

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 144/07  
5074739

BETWEEN                      BRUCE HAUSSMAN  
   Applicant  
  
AND                              ALLAN      and      LYNETTE  
   SMITH  
   Respondents

Member of Authority:      James Crichton  
  
Representatives:              Grant Slevin, Counsel for Applicant  
   Jeff Goldstein, Counsel for Respondents  
  
Investigation Meeting:      7 August 2007 at Ashburton  
  
Determination:                28 November 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant (Mr Haussman) claims to have been unjustifiably dismissed on 16 December 2005. The respondents (the Smiths) deny the allegation of an unjustifiable dismissal and say that the dismissal was justified following a fair transparent and reasonable process.

[2]      Mr Haussman commenced employment with the Smiths on 25 August 2005 as a dairy farm worker.

[3]      It seems that an employment agreement was prepared for Mr Haussman but by reason of the fact that the Smiths lived on their other farm, 24 kms away from where Mr Haussman was working, there was a delay of approximately six weeks in giving the agreement to Mr Haussman. The Smiths say that Mr Haussman could have called to the home to obtain it earlier; Mr Haussman points out that that required a 24 km trip and return again.

[4] When the agreement was finally delivered to Mr Haussman, he chose not to sign the agreement and sought the involvement of a Union to negotiate terms for him.

[5] However, many of the salient terms do not seem to be in dispute. For instance, Mr Haussman was to work 11 days on and 3 days off on a rostered basis.

[6] There was argument between the parties about whether the understandings about the roster were complied with or not. Mr Haussman says that he was required to work in excess of his understanding of the roster arrangement; the Smiths say the guaranteed days off specifically did not apply during calving.

[7] Mr Haussman says that he worked some of his rostered days off during the early part of the employment relationship but refused to take this step when requested by the Smiths to do so on 2 December 2005.

[8] On 14 and 15 December 2005 the Smiths emphasised to Mr Haussman the need for him to sign the employment agreement which by then Mr Haussman had been given a copy of. Mr Haussman refused saying the written agreement did not represent the nature of the bargain between them, a view that the Smiths deny.

[9] There were relationship problems between Mr Haussman and another employee, Mr Goodwin Mukundo. Mr Haussman says that Mr Mukundo's behaviour was inappropriate; the Smiths say that Mr Haussman threatened Mr Mukundo with violence.

[10] On 16 December 2005, Ms Bell, the Smiths herd manager, heard Mr Haussman yelling at the cows when he was bringing them in for milking. Ms Bell said in her evidence that this was not the first occasion on which she had heard Mr Haussman abusing the animals. Ms Bell says she then saw Mr Haussman striking one cow with a metre long length of plastic pipe. She described the animal as being *distressed*.

[11] Ms Bell says that she felt threatened by Mr Haussman who continued to hit the cow with the length of plastic pipe. The cow jumped the rail and caught her leg. The cow's leg was seriously injured in this manoeuvre and she was seen by a veterinary surgeon whose report on the incident referred to *trauma to her left hind leg just below the hock causing a deep puncture wound which required veterinary attention*.

[12] Ms Bell told the Smiths about this incident and on instructions from the employer she proceeded to suspend Mr Haussman.

[13] Mr Smith arrived at the cow shed, spoke to Mr Haussman and Ms Bell and then, after considering matters, made the decision to summarily dismiss Mr Haussman which decision was promptly communicated to him.

### **Issues**

[14] It will be helpful if the following issues are traversed:

- a) The employment agreement;
- b) The alkathene pipe and its use;
- c) The relationship with Mr Mukundo;
- d) The incident on 16 December 2005.

#### *The employment agreement*

[15] The Smiths say that an employment agreement using the standard Federated Farmers format for farm workers was prepared for Mr Haussman and was available for him to sign at the farm office, which is where the Smiths live. The Smiths acknowledge that the farm office and their residence is some 24 kms from the farm Mr Haussman was employed on.

[16] The Smiths say that the terms and conditions provided in the written agreement (a copy of which has been provided to the Authority) were discussed and agreed with Mr Haussman when he was interviewed for the vacant position. Amongst other things, the 11 on / 3 off roster was discussed and agreed and according to Mr Smith this was on the specific basis that the roster was both flexible (that is, it could be adjusted by both parties to suit the particular circumstances at the time) and did not apply during the spring calving period. Mr Smith is quite explicit that Mr Haussman agreed to that flexibility around the roster and Mrs Smith, who was also present, confirms that evidence as well. Ms Bell, the herd manager was also present at the interview and she also confirms the agreement reached.

[17] There is dispute between the Smiths and Mr Haussman as to exactly what days he worked; this Smiths produced a roster which shows that the days that Mr Haussman worked continuously were significantly less than he himself maintains.

[18] The Smiths deny that there were difficulties with the rostering arrangements and say that the communication between them and Mr Haussman was perfectly satisfactory. They also refer to the fact that they readily gave Mr Haussman sick leave significantly in excess of his legal entitlement during the short period of his employment.

[19] For his part, Mr Haussman denies that communication was satisfactory with the Smiths, claims that he worked significantly different hours from the hours that the employers' records disclose, denies that he received the employment agreement in October (as the Smiths claim) and says that he receive it in early December, claims to have been treated as *second in command* by the Smiths and their herd manager Ms Bell, despite the contrary evidence of the Smiths and Ms Bell and the provisions of the unsigned employment agreement.

[20] It follows from the foregoing summary analysis that credibility is very much in issue. In relation to the issues around the employment agreement, I prefer the evidence of the Smiths and Ms Bell that there was an understanding about the central provisions of the employment agreement, that that understanding was reached with Mr Haussman at the initial interview for the position and that Mr Haussman was provided with a copy of the employment agreement in early October, nor early December as he himself contends.

[21] For instance, Mr Haussman's evidence that there was never ever any agreement about him meeting the cost of power at the farm cottage he was provided with, while not of any great significance in the scheme of things, is roundly contradicted by the Smiths and by Ms Bell, all of whom clearly remember not only Mr Haussman being told that he met his own costs, but also him agreeing to it. Further, Mr Haussman's claim about his difficulty in getting his rostered days off is contradicted by the Smiths and Ms Bell, all of whom say that Mr Haussman accepted and understood that during calving (the period Mr Haussman is talking about) there would be less flexibility and that the understanding was that the rostered days off during calving might not be available.

[22] In this particular connection, Mr Haussman was unable to produce any evidence at the Authority's investigation meeting to support his contention about the days he worked and the days that he actually had off. He said that information was in his own private records which he kept in a briefcase which he alleges was stolen from his farm cottage. The clear implication from Mr Haussman's evidence is that the Smiths, or their agents, had something to do with the removal of Mr Haussman's briefcase, a contention which the Smiths, not unnaturally, denied and which I confess I found absolutely fanciful.

[23] On the issue of the days actually worked and the days rostered off then, the Authority is left with Mr Haussman's bare oral testimony against the employers' records which disclose that Mr Haussman's recollection of events is mistaken.

[24] I am satisfied then on the balance of probabilities that the employment agreement unsigned by Mr Haussman which has been filed in the Authority, represents the bargain between the parties. I reach this conclusion because I prefer the evidence of the Smiths and Ms Bell about the nature of the understandings reached in the initial interview between Mr Haussman and Mr and Mrs Smith.

[25] In particular, I do not think that the evidence I heard discloses that there was any impropriety in the hours worked by Mr Haussman, although it is clear that Mr Haussman was not promptly provided with a copy of the employment agreement. Even on my finding that the agreement was provided to him in early October 2005, that is some six weeks after Mr Haussman commenced his employment. It is unreasonable for an employer to expect an employee to drive 24 kms in order to access an employment agreement which is his as of right and in the circumstances of this particular employment, the Smiths ought to have promptly provided a copy of the proposed agreement so that Mr Haussman could consider it, take appropriate advice and either execute it or seek amendments.

