

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Logan Hunter and Te Mahia Teddy (Applicants)

AND Robbie McKay (Respondent)

REPRESENTATIVES Ian Peterson, Counsel for Applicants
Jake McCleary, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 20 July 2005

DATE OF DETERMINATION 10 October 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr Hunter and his partner, Ms Teddy, claim that on or about 1 November 2004, they were unjustifiably dismissed from their employment. They seek that the Authority finds that they have a personal grievance and award them various remedies. Mr Hunter also says that he should be paid the sum of \$414.80, for livestock improvement fees incurred, and that he should be paid the sum of \$1,000 being the value of a cow that died due to an alleged lack of care attributed to Mr McKay. Mr Hunter also alleges that Mr McKay deliberately injured two of his cows and he seeks payment of the sum of \$1,120 due to their loss of value. Finally, Mr Hunter claims that he has not been paid production bonuses due to him and he has not been paid for the weekends that he worked while Mr McKay was incapacitated.
- [2] Mr McKay denies that there is any validity to Mr Hunter's claims with the exception of the claim for the cow that died. While Mr McKay denies any fault on his part, he is prepared to make payment of the sum of \$1,000. Mr McKay says that because Mr Hunter took his cows off the farm, the income from the milk of the cows was lost and Mr McKay presents a counter claim for that loss of income.

Background Facts and Evidence

- [3] Mr Hunter was employed as a Herd Manager on a dairy farm owned by Mr Robbie McKay. Ms Teddy was employed on a part time basis as an Assistant. They commenced their employment on or about 15 January 2004. The terms of payment were initially presented by Mr McKay in a hand written summary. A standard Federated Farmers employment agreement was subsequently presented and signed by Mr McKay on 26 June 2004, and signed by Mr Hunter on 21 July 2004. The employment agreement provided for two separate bonuses of \$1,000 to be paid if production and quality targets were reached, and two other separate bonuses of \$500 to be paid for achieving fertility and mortality goals applying to the herd.

Included in the hours of work conditions of the employment agreement was a provision that Mr Hunter would have every third weekend off during the milking season.

- [4] There was also an arrangement for Mr Hunter to bring 12 cows that he owned onto Mr McKay's property. While they were integrated and managed with those owned by Mr McKay, Mr Hunter retained ownership of his cows.
- [5] It was initially agreed that Ms Teddy would be paid a salary of \$10,000, but following an approach from Mr Hunter to Mr McKay, some time in late February or early March 2004, it was agreed that from 15 March, Ms Teddy would be paid an hourly rate of \$10.00 per hour, inclusive of holiday pay.
- [6] In April 2004, Mr McKay broke a leg and as a result could not carry out his normal role, including the milking of the cows. Mr Hunter agreed to defer taking his weekends off until a later time. He says that he did not take the time off at a later date and now seeks payment. Conversely, Mr McKay says that the time off was taken and no payment is due. However, the evidence points towards it being most probable that the days in question were recognised in the final pay received by Mr Hunter
- [7] There is an issue about the purchase of a motor bike and payment for it being off-set against bonus payments due to Mr Hunter. It seems that there is a general custom that exists that workers employed on dairy farms must provide their own farm bike, albeit they use it to carry out work for the employer. It appears that Mr Hunter could not afford to buy a bike and used Mr McKay's for some months. It was subsequently agreed that Mr Hunter would buy the bike from Mr McKay, subject to a valuation to set the price. In a letter dated 21 March 2005, the belated value of the bike was assessed by a local dealer to have been approximately \$2,500, as at July 2004, when Mr Hunter purchased it. The evidence of Mr McKay is that Mr Hunter agreed to pay that price but then complained that it was too high. The *Vehicle Offer and Sale Agreement* shows that Mr Hunter paid the sum of \$1,000 for the bike plus the cost of repairs of \$957, making a total of \$1,957.00.
- [8] The evidence of Mr McKay is that he reduced the price from the valuation of \$2,500 to \$2,250 and that Mr Hunter paid him \$1,000 in cash and the remaining \$1,250 was to be set-off against any bonus payments due. But, that is not what the sale agreement shows. It shows that Mr Hunter purchased the bike from the dealer, Underwood & Wilkins, for the sum of \$1,957 plus insurance of \$200. The purchase was financed by Motor Trade Finance to be paid over a period of 24 months. Further evidence on this matter was sought from the parties and I conclude that it is most probable that the finance was arranged for the \$1,000 to be paid to Mr McKay plus \$957 for the repairs bill.
- [9] The relevance of the transaction relating to the purchase of the motor bike is that Mr Hunter says that he has not been paid the production bonuses that he believes he has an entitlement to. On the other hand, Mr McKay says that some of the bonus payments due were set-off against the purchase of the motor bike.

