

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 106
5275539

BETWEEN LEROY JARVIS
 Applicant

A N D BROOKTON FARM LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mandy Freeman, Advocate for Applicant
 Kathryn Dalziel, Counsel for Respondent

Investigation meeting: 1 May 2012 at Christchurch

Date of Determination: 30 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Jarvis) alleges that he was unjustifiably dismissed and that there were various breaches of practice by the employer such as a failure to provide a safe workplace, misrepresentation at the time of engagement and breaches of implied or express terms of the employment agreement.

[2] The respondent (Brookton Farm) resists each and every claim and in particular, in respect of the dismissal of Mr Jarvis, acknowledges that there was a dismissal but contends that it was a justified one.

[3] Brookton Farm Limited was Mr Jarvis' employer, not TH Enterprises Limited which was the party sued by Mr Jarvis. The Authority determines that the file be correctly intitled accordingly. Brookton Farm Limited is one of seven dairy farm companies owned by TH Enterprises Limited so while TH Enterprises Limited has an involvement in the employment relationship problem raised by Mr Jarvis, its

involvement is essentially as a holding company or parent company of Brookton Farm and it is the latter entity which actually was Mr Jarvis' employer.

[4] Mr Jarvis applied for the job at Brookton Farm after returning to New Zealand from overseas and an interview was arranged in the normal way with the then farm manager, Malcolm Ford. Not surprisingly, Mr Ford was interested in establishing whether Mr Jarvis had previous dairy farm experience. Mr Jarvis did have previous dairy farm experience because he had been self-employed as a relief milker in the Bay of Plenty and in that capacity, had contracted to, amongst other people, his mother and stepfather.

[5] Mr Jarvis' evidence is that he told Mr Ford when he initially applied for the job by telephone that his two principal referees were his mother and his stepfather. Mr Ford is adamant that that intelligence was not given to him at all.

[6] Also at the initial interview, there was discussion about the staff ratio, that is the number of staff on the farm. It is common ground that at the interview, Mr Ford told Mr Jarvis that there were five staff working the farm. One of Mr Jarvis' complaints is that that number rapidly declined after the interview which he said put pressure on him, meaning that he had to work harder than he would otherwise have. Mr Jarvis claims that it was a term of the agreement that the staff ratio remained at five. Mr Ford agrees that at the interview there was discussion about total staff numbers working the farm as being five, and also agrees that shortly after the interview, that position changed because of a variety of unavoidable difficulties such as the departure of other staff and the inability to recruit replacements. In any event, Brookton Farm denies that it was ever a term of the agreement that the staff ratio would be five. The practical effect of a staff ratio of five would have been that there were always three staff members working at any time.

[7] The short employment relationship seemed to commence well enough. Relationships between Mr Ford as manager and Mr Jarvis were positive. But Mr Jarvis' evidence is that he became increasingly concerned about the failure to maintain the staffing ratio and he also identified health and safety matters which he said needed attention. Mr Jarvis' evidence is that he raised these matters with Mr Ford and that Mr Ford took no steps to rectify them.

[8] Mr Ford agrees that the matters were raised by Mr Jarvis, agrees that he had not rectified them by the time the employment came to an end but points out that the employment, in its totality, lasted barely a month and that the issues that Mr Jarvis raised were either intractable (such as the inability to hire staff) or insignificant (such as the various minor health and safety issues which Mr Jarvis had raised).

[9] One outcome of Mr Jarvis' complaints about the staffing ratio was that Mr Ford agreed to hire Andy and Mandy Freeman as relief contract milkers. Andy and Mandy Freeman, of course, were Mr Jarvis' mother and stepfather but Mr Ford is adamant that he did not know that relationship then and had not been told of it previously when the couple had been used as Mr Jarvis' referees.

[10] Matters came to a head on 15 and 16 March 2009. Mr Ford had asked Mr Jarvis to work those two days although they were his rostered days off. Mr Ford was forced to make that request because of the continuing staff shortage. Mr Jarvis was on an 8 and 2 roster, that is to say, he worked eight days and then had two days off. During the short course of the employment, 15 and 16 March would have been Mr Jarvis' third pair of days off.

