

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 44
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BETWEEN JOANNE AMY
 GOUDSWAARD
 Applicant

AND AGRITERRA LIMITED
 First Respondent

Member of Authority: James Crichton

Representatives: Ralph Goudswaard, for Applicant
 Vicki Campbell and Karina McLuskie, for Respondent

Investigation Meeting: 6 December 2011 at Hamilton

Determination: 2 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Goudswaard) alleges that she was unjustifiably dismissed from her employment, short paid holiday pay and not subject to a signed employment agreement.

[2] Those claims are resisted by the respondent (Agriterra) which also raises a counterclaim alleging breach of the employment agreement and damage to Agriterra's property. The counterclaim is resisted by Ms Goudswaard.

[3] By agreement between the parties, the two claims were heard together.

[4] It is common ground that Ms Goudswaard sought employment with Agriterra as a farm worker and there were discussions between Mr Paul Wetzels and Ms Goudswaard around the turn of the calendar year 2010/2011 before the employment relationship commenced properly in January 2011. Mr Wetzels's

evidence is that Ms Goudswaard was inexperienced in farming work but that she seemed keen to learn and he and his wife thought it was appropriate to give her the opportunity.

[5] At the time of her engagement, Ms Goudswaard was working as a stable hand at a horse stud but the employment agreement offered by the Wetzels was the standard Federated Farmers individual employment contract. The Wetzels say they went through the contract clause-by-clause when they met with Ms Goudswaard on 4 January 2011 and it is common ground that Ms Goudswaard actively negotiated the terms of the employment agreement in relation to such matters as weekends off, hours of employment, salary, wet weather gear and job description. The results of those negotiated changes are recorded in the copy of the employment agreement provided to the Authority. Each of the pages of the agreement provided to the Authority has been initialled by Ms Goudswaard as have many of the handwritten additions to the terms of the standard Federated Farmers individual employment agreement. However, nowhere in the agreement copy provided to the Authority does there appear a full signature from Ms Goudswaard. She says this is because she never signed the employment agreement. Conversely, the Wetzels say they are “*pretty sure*” that Ms Goudswaard “*signed her copy of the employment agreement and took it away with her*” at the end of the 4 January 2011 meeting.

[6] The employment relationship seems to have initially been a productive one but matters came to a head in mid-April 2011. Paul Wetzels’ evidence is that he had a conversation with Ms Goudswaard on 15 April 2011 in which she demanded that the farm motorbike be repaired because she needed it to commute to and from work. The motorbike had been damaged when Ms Goudswaard had been riding it on 9 March 2011 and the motorbike had suffered significant damage which was not immediately repaired. In the conversation between Mr Wetzels and Ms Goudswaard, Mr Wetzels said that he made the point that the use of the motorbike was a privilege and not a right and it is Mr Wetzels’ evidence that this statement provoked Ms Goudswaard’s response that she would resign effective 1 June 2011, the end of the dairy season.

[7] The Wetzels say they immediately sought advice from Federated Farmers and, acting on that advice, prepared a letter confirming Ms Goudswaard’s resignation together with another letter outlining Ms Goudswaard’s responsibilities when using the farm motorbike.

[8] The first of these two letters dated 15 April 2011 simply acknowledges the verbal resignation and accepts it with regret. This letter was presented to Ms Goudswaard the following day, Saturday, 16 April, and all parties signed it on that day. Similarly, the letter concerning the use of the farm motorbike makes clear that its only permitted use is for commuting between Ms Goudswaard's home and the farm (Ms Goudswaard being resident on a neighbouring property). Again, this letter was signed and dated by the parties on 16 April 2011.

[9] The following day, Mr Wetzels attended at the cowshed where he found what he described as a "*chaotic scene*". Mr Wetzels' evidence was that he had become increasingly concerned about Mr Goudswaard's application to the role and was having to spend more time than he cared to in supervising her work. On this Sunday morning, he says that Ms Goudswaard shouted and swore and he says that she walked off the job saying "*you can stick your job up your arse*".