Breakdown in the Relationship – Issues Arising

(a) *Hours of work for Ms Teddy*

- [10] The evidence of Mr McKay is that through the months of August and September 2004, he noticed that the hours of work being recorded for Ms Teddy were higher than he would have expected. Upon discussing this with Ms Teddy, she informed him that she had been doing "a

lot” of Mr Hunter’s work. Mr McKay says that while he had no issue with Ms Teddy working more hours, as there was always work available in the orchard he owned, he was unhappy with Ms Teddy doing work that Mr Hunter should have been doing.

[11] Consequently, he confronted Mr Hunter about the explanation received from Ms Teddy. Mr McKay says that Mr Hunter became abusive towards him. Mediation of the issue was requested by Mr Hunter and Mr McKay contacted the mediation service and received forms to make an application for mediation, but it appears that Mr Hunter no longer wished to take the matter further.

(b) ***Stock breakout***

[12] The evidence of Mr McKay is that he arrived home on Monday 25 October from a visit to the South Island and discovered that cows had entered onto a freshly sown swede crop. Mr McKay was of the view that Mr Hunter should have prevented the stock breakout and confronted Mr Hunter accordingly. An argument took place. Mr McKay says that Mr Hunter was abusive towards him and as the argument was “*going nowhere*,” he left it.

[13] The evidence of Mr Hunter is that upon the discovery of the stock breakout Mr McKay came to his house. Mr Hunter says that Mr McKay was: “*very irate and raved at me – he was screaming and yelling and waved his clenched fist in my face and poking his finger so close to me it was frightening.*” Mr Hunter’s further evidence is that from that day on he suffered [“*severe stress*” and could not go to milking each morning without [“*getting up and retching and feeling weak and fearful of what might happen next.*”

[14] Having closely observed both men during the investigation meeting, I conclude that Mr Hunter’s version of events is an exaggerated and largely histrionic account, both as to what occurred, and the alleged affect upon him. Mr Hunter impressed me as a very robust character indeed and while given the circumstances, Mr McKay may well have been angry and forceful, I doubt that he, or many other people, would be capable of making Mr Hunter feel as fearful or frightened as he claims to have been.

(c) ***Leave days owing***

[15] On or about 27 October 2004, there was some discussion between the two men about Mr Hunter having some of the days off that he was owed. Mr McKay prepared a summary of the days owing. The evidence about the discussion that took place as to when Mr Hunter would take some time off is conflicting, but it appears to be commonly accepted that some aggravation arose and nothing was agreed in regard to Mr Hunter having some time off.

[16] The evidence of Mr Hunter is that on 28 October, he informed Mr McKay as to the days that he wished to have off. Mr Hunter says that Mr McKay told him that he could not have the nominated days off as another employee wanted to be off at that time. The response of Mr Hunter was that if he could not have the time off that he had owing, he wanted to be paid for them that day. Mr Hunter’s evidence is that Mr McKay asked him if he wanted to “*stay on working*” but if they could not come to some agreement Mr McKay would be happy for Mr Hunter to leave.