[11] It is common ground that Mr Jarvis agreed to work the two rostered days off although he expected to be paid extra for those days (or at least that is what he told the Authority). The 15th of March 2009 went off without incident but on 16 March 2009, a Monday, Mr Jarvis told Mr Ford that he was experiencing "*signs of workplace stress*" and he sought to take a break before his stipulated duties for that day had been completed. There were words between Mr Ford and Mr Jarvis in the milking shed. Mandy Freeman, Mr Jarvis' mother, was present in her capacity as a relief contract milker. She told Mr Jarvis to go home and have a sleep and the rest of the crew would finish the duties for the day.

[12] Mr Jarvis told me that he "*wanted to put in for sick leave*" and he raised that with Mr Ford in one of the series of meetings held that Monday, 16 March 2009.

[13] In fact, the parties appear to have undertaken a full shuttle diplomacy on that evening. They met at 6.30pm, 8.30pm, 8.45pm, and 9.15pm. According to Mr Jarvis, at 6.30pm he went to Mr Ford's house to try to sort the matter out, was unsuccessful and gave him until 9pm to resolve the matter. At 8.15pm, Mr Ford arrived at Mr Jarvis' house and, amongst other things, said that nothing could be resolved that

night. Mr Jarvis confirmed that he would not be at work the following day because he was “*under grievance*”.

[14] Then at 8.45pm, Mr Ford came back to see Mr Jarvis to say that he would be milking on his own the following morning and Mr Jarvis’ response was to tell him he would be down at his house in 30 minutes with his grievance letter. He was as good as his word and arrived at Mr Ford’s house at 9.15pm to hand over his letter of grievance.

[15] That letter of grievance is in the following terms:

I wish to advise you due to the deception contents of contract in relation to roster dates, times and duties I will not be subject to any further misrepresentation and due to stress and trauma I feel at risk.

I have seeked [sic] to resolve this issue after numerous occasions and have not come to a resolution.

I advise you I will be seeking mediation with the Employment Relations Authority urgently.

I advise you I will not be returning to employment until a resolution is meet [sic].

[16] For his part, Mr Ford, having received this letter, sought to negotiate around it. The following morning, Tuesday, 17 March 2009, Mr Ford arrived at Mr Jarvis’ house at 10am to indicate that he wanted to discuss “*the time for my grievance leave*” (according to Mr Jarvis’s evidence). Mr Jarvis refused to talk about it verbally and said that he wanted any proposals put in writing.

[17] Half an hour later, Mr Ford was back again with a list containing the topics that he wanted them to discuss. Again, Mr Jarvis told him to put it all in writing and Mr Jarvis said that he wanted 48 hours notice before Mr Ford entered his property. Mr Jarvis also told Mr Ford that he had given his mother, Mandy Freeman, consent to act for him. Letters were to be put in Mr Jarvis’ mailbox, he instructed.

[18] Mr Jarvis then proposed a meeting the following Saturday. At about the same time, Mr Ford notified Mr Jarvis that there had been a directive from the company principals that only the director of the company, Mr Trevor Hamilton, could deal with Mr Jarvis’ issues.

[19] The following day, Mr Jarvis sought the business address for the employer so that progress could be made on the employment issues, but he confirmed that he remained on “*stress leave*”.

[20] Mr Ford told the Authority that the whole episode had resulted in him feeling “*cornered*”. In effect, he was confronted with his most junior staff member refusing to continue work after barely three weeks on the job, claiming that he was either sick or stressed, and expecting to be paid while the employer sorted that out. In addition, Mr Ford’s evidence is that Mr Jarvis, supported by his mother, Ms Freeman, was looking to unilaterally impose new terms and conditions of employment such that he was paid an hourly rate, that Ms Freeman would remain there and contract milk and Mr Jarvis would move from one farmhouse to another.

[21] As a consequence of Mr Ford being removed from involvement in the dispute, matters were dealt with principally from now on by Mr Kloppers, the Operations Manager. Mr Kloppers wrote to Mr Jarvis by letter dated 18 March 2009 instructing him to return to work and telling him that he was not entitled to sick leave or stress leave because he had not been working for the statutory minimum of six months. The letter also made clear that the company was not going to engage in mediation because the matters in dispute were clearly dealt with in the employment agreement. Mr Jarvis’ response was to indicate that mediation would be proceeding but that he would return to work on 21 March.