[10] Ms Goudswaard sought advice from her father later that day and from then onwards, Mr Ralph Goudswaard used his best endeavours to speak with the Wetzels about the matter. The Authority is satisfied there was some reluctance on the Wetzels' part to talk to Mr Goudswaard because of a mistaken belief that it was inappropriate for Mr Goudswaard to be involved in his daughter's employment relationship problem. In fact, Mr Goudswaard had carefully obtained his daughter's consent in writing to his involvement and Ms Goudswaard conveyed that authority to Mr Wetzels on Monday, 18 April.

[11] Prior to that though, on Sunday afternoon, 17 April 2011, Ms Goudswaard had returned to the farm by herself and there she met with both Mr and Mrs Wetzels who told her they intended to give her seven days notice. The Wetzels say that Ms Goudswaard reacted negatively to this notice and said "*I resign. I'm off now*". The Wetzels then handed Ms Goudswaard a further letter dated that day confirming her immediate resignation and asking her to sign the letter as having received it. The Wetzels say that Ms Goudswaard told them to "*fuck off*", threw her farm boots on the lawn and walked home in bare feet.

[12] Having obtained further advice from Federated Farmers, the Wetzels then issued a further letter and hand delivered that to Ms Goudswaard on Monday, 18 April. This letter gives her seven days notice of the termination of her employment meaning that the last day that she was supposed to work was 25 April.

Later that day, Ms Goudswaard returned property belonging to Agriterra and at the same time gave Mr Wetzels a copy of the letter of authority appointing Ralph Goudswaard as Ms Goudswaard's spokesperson. There was then discussion between Mr Goudswaard and Mr Wetzels but notwithstanding the continuing contact between the parties at this level, Ms Goudswaard never returned to the workplace. Agriterra maintains that Ms Goudswaard has been paid all of her entitlements.

[13] As part of Agriterra's response to Ms Goudswaard's statement of problem, Agriterra filed a counterclaim, the essence of which is a recovery of a sum to assist in compensating Agriterra for the damage done to the farm motorbike when Ms Goudswaard crashed it, together with compensation for the week that Ms Goudswaard was supposed to work but did not (the notice week). The latter claim is derived from the effect of clause 22.2 of the individual employment agreement.

Issues

[14] The Authority needs to examine the following issues:

- (a) Was there a written employment agreement between the parties;
- (b) Was Ms Goudswaard unjustifiably dismissed;
- (c) Is Ms Goudswaard owed wages;
- (d) Is the counterclaim made out?

Was there a written employment agreement?

[15] The Authority is satisfied that the parties never completed the written employment agreement although it is plain that they took some significant steps in that direction. Nonetheless, Ms Goudswaard's evidence is persuasive that she always had issues that were unresolved and as a consequence, in the absence of any documentary evidence that there is a completed employment agreement between the parties, the Authority cannot conclude that the document presented applies at all.

[16] It follows that any reliance on particular provisions in the employment agreement as a basis for a claim cannot be made out. For example, the reliance that Agriterra places on clause 22.2 of the employment agreement as a means for enforcing its claim for compensation for the notice week that Ms Goudswaard did not work, is misplaced; as the employment agreement was never executed by

Ms Goudswaard and she was clear in her evidence that she never accepted it in its totality, there can be no reliance on the provisions of the agreement. In any event, the claim for the notice week compensation presupposes a conclusion about how the relationship ended.

Was Ms Goudswaard unjustifiably dismissed from her employment?

[17] The Authority is not satisfied that Ms Goudswaard was unjustifiably dismissed from her employment. The evidence the Authority heard confirms that Ms Goudswaard resigned her position. In reaching this conclusion, the Authority accepts as truthful the recollections of the Wetzels, and especially Mr Wetzels, about the events from 15 April on. The factual matrix discloses that Ms Goudswaard resigned her position on 15 April 2011 indicating that she would finish up on 1 June 2011. Then there was an altercation between the parties two days later which the Authority is satisfied concluded with Ms Goudswaard saying to Mr Wetzels “*you can stick your job up your arse*”. Later that afternoon, the parties got together and the Wetzels indicated to Ms Goudswaard that their intention was to give her seven days notice. But the Authority is satisfied that her immediate response was to say “*I resign. I’m off now*”. Despite the Wetzels’ efforts to calm Ms Goudswaard down, she insisted that she wished to finish up then and there and accordingly the Wetzels gave her the letter dated 17 April 2011 which confirmed that Agriterra had accepted Ms Goudswaard’s immediate resignation.