[17] The further evidence of Mr Hunter is that sometime later, Mr McKay came back to him when he was working at the cowshed and informed Mr Hunter that he was required to attend a doctor to have a blood test. Mr Hunter says that Mr McKay informed him that there had been four occasions that he had noticed the smell of marijuana about Mr Hunter’s presence and that

he believed that Mr Hunter was under the influence of the drug in the workplace. Mr Hunter refused to have a blood test.

- [18] The evidence of Mr McKay is that at about 7:30am on the morning of 28 October, he saw Ms Teddy walking back from the cowshed. She was upset and told Mr McKay that she did not want to carry out the milking with Mr Hunter – they had had a domestic argument and she described Mr Hunter with a number of expletives. Mr McKay says that he went to the cow shed and found Mr Hunter in an angry and agitated state. It is the evidence of Mr McKay that Mr Hunter told him that he need to have some time off immediately as he had some personal issues. The response of Mr McKay was that he conveyed to Mr Hunter that he would need to organise a relief worker but would see what he could do.
- [19] Mr McKay says that Mr Hunter became argumentative and this prompted him to confront Mr Hunter about his suspicions that Mr Hunter was using marijuana at work. Mr McKay says that the anger and mood swings emanating from Mr Hunter were becoming common place and he asked Mr Hunter to take a drug test. Mr Hunter refused and walked off “*in a huff.*” Mr McKay says that he then went to his home and prepared a list of days for Mr Hunter to take off. He consequently informed Mr Hunter that he could take the days in one block if he wanted to and that he should inform Mr McKay about when he wanted to have the time off. Mr McKay then went to work in his orchard shed located elsewhere on the farm.

(d) ***Resignation or dismissal?***

The evidence of Mr McKay

- [20] The evidence of Mr McKay is that Mr Hunter was still angry when he came to the orchard shed at about 9:00am on 28 October 2004. Mr McKay says that Mr Hunter called him “*an arsehole.*” Very soon after, Ms Teddy arrived on the scene. The further evidence of Mr McKay is that Mr Hunter said that: “*I don’t want to work here any more.*” Mr McKay says that he was “*taken aback*” but asked Mr Hunter when he wanted to go – the response being, “*right now.*” Mr McKay says he told Mr Hunter that he needed to “*cool off*” and be reasonable. He also advised Mr Hunter that he only had three more milkings to do before his weekend off. He should then take the weekend off and if he still felt that he wanted to leave, then he could go. Mr McKay says that Mr Hunter said that he and Ms Teddy would go home and “*discuss it*” and let Mr McKay know their decision. At about 10:00am that day, Mr Hunter phoned Mr McKay and told him he would do the last three milkings and then leave.
- [21] Mr McKay’s evidence is Mrs McKay took a phone call from Mr Hunter that evening and he informed her that Mr McKay would have to do the last milking as Mr Hunter was going to a job interview. Mr McKay says that he realised then that Mr Hunter was serious about his resignation. Upon that understanding, on 1 November 2004, Mr McKay gave Mr Hunter the following letter:

“Re Employment

1. I confirm your resignation of employment given to me verbally on 28th October 2004, effective 1st November 2004 (today).
2. The balance of your leave is calculated as follows:

Annual Leave accrued	16 days
Time in Lieu	9 days

TOTAL 25 days

3. Your leave will be paid with your final pay owing and deposited into your account this Thursday in the normal manner.
4. Pursuant to clause 18.4 of the Employment Contract you are also required to vacate the house this evening. However as an act of good faith I am prepared to extend your vacation date to tomorrow night, Tuesday 2nd November 2004. Please ensure the home is left in a clean and tidy manner.
5. I have sought legal advice with respect to your cows, and the special clause on page 13 of the Employment Contract. This clause that you prepared clearly anticipates that the cows would remain on the property until dried off. Accordingly, they will remain on the property until dried off.
6. I will also replace any dead stock at the end of the season.
7. Please ensure that you leave your contact details with me before you leave the property.

I wish you all the best for your future employment.”

[22] Mr McKay says that sometime during the evening of 1 November, Mr Hunter removed his cows from the farm. The next morning, Mr McKay discovered that all of the farm herd records had been taken from the cow shed and that some pages had been ripped out of the cow shed diary. Mr McKay suspected that Mr Hunter had removed these papers and became distrustful of him and arranged for trespass notices to be served on Mr Hunter and Ms Teddy. When questioned as to a possible motive for Mr Hunter to remove the papers in question, Mr McKay ventured the view that there were may have been some negative records relating to Mr Hunter’s performance in his position.

[The Authority is not required to, nor have I, come to any conclusions about this matter.]

The evidence of Mr Hunter

[23] The evidence of Mr Hunter as to his departure is quite at odds with that of Mr McKay. Mr Hunter says that when he found Mr McKay at the orchard shed, he said to him: “*Look here Robbie, what’s your problem?*” Mr Hunter says that Mr McKay responded by saying: “*My problem is you, I want you off my farm, I want you to leave, I want you to take you and your property and want you to get out.*”

Mr Hunter says that he responded by saying to Mr McKay: “*Well you’d be a fucking arsehole wouldn’t you?*” The evidence of Mr Hunter is that Mr McKay was standing above him on a trailer and waved his finger at him and said: “*You’re sacked, now get off my fucking farm.*” Mr Hunter says that Mr McKay screamed at him “*at the top of his voice.*”

[24] Mr Hunter’s evidence is that he left the shed as Ms Teddy was coming in and when she questioned what had happened he told her that: “*He’s just sacked us and told us to get us and our property off the farm.*” Mr Hunter says that he went home but Ms Teddy stayed to talk to Mr McKay.

[25] Mr Hunter says that Mr McKay later came to his house and informed him that Friday was Mr Hunter’s day off and that he had “*today and tomorrow to milk and then you can go.*” Mr Hunter responded that he would be going now but then agreed to milk the cows on Friday night. He says that he had some fears for the safety of his cows. Mr Hunter says he milked the cows on Friday morning then attended a job interview later that day. That morning was the last work

that Mr Hunter performed on the McKay farm.

The evidence of Ms Teddy

[26] The evidence of Ms Teddy is that she arrived at the orchard shed as Mr Hunter was exiting. She says that when she enquired from Mr Hunter what was going on, he replied that: [*“he has just sacked us.”*] Ms Teddy says that Mr McKay was following behind Mr Hunter and when she enquired from him what had happened, Mr McKay replied: [*“what am I supposed to do when I am called an arsehole.”*] The further evidence of Ms Teddy is that when she spoke to Mr McKay alone he told her that they had six weeks so as to give him time to find another worker and for them to find another job. Ms Teddy says that Mr McKay offered for her to stay in her job and stay on in the house.

The evidence of Terry Papuni, Jamie Papuni and Maria Drummond.

[27] The evidence of the three women is largely consistent. They were employed by Mr McKay at the material time. On the morning of 28 October 2004, they were working in the orchard pruning kiwifruit. It was about 10:00am and they had stopped for morning tea. They all say that they saw Mr Hunter coming on his motor bike from the direction of the orchard shed and that when he got to them, he called out: [*“I hope you like working for your fucking boss because I’ve just quit.”*] All three women are entirely consistent in their evidence as to what Mr Hunter said, albeit Ms Papuni and Mrs Drummond say that Mr Hunter stopped his bike when he spoke to them, but Mrs Papuni says that Mr Hunter called out the words while the bike was still moving. Nonetheless, I find the substance of the evidence of these witnesses to be compelling and credible.

Analysis and Conclusions

1. *The alleged personal grievances – unjustified dismissal*

[28] The first substantive question to be determined is: Was Mr Hunter dismissed?

[29] There are varying degrees of conflict and some inconsistency in the overall evidence on the part of all concerned. However, in regard to the general conflict in the evidence between Mr Hunter and Mr McKay, I find the evidence of Mr McKay to be more credible overall. In regard to what happened on 28 October, in so far as the matter of whether Mr Hunter was dismissed or resigned is concerned, I find the evidence of the three women working in the orchard to be compelling, credible and collaborative with the evidence of Mr McKay. There is also the letter of 1 November 2001, from Mr McKay to Mr Hunter – a reference to Mr Hunter’s resignation. I find the content of this letter to be consistent with a fair and reasonable conclusion on the part of Mr McKay that Mr Hunter had resigned from his employment.

[30] I therefore find that Mr Hunter was not dismissed and that he resigned on the morning of 28 October 2004.

[31] I also find that Ms Teddy was not dismissed. While she could have remained in the employment of Mr McKay, understandably, she chose to follow Mr Hunter upon his resignation from his employment. I would also add that I accept the evidence of Mr McKay that he had no quarrel with Ms Teddy, or she with him, and that she could have remained employed had she wished, and that she was reluctant to leave at the time.

2. ***The Livestock Improvement expenses***

[32] The employment agreement provides that: “All vet bills AB semen + services will be at the farm’s cost.” Mr Hunter has presented accounts that show that he incurred costs in the above category to the sum of \$414.80 and says that he has not been paid by Mr McKay. In the absence of any evidence to the contrary, it appears that Mr Hunter has a legitimate entitlement to be paid this sum under the terms of the employment agreement.

3. ***The damage to cows***

[33] Mr McKay denies doing any damage to Mr Hunter’s cows and there is no evidence to show otherwise. Mr Hunter’s claim is not proven to have any validity and must be declined.

4. ***The bonus payments***

[34] The employment agreement provided for two bonus payments to be paid to Mr Hunter. There is a grade bonus and a production bonus, the payment of which was contingent upon specific criteria being met. It is my understanding that Mr McKay acknowledges that both the milk production and milk grade criteria were met by Mr Hunter. It is my conclusion that Mr Hunter is entitled to be paid the two bonus payments each of \$1,000 – less the sum of \$1,250 that I find Mr Hunter agreed to have set-off against the bonus payments in order to purchase the motor bike from Mr McKay.

5. ***The dead cow***

[35] While it has been accepted by Mr McKay that he will pay the sum of \$1,000 for cow number 500, an order will follow.

6. ***Time and a half payments***

[36] In the *Statement of Problem*, Mr Hunter and Ms Teddy claimed payment for days they say were owed to them to be paid at the rate of time and a half. There has been no tangible evidence produced to support the respective claims and hence I decline them.

7. ***The counter-claim of Mr McKay***

[37] Mr McKay claims that because Mr Hunter removed his cows from the farm before the end of the milking season, he is entitled to be paid for the lost production accordingly. Apart from the fact that it would appear that the agreement for Mr McKay to receive the milk from Mr Hunter’s cows was contingent upon Mr Hunter remaining in employment, I am bound to decline this claim on the ground that there is no evidence of the claimed financial loss.

Determination

1. I find that Mr Hunter was not dismissed from his employment – he resigned on 28 November 2004. I also find that Ms Teddy was not dismissed from her employment – she voluntarily left her employment upon the resignation of her partner, Mr Hunter.
2. Mr McKay is ordered to pay to Mr Hunter the sum of \$414.80 for the Livestock Improvement services.

3. Mr McKay is ordered to pay to Mr Hunter the sum of \$1,000.00 being the valuation of cow number 500.
4. Mr McKay is ordered to pay to Mr Hunter the sum of \$750.00 being the remainder of the bonus sums due to Mr Hunter. (\$2,000 less \$1,250 for purchase of the motor bike.)
5. All other claims of the parties are declined.

Costs.

As both parties were partially successful with their respective claims, costs will lie where they fall.

Ken Anderson
Member
Employment Relations Authority