[22] Then, on 20 March 2009, the employer wrote again, this time proposing suspension on full pay to investigate various serious allegations. A further letter of 23 March 2009 summoned Mr Jarvis to a disciplinary meeting for 30 March 2009 and that disciplinary meeting resulted in Mr Jarvis’ summary dismissal. The basis of the dismissal was Mr Jarvis’ use of his mother and stepfather as referees without disclosing they were related to him, but there was also reference to his threatening and harassing behaviour directed at Mr Ford and threatening behaviour from Ms Freeman.

Issues

[23] It will be useful if the Authority considers first whether Mr Jarvis was unjustifiably dismissed and then whether he has other grounds for complaint.

Was Mr Jarvis unjustifiably dismissed?

[24] The Authority is not satisfied that Mr Jarvis was unjustifiably dismissed. In essence, the primary basis for the dismissal was Brookton Farm's contention that Mr Jarvis had effectively got his position by a false pretence in that he had failed to make clear that his two referees were his mother and stepfather. There is a subsidiary ground for the dismissal as well, namely the allegation that Mr Jarvis and/or his mother, Ms Freeman, abused or intimidated company personnel.

[25] However, dealing with the issue of the referees first, it is the position that the Authority's decision on this matter relies on questions of credibility. On the one hand, Mr Ford was adamant that he did not know that Ms Freeman and Mr Freeman were related to Mr Jarvis until towards the end of the employment relationship and on the other, Mr Jarvis and his mother and stepfather all maintain that they told Mr Ford about the relationship. While it might be thought that the weight of evidence favoured Mr Jarvis' claim, the Authority much preferred the staunch evidence of Mr Ford who was unshakeable in his conviction that he did not know the Freemans' relationship to Mr Jarvis.

[26] What is so extraordinary about this case is that the relationship between the parties soured so quickly but before it soured, Mr Ford was effectively either employing or contracting with the three members of the family. That notwithstanding, Mr Ford maintained that he did not know the relationship. He pointed out the difference in surname (and indeed the fact that Ms Freeman has more than one surname apparently), and that she had worked at the farm under one name and given the reference under another.

[27] Mr Jarvis maintained that he had told Mr Ford in the initial telephone discussion, when he first sought information about the advertisement, that his referees were his mother and stepfather, but Mr Ford denies this. Indeed, Mr Ford goes further and in his evidence, he confirmed that Mr Jarvis had disclosed in the initial telephone discussion that he had primarily worked with and for family members, but it was precisely because of that admission that Mr Ford said he insisted on being given referees who were not family members. When Mr Jarvis had his interview for the role and gave Mr Ford the names of his mother and stepfather (with different surnames from him) and, on Mr Ford's evidence, without telling Mr Ford that they were relatives, Mr Ford felt that he had independent referees.

[28] Of course, both Mr Freeman and Ms Freeman say that they told Mr Ford of the family relationship with Mr Jarvis but that is inherently inconsistent with Mr Ford's evidence that he insisted on referees from non-family members.

[29] A further point is that the Authority has seen Mr Ford's notes of the interview with Mr Jarvis. The handwritten notes include the notes that Mr Ford made in his telephone discussion with Mandy Freeman. Nowhere does it suggest that Ms Freeman was Mr Jarvis' mother and given Mr Ford's evidence (which the Authority accepts) that he made a particular point of emphasising to Mr Jarvis that family referees would not do, it seems inconceivable that if Ms Freeman had mentioned (as she claims) that she was Mr Jarvis' mother, that Mr Ford would not have included it in his notes and would have discounted the reference because of the family connection.

[30] Instead, Mr Ford records a glowing reference from Ms Freeman, without noting the family connection, and then goes on in short order to hire Mr Jarvis.

[31] On the balance of probabilities then, the Authority is persuaded that the applicant did try to mislead the employer about the nature of his referees, that in fact he kept the truth of who his referees were from Mr Ford until after the employment was well and truly under way and that in deceiving Mr Ford in the way that he had, Mr Jarvis effectively secured the job by false pretences and thus placed himself in jeopardy once the employer became aware of the actual position.