[26] In relation to the prospect of Mr Haussman seeking advice, it is clear that Mr and Mrs Smith were, during the later stages of the employment relationship, keen to get Mr Haussman to execute the employment agreement which he had finally been provided with a copy of, and Mr Haussman was equally keen to seek advice from a union and negotiate certain terms and conditions before execution. Mr Haussman says that the Smiths put unreasonable pressure on him to sign up and also claims in his statement of problem that a dominant reason for the termination of his

employment was his failure to sign the agreement. I must say I think it quite unreasonable of the Smiths to pressure an employee to sign an employment agreement in circumstances where they have not promptly provided the employee with a copy. However, I do not find any evidence that the Smiths took the failure to sign the agreement as in any way relevant to the dismissal.

*The alkathene pipe*

[27] During the incident on 16 December 2005 which ultimately resulted in Mr Haussman's dismissal, Mr Haussman was observed to use an alkathene pipe to strike a cow ostensibly to move the cow in for milking.

[28] Evidence was given by a Lincoln University student, Kirk Molloy, who worked at the farm during the summer of 2005. Mr Molloy said that there were *two pieces of alkathene pipe and a piece of rubber hose in the milk shed which all of us would use from time to time to give a cow a whack on the rump to get it moving. There was nothing unusual or cruel about this, it was just normal practice. It did not injure the animals and was sometimes necessary to get them to move.*

[29] Mr Molloy also did relief milking on another farm where alkathene pipes were also used for the same purpose.

[30] However, Mr Molloy was very clear in his oral evidence that Mr Smith *wasn't happy* about the staff using the alkathene pipes. Although Mr Molloy knew that that was Mr Smith's rule, he also said in his evidence that he had never heard anyone telling Mr Haussman not to use the alkathene pipe. Mr Molloy also denied Ms Bell's evidence that she had removed the alkathene pipes from the milking shed on more than one occasion. Indeed, Mr Molloy claimed that he had seen Ms Bell using the alkathene pipes herself.

[31] In cross examination Mr Molloy agreed that it was okay to hit cows but not that it was okay to repeatedly hit them.

[32] Mrs Smith gave evidence that sticks and pipes were not to be used on the animals and she says that Mr Haussman and Mr Molloy *were constantly told of this* and that the sticks and pipes were regularly taken away but they would reappear and Mr Molloy and Mr Haussman would use them again. Mr Smith said that the metre long piece of alkathene pipe used in the incident on 16 December 2005 was brought to

the cow shed by Mr Haussman ... *no one else, because he knows it is not allowed to be used.* Mr Smith, in his oral evidence, referred to one occasion in November when he says that he went *storming into the cow shed and removed all the sticks.* He is adamant that Mr Haussman was there at the time.

[33] Ms Emma Maver, who was a relief milker, said that the sticks and pipes were used *only as an extension of your arm and not to beat the cows with.*

[34] The herd manager, Ms Elizabeth Bell, was a most impressive witness. She gave evidence that she had told Mr Haussman that he was not to yell or scream at the cows when he was bringing them in as the cows did not respond well to that sort of treatment.

[35] I am satisfied on the evidence I heard that the use of an alkathene pipe to assist in the management of cows into the milking shed was a device which was actively discouraged by the Smiths and that the management of the herd in a sensitive and non confrontational way was encouraged. I prefer the evidence of the Smiths and Ms Bell to the evidence of Mr Molloy and Mr Haussman.

[36] Ms Bell's evidence that Mr Haussman was verbally aggressive with the cows seems to me further evidence of a pattern where Mr Haussman set himself up against the prevailing view in the farm and really sought to operate on quite different principles.

[37] The fact is that Mr Haussman was an employee and his employer is entitled to expect that he will follow their dictates in respect to the way the business is run. This is particularly the case where animal welfare is at stake. The Smiths adopted a conscious policy of treating their animals gently and they actively encouraged their staff to follow suit. The fact that there seems to have been a varying degree of take up of those very desirable principles does raise the question of whether Mr and Mrs Smith did enough to communicate their instructions in this regard.

[38] I am satisfied on the balance of probabilities that all that could be said is that there was a prevailing ethos which discouraged the use of the alkathene pipe as a method of directing the cattle, but I do not think the evidence supports the conclusion that the Smiths actively prohibited the use of the alkathene pipe because there was no clear evidence that the Smiths gave an explicit instruction to Mr Haussman or indeed to anybody else in regard to the alkathene pipe and its use. In order to make the

matter free from doubt in the future, I would encourage the Smiths to take this step to protect the animals and to ensure that their staff understand their principles in this matter.

*The relationship with Mr Mukundo*

[39] The letter of dismissal dated 16 December 2005 gives as one of the bases for the dismissal, ...*your violent and aggressive behaviour against Goodwin Mukundo on December 10 2005.*

[40] It follows that the relationship between Mr Haussman and Mr Mukundo is relevant to my investigation.

[41] Mr Haussman says that he *had several concerns* about Mr Mukundo. What these concerns appear to amount to was Mr Haussman's belief that Mr Mukundo had difficulty *interpreting and carrying out instructions* and that he caused many problems in the cow shed.

[42] Ms Bell, who as I have already indicated, I regard as a credible and reliable witness, agreed that Mr Mukundo had problems with his understanding, but Ms Bell thought that this was because *we spoke too fast for him. He had to translate it in his mind back to his own language and if you took the time he had a very capable understanding of what you wanted him to do.*

[43] Mr Smith noted in his evidence that Mr Mukundo was actually more qualified and experienced in dairy farming work than Mr Haussman.

[44] Both Mr and Mrs Smith, Ms Bell, Ms Maver and even Mr Haussman himself, gave evidence that Mr Haussman used derogatory racial epithets to abuse Mr Mukundo.

[45] Ms Bell also gave evidence that Mr Haussman did not want to work with Mr Mukundo and made that absolutely clear to her. She also referred to a particular incident on 10 December 2005 (which is mentioned in the letter of dismissal) in which she is absolutely clear that Mr Haussman abused Mr Mukundo. She says that Mr Haussman told her that if Mr Mukundo *stepped one foot in the yard again with him he was going to smack him one and he wasn't joking.*

[46] In giving her oral evidence, Ms Bell was very clear that that was what Mr Haussman said. She was sufficiently anxious about Mr Haussman's aggressive stance and demeanour that she reported the incident to Mr Smith and from that day onward, she kept the pair of them separated. As a matter of practice, that was not especially difficult as Mr Mukundo was not working regularly at the farm Mr Haussman worked at; he was a regular worker at one of the Smiths' other properties and he only relieved at the property Mr Haussman worked at.

[47] On 12 December 2005, Mr Smith spoke to Mr Haussman about his treatment of Mr Mukundo. Mr Smith, in his brief of evidence, says he told Mr Haussman ... *not to speak to or threaten Goodwin (Mr Mukundo) like he had on 10 December again, as it was serious*. Mr Haussman remembers that discussion and refers to Mr Smith asking if he could *please take it easy on Goodwin (Mr Mukundo)*.

[48] It is interesting to note that in the context of referring to that conversation, Mr Haussman then goes on to make the following observation:

*... which is all he (Mr Smith) ever said about my disciplining of him (Mr Mukundo).*

[49] Mr Haussman maintained throughout his evidence that he was recognised as the second in command in the milking shed (the 2IC is the expression he used in his evidence). None of the employers' witnesses agree that Mr Haussman was anything of the sort. He was simply a farm worker. Nobody had ever given him authority to behave as if he was next in charge after Ms Bell, neither Ms Bell nor Mr or Mrs Smith, all of whose evidence I consider to have been truthful. Mr Haussman simply appears to have taken it upon himself that he was in some position of authority and therefore was entitled to *discipline* Mr Mukundo. It is particularly ironic that Mr Haussman should consider this appropriate when Mr Mukundo had more experience than he in dairy farming operations.

[50] I am satisfied on the balance of probabilities that Mr Haussman did racially abuse Mr Mukundo and threaten him with physical violence. Although Mr Mukundo had left New Zealand and was not able to give any evidence before the Authority, the evidence of other witnesses and the acceptance by Mr Haussman himself in relation to the racial abuse is strong enough to justify my conclusion.

[51] I do not accept the contention made on Mr Haussman's behalf that Mr Haussman was warned by Mr Smith when Mr Smith spoke to him on 12 December, and that therefore the matter had already been dealt with; the evidence is in fact the other way. Mr Smith, an honourable and straightforward witness, said quite the reverse in giving his evidence. He denied it was *a conversation* then went on to say *I told Bruce (Mr Haussman) he had to ease up on Goodwin (Mr Mukundo) but I didn't warn him.*

[52] Clearly all that happened was that Mr Smith had a conversation with Mr Haussman in which he asked him to, in effect, leave Mr Mukundo alone. Given that Ms Bell had, on and from 10 December, separated the two of them for work purposes, Mr Smith may well have thought that all he was doing was making a point on ensuring that Mr Haussman got the message and nothing more than that.

*The incident on 16 December 2005*

[53] Both Mr Haussman and Ms Bell (the two principal witnesses of the 16 December event) acknowledge that there was an incident, but the severity or magnitude of the incident is differently described by the two of them.

[54] Mr Haussman, for instance, describes the incident in four short paragraphs; critically, he says that he gave the cow in question *a slap on the rump with a piece of alkathene pipe to get it moving.*

[55] Ms Bell describes the incident in nine paragraphs of her written brief and importantly, she says that Mr Haussman kept hitting the cow with the alkathene pipe and that both she and the cow were *terrified* of Mr Haussman.

[56] In her oral evidence, Ms Bell said *you could hear the thump of the alkathene pipe hitting the cow. They were full bodied hits. He was still hitting her when her leg was trapped by the rail.* Ms Bell reports Mr Haussman saying to the cow at this point, once the animal had become entangled in the rail, *go on you stupid bitch, break your leg.*

[57] I prefer Ms Bell's recollection of the significant events to Mr Haussman. I found Mr Haussman an unconvincing witness who, in relation to the 16 December incident particularly, offered no credible explanation for why Ms Bell would have concocted the story that according to him, she has. Mr Haussman, in commenting on

the detailed description of the 16 December incident in Ms Bell's brief of evidence, said at various times during his oral evidence, that Ms Bell was *lying*, that there was *not an element of truth in that statement* (referring to para.27 of Ms Bell's brief of evidence) that the bulk of para.30 of Ms Bell's brief was *a fabrication* and that Ms Bell was *a consummate liar*. I do not think any of those observations do Mr Haussman any credit and I reject his conclusions out of hand. In my considered view, Mr Haussman's recollection of the 16 December event is a minimising of the actual incident and of his part in it.

[58] If, on inquiry, a farm worker were found to have physically abused an animal in his care, that would constitute serious misconduct and could result in summary dismissal.

[59] The real issue in relation to the 16 December incident is whether the process adopted by Mr Smith in making the determination to dismiss Mr Haussman was a reasonable one in all the circumstances.

[60] The evidence discloses Mr Smith was summoned to the milking shed by Ms Bell and that he got there as soon as he could, remembering that he was based 24 kms away. I accept Mr Smith's evidence that when Ms Bell rang him to report the incident she was upset and talked so fast that he had to tell her to slow down.

[61] Before coming down to the farm, Mr Smith took some time to discuss matters with his wife, and then rang Ms Bell back and told her to suspend Mr Haussman, which she did. She said in her evidence, and I accept, that she was very anxious about going to Mr Haussman and suspending him because she was *so petrified of him*.

[62] When Mr Smith arrived at the milking shed, Mr Haussman arrived and was described by Mr Smith as being *obviously very angry*. *I could see why Liz (Ms Bell) was very intimidated. He was shouting at me and Liz asking what was going on. He was waving his hands around and very agitated and I even felt threatened by him.*

[63] Mr Smith asked Mr Haussman what had happened. Mr Smith then re-interviewed Ms Bell privately, and according to Mr Smith, what Ms Bell told him was consistent with what she had told him over the phone.

[64] Mr Smith identified in his evidence that the key issue was whether Mr Haussman had *merely slapped the cow or as Liz (Ms Bell) had explained been beating the cow and yelling and screaming at her.*

[65] Mr Smith decided that he could not continue to trust Mr Haussman and in his brief of evidence he refers not just to the injury to the animal, but also to the way that Mr Haussman behaved when Mr Smith was investigating the incident. Mr Smith referred particularly to Mr Haussman's arrogance and *his intimidating and threatening behaviour.*

[66] In his oral evidence, Mr Smith said that Ms Bell's *story was more believable and I trusted her because she was my manager.*

[67] I am satisfied on the balance of probabilities that applying the tests set out in s.103A of the Employment Relations Act 2000, the appropriate question for the Authority to consider is whether an average dairy farmer would consider it fair and reasonable to dismiss a worker in Mr Haussman's circumstances after conducting a proper inquiry. In enunciating the test in *Timu v. Waitemata District Health Board* AC34/07, Judge Couch has this to say:

*But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable.*

[68] That being the position, the Authority must consider whether the investigation conducted by Mr Smith was a proper one in all the circumstances and whether the fact that he chose to dismiss after the investigation stands up to scrutiny in terms of the substantive justification for the dismissal.

[69] Turning to the procedural elements first, it is I think appropriate to reflect on the remoteness of the farm and therefore the difficulty in either party obtaining advice and the realities of the interpersonal tensions and the possible risk or further risk to the animals.

[70] Clearly, this was a reasonably quick investigation. The episode appears to have happened around 7.30am and the dismissal was conveyed to Mr Haussman around 10.15am, less than 3 hours later. While Mr Smith apparently got some advice by telephone from Federated Farmers, Mr Haussman did not seek advice and there is no suggestion that he was advised to do so by the Smiths.

[71] However, I am inclined to accept the submission made on the Smiths' behalf that the remoteness of the employment location and the particular circumstances of the allegations made against Mr Haussman, both in terms of animal welfare and in terms of interpersonal relationships, made urgent action appropriate.

[72] I am satisfied on the basis of the evidence I heard that Mr Smith talked to the principal protagonists, gave each an opportunity to be heard and then made a decision which in all the circumstances was available to him to make.

[73] I am satisfied that even if Mr Haussman had obtained legal advice and/or that Mr Smith had obtained advice, the result would have been the same, albeit that that result might have been delayed somewhat because of the need for advisers to engage with each other. A lengthier period of suspension would have been involved and the effect of that would simply have been to increase the stress on all of the human protagonists.

[74] I am also satisfied on the balance of probabilities that it was available to Mr Smith to conclude that the incident that he had, by dint of his investigation, found proved, constituted serious misconduct and was therefore able to be responded to by the sanction of summary dismissal. I conclude that simply by reason of the seriousness of the allegation found against Mr Haussman. In a business which earns its income by the management of animals, abuse of animals must of necessity be taken very seriously indeed. It is hard to imagine a more serious offence in a farming situation than the wanton cruelty to an animal of the sort which Mr Smith found proved against Mr Haussman. That, coupled with the attitude of Mr Haussman and the earlier issue relating to Mr Mukundo, is in my view sufficient to justify a finding of serious misconduct and in turn a conclusion that the sanction ought to be summary dismissal.

### **Determination**

[75] I find Mr Haussman's claim for unjustified dismissal unfounded, having reached the conclusion that the dismissal was in all the circumstances of the particular case, a justified one.

[76] Mr Haussman left the farm property of Mr and Mrs Smith owing power and rent and Mr and Mrs Smith claim those amounts back from Mr Haussman in effect by way of a counterclaim. The Smiths argue that those amounts are part and parcel of

the employment relationship and therefore capable of being dealt with by the Authority.

[77] I agree and direct that Mr Haussman is to pay to the Smiths the sum of \$1,154.52 being the total of \$704.52 owing in phone charges and \$450.00 owing in rent. I am satisfied, on the evidence I heard, that Mr Haussman knew full well that he was liable for those amounts and that they were part and parcel of the employment relationship.

**Costs**

[78] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority