a dispute about the interpretation, application, or operation of the employment agreement regarding the hours of work provisions. The facts also raise questions about whether Mr Murphy issued a lawful

and reasonable instruction that Mr Gaylor work on 7 October and whether Mr Gaylor was justified in refusing to do so.

[26] The express terms of the employment agreement prevailed. The dispute about the hours of work provision centred on whether an absence on leave during a weekend which would otherwise have been a working weekend meant the employee could be required to work on a subsequent weekend that would not otherwise have been a working weekend. That would be an unusual application of leave and hours of work provisions. On the face of the matter Mr Murphy's interpretation of the agreement is not strong.

[27] In turn, it is unlikely that the instruction that Mr Gaylor work on 7 October was lawful with reference to the terms of the agreement. In principle Mr Gaylor was entitled to decline.

[28] Included in this mix is the likelihood that Mr Gaylor remained in a mentally fragile state by 5 October (albeit cleared as fit to work), while Mr Murphy believed he had extended considerable assistance and leniency towards Mr Gaylor and felt let down by Mr Gaylor's attitude to working that weekend. He believed that, in the light of the recent absence, Mr Gaylor at least had a moral obligation to work that weekend. It is unfortunate that both men lost their tempers and became aggressive, instead of attempting a rational discussion of the issue.

[29] However my findings about the words Mr Murphy used on 5 October mean I find he dismissed Mr Gaylor. My findings about the hours of work clause and the instruction that Mr Gaylor work the next day mean I find the dismissal unjustified. Since the disadvantage grievance concerned the same set of facts, and is subsumed in them, I make no further finding in respect of it.

Remedies

[30] Mr Gaylor seeks the reimbursement of remuneration lost as a result of his personal grievance.

[31] He obtained alternative employment commencing on or about 18 October 2007, and commenced a new more permanent position in the first week of November 2007. He was unemployed as a result of his grievance for some two weeks.

[32] Since Mr Gaylor's weekly earnings were \$728.82, he lost \$1,457.64 as a result of his personal grievance. By his behaviour on 5 October I find he contributed in a blameworthy way to the circumstances of the personal grievance, and reduce the amount I would otherwise have awarded accordingly. Mr Murphy is ordered to reimburse Mr Gaylor in the sum of \$728.82.

[33] Mr Gaylor also seeks compensation for injury to his feelings. However he was already struggling with his job and was disposed to leave. Further, the evidence of any injury to feelings which he experienced as the result of his grievance was associated with anger arising from his argument with Mr Murphy. Bearing in mind, too, the reduction in remedies resulting from Mr Gaylor's contributory conduct, only a modest award is warranted. Mr Murphy is ordered to compensate Mr Gaylor for injury to his feelings in the sum of \$1,000.

Summary of orders

[34] Mr Murphy is ordered to pay to Mr Gaylor:

- a. \$728.82 as reimbursement of remuneration lost as a result of his personal grievance; and
- b. \$1,000 as compensation for injury to his feelings.

Costs

[35] Costs are reserved. If either party seeks an order from the Authority there shall be 28 days from the date of this determination in which to file and copy to the other party a written statement of what is sought and why. The other party shall have a further 14 days in which to file and copy a written statement setting out any reply.

R A Monaghan

Member of the Employment Relations Authority