[32] In terms of the operative individual employment agreement, by clause 19.1, the employer might dismiss an employee without notice (that is, summary dismissal) for serious misconduct provided it follows a fair process. Pursuant to the First Schedule to the employment agreement, serious misconduct is defined by a series of examples. While those examples are just that and not an exclusive code, there is specific reference in the penultimate bullet point to "*misrepresentation during the pre-employment stage*". That is precisely what the Authority is satisfied happened in the present case, that is that Mr Jarvis misrepresented who his referees were in order to secure employment for himself.

[33] It follows that provided that the employer followed a fair process, it is available to the employer, in reliance on the contractual provisions, to dismiss on this basis. The fair process contemplated by the individual employment agreement

requires the employee to be provided with information about the aspects of concern and how serious it is, for there to be a formal meeting where the employee has the opportunity to take advice and be represented and to give the employee an opportunity to respond to the concern before any decision is taken. The Authority is satisfied that that process was followed in the present case and there was nothing in the evidence that would suggest otherwise.

[34] As the Authority has already noted, a subsidiary ground for the dismissal was the allegation that Mr Jarvis and/or his mother Ms Freeman had either abused or intimidated company personnel. Brookton Farm alleged that Mr Jarvis and Ms Freeman (who was his support person) had put unreasonable pressure on Mr Ford who was then the Manager of Brookton Farm to have him agree to new terms and conditions of employment to overcome Mr Jarvis's various complaints about conditions of work including the allegation that there had been an implied term of the agreement setting the staff ratio for the farm.

[35] Further, it was alleged by Brookton Farm that Ms Freeman had abused or intimidated Mr Hamilton who was the Managing Director of T H Enterprises Limited which owned Brookton Farm.

[36] The dismissal letter is short on specifics about the exact nature of the behaviour complained of, but the Authority thinks the allegations can be grouped under two heads. A general allegation of pressure, abuse or intimidation is to be contrasted with a threat to complain to the Department of Labour's Health and Safety Inspectorate unless a sum of "compensation" was paid.

[37] Neither of those allegations are themselves central to the basis of the dismissal, on the evidence which the Authority heard. However, they were referred to in the letter of dismissal and it is appropriate that they are commented on by the Authority. The claim that Ms Freeman dealt inappropriately with Mr Hamilton is not, in the Authority's opinion made out. Mr Hamilton complains that Ms Freeman contacted him obsessively especially by text message including at his daughter's overseas wedding. That may be discourteous, but it is certainly not, in the Authority's opinion, either intimidating or abusive. The Authority has reviewed the text messages which Mr Hamilton has put into evidence and considers that those messages may have been irritating, even disrespectful, but no more than that. After all, all Ms Freeman was endeavouring to do was to engage with Mr Hamilton, given that she had been

told by Mr Ford that he was no longer prepared or indeed able to resolve her son's personal grievance.

[38] As to the general complaint about intimidating and abusing Mr Ford, this allegation is based loosely on the behaviour of Mr Jarvis and Ms Freeman in confronting Mr Ford and trying to resolve Mr Jarvis's employment relationship problem. It may be that those discussions also were characterised by a lack of courtesy and it is certainly the case that Mr Ford told the Authority that he felt *cornered* by Mr Jarvis's behaviour. But the factual matrix suggests that Mr Ford dealt with the matter deftly enough once it became clear that he was not going to make any progress with Mr Jarvis and Ms Freeman. After the extraordinary events of 16 March 2009, when it seems that Mr Ford and Mr Jarvis entered into what amounted to shuttle diplomacy to try to get a basis on which Mr Jarvis would return to work, Mr Ford quickly referred the matter to the Operations Manager, Mr Kloppers and he dealt with the matter from thereon.

[39] Again, if this were the only basis for complaint, the Authority would not conclude that there were grounds for dismissal. However, the fundamental basis on which the dismissal rests (and this is clear from the factual matrix and in particular from the letter of dismissal), is that Mr Jarvis was dismissed because he misrepresented the relationship he had with his two primary referees. In consequence, the dismissal rests fairly and squarely on a ground in the employment agreement between the parties and as the Authority has already identified, it prefers the evidence of Brookton Farms on the events in question to the evidence put up by Mr Jarvis.

[40] That said, the Authority must deal with the other ground on which Brookton Farm say that the behaviour of Mr Jarvis and Ms Freeman was inappropriate. Brookton Farm say that Ms Freeman effectively tried to extort money from them by indicating, on two occasions that, unless Brookton Farm paid Mr Jarvis \$10,000 "compensation" she would lay a complaint with a Health and Safety Inspector about the alleged state of the farm. That "proposal" was, according to Brookton Farm firmly rejected and in the result a complaint to the Health and Safety Inspectorate was made, the substance of which is referred to in the next section of this determination.

[41] Mr Jarvis and Ms Freeman both deny any such threat was made but both Mr Ford and Mr Kloppers give separate evidence of the threat having been made and indeed, Mr Kloppers refers to the threat in his letter of 30 March 2009 which

confirms the summary dismissal. The Authority concludes that the threat was made, preferring the evidence of Brookton Farms to that offered by the applicant. On the face of it, the evidence suggests that the threat was made twice, once to Mr Ford alone and later at a disciplinary meeting which Mr Kloppers attended.

[42] In another jurisdiction, such a threat, if proved to the criminal standard, might ground a charge of extortion. For present purposes, it is enough for the Authority to observe that it is satisfied the threat was made and that fact, of itself, evidences a breach of good faith by Mr Jarvis through his advocate. Advocates must be very careful in their negotiating behaviour not to overstep the line by engaging in conduct which might attract criminal sanctions.

Does Mr Jarvis have other grounds for complaint?

[43] It will be remembered that Mr Jarvis advanced various other grounds for complaint against Brookton Farm like the failure to provide a safe workplace, misrepresentation at the time of engagement and breaches of implied and expressed terms of the employment agreement. For the avoidance of doubt, the Authority proposes to deal with each of these allegations separately and make findings.

[44] The failure to provide a safe workplace is, in the Authority's opinion, not made out. Mr Jarvis made a number of complaints during the very brief employment relationship and when he was unable to get satisfaction from Mr Ford, ultimately made a complaint to the Labour Department's Health and Safety Inspectorate. Contrary to the submission made on Mr Jarvis's behalf, the Authority is not persuaded that the Department of Labour's involvement vindicated Mr Jarvis's complaints. In fact, the Department of Labour's inspector made some suggestions to Brookton Farm and those suggestions were voluntarily accepted. No infringement notice was issued and the matter rested there.

[45] The allegation of a misrepresentation at the time of engagement relies on Mr Jarvis's contention that when employed, he was promised that the staff ratio would remain at five, the effect of which would have been that there were three staff working the farm at any one time. Mr Jarvis seeks to assert that he accepted the position on the basis of the asserted staff ratio. First, it is common ground that when Mr Jarvis was engaged, the staff ratio discussed was five, but subsequently, through

no fault of Brookton Farm, that ratio declined and, in consequence, Mr Jarvis was asked to work two of his rostered days off to assist.

[46] But in order to be successful with this claim, Mr Jarvis must successfully assert that the staff ratio clearly mentioned by Mr Ford at interview had become a term of the employment agreement in contradiction to the written terms of the employment agreement which were accepted and signed by both parties. Those written terms of the agreement include ... *reasonable additional hours, from time to time, as required by the employer*: clause 6.5 of the Individual Employment Agreement.

[47] Mr Jarvis has not satisfactorily demonstrated to the Authority that he entered into the employment because of Mr Ford's intimation that the staff ratio was five. On the contrary, the evidence suggests that Mr Jarvis was keen to obtain employment having just come back from Australia and there is no evidence, save for his own claim to that effect, that he relied on the staff ratio in deciding to accept the position and, to the converse, that he would not have accepted the position if it had been in his contemplation that the staff ratio would decline over time.

[48] The contention that Mr Jarvis has suffered breaches of terms of the employment agreement appears to comprise an allegation first that Brookton Farm has failed to provide a safe workplace (and that allegation has already been rejected by the Authority above) and second that Mr Jarvis was somehow entitled to four weeks notice of the termination of the employment. But that claim cannot be made out either because of course Mr Jarvis had his employment terminated summarily so Brookton Farm was not required to give notice.

Determination

[49] It follows from the foregoing analysis that Mr Jarvis's various claims are dismissed. The Authority is satisfied that a fair and reasonable employer would have dismissed Mr Jarvis after conducting a full enquiry in all the circumstances of the case. The Authority also considers that Mr Jarvis' behaviour was characterised by a lack of good faith.

Costs

[50] Costs are reserved.

James Crichton

Member of the Employment Relations Authority