[18] It follows that, in the Authority’s view, Ms Goudswaard resigned her employment but, in any event, it seems clear from the Authority’s analysis of the facts that the initiative for the breach came not from Agriterra but from Ms Goudswaard herself. There was no “*sending away*” as the law requires. This was not, in the Authority’s view, a termination of the employment “*at the initiative of the employer*”. Rather, this was an example of a determined young woman who wished, for her own reasons, to leave the employment. The Authority is satisfied that she formed that view of her own motion, without pressure from the employer and that there was no sense in which any of the employer’s actions precipitated Ms Goudswaard’s determination to be quit of the employment relationship. In particular, the initial altercation about the motorbike was not, in the Authority’s opinion, an abuse of the employer’s right to set rules around the use of its property.

Are there wages due to Ms Goudswaard?

[19] Ms Goudswaard claims that she has been short paid her holiday pay. This claim is based on her contention that she should have received holiday pay calculated up to 1 June 2011, the date that she at first said that she would work up till, despite having resigned her position. But it cannot be right that she is entitled to receive the benefit of holiday pay when she is not providing work. As a matter of fact, Ms Goudswaard ceased actual employment after morning milking on Sunday, 17 April 2011 and she did not provide any work thereafter.

[20] Accordingly, she is not entitled to receive any payment after that date, either in terms of ordinary wages or holiday pay.

Is the counterclaim made out?

[21] The Authority has already rejected part of the counterclaim, that relating to compensation for the unworked notice period. The Authority's rejection of that part of the claim is based on the fact that the employment agreement discussed between the parties and initialled by Ms Goudswaard was never signed by Ms Goudswaard and she maintained throughout her evidence to the Authority that she never agreed with it in total. That being the position, clause 22.2 which the employer, Agriterra, seeks to rely upon, is of no effect. Further, the Authority's conclusion is that the employment relationship came to an end on Sunday 17 April, not later.

[22] The other part of the counterclaim is a claim for part of the cost incurred by Agriterra in repairing the motorbike which Ms Goudswaard crashed on 9 March 2011. Agriterra seeks \$800 out of a total cost of \$1,199.07. Again, this part of the counterclaim also relies to some extent on the unsigned individual employment agreement which at clause 12.5 gives Agriterra the right to deduct moneys owed by Ms Goudswaard to "*repair or replace damage or loss to the employer's equipment, caused by wilful or careless action or inaction, misuse or abuse*".

[23] The Authority has already made clear that it does not consider the individual employment agreement presented to it records the nature of the terms of the employment between the parties. It follows that reliance on clause 12.5 of the individual employment agreement (unsigned) is misplaced. However, on general principles, Agriterra can recover against Ms Goudswaard if it can prove the loss was

caused by breaches of implied terms of the employment agreement such as the term to take proper care of the employer's property.

[24] The real question in the present case is whether the Authority can be persuaded that the damage to Agriterra's motorbike (which is undoubted) was caused by sins of omission or commission of Ms Goudswaard. The Authority is not persuaded that that is the case. Clearly the motorbike was damaged and it was damaged while Ms Goudswaard was riding it, but there is a factual dispute as to whether she was riding it with the consent (tacit or otherwise) of Agriterra or not. If she had no authority to be riding it and she crashed the motorbike and caused damage to it, then a contribution to the costs of repair would, in the Authority's view, be appropriate. However, there is no evidence to confirm that Ms Goudswaard was not supposed to be riding the machine when it crashed. Indeed, Ms Goudswaard was persuasive that Agriterra knew or ought to have known that she was habitually riding the machine home after work, and she understood that it was a term of the employment bargained between the parties that she was entitled to do that.

[25] In those circumstances, the Authority cannot make a finding adverse to Ms Goudswaard.

Determination

[26] Ms Goudswaard's claim for unjustified dismissal and other remedies against Agriterra fails for the reasons enunciated in this determination.

[27] Agriterra's counterclaim against Ms Goudswaard also fails for the reasons enunciated in this determination.

Costs

[28] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority