

Background Facts and Evidence

[3] The evidence of Mr Pye is that around March 2008, he was approached by Mrs Milham. She indicated an interest in renting a cottage on the dairy farm owned by Blisland. Mr Pye told her that he didn't think the cottage was suitable for a family. Nonetheless, Mrs Milham came back the next day and confirmed she would rent the house. The Milhams moved in two days later. Mr Pye says that Mrs Milham told him that Mr Milham was going to work in the mines in Western Australia, but Mr Pye discovered that Mr Milham had been dismissed by a neighbour, after being arrested for growing cannabis plants. Mr Pye was not happy with the circumstances but consequently employed Mr Milham on a casual basis, so that he could earn some income to pay the rent. Mr Pye says that in late May 2008, he was requested to employ Mr Milham on a full time basis so that he could qualify for home detention relating to the cannabis related charges. Mr Milham commenced full time employment on 1st June 2008. Apart from one particular incident, the employment relationship appears to have been mutually satisfactory.

[4] The further evidence of Mr Pye is that Mr Milham milked the cows on 12th May 2009 and that Mr Pye; "*hadn't seen him since.*" Mr Pye says that Mr Milham "*had done a flit*" and his whereabouts were unknown. The evidence of Mr Milham is that he moved out of the farm cottage on 6th May 2009 and that; "*it took a couple of days.*" Mr Milham says that on his last day of working for Blisland, he went to Mr Pye's house but Mr Pye was "*at the beach.*" There is some conflict in the evidence as to when Mr Milham ceased working for Blisland and when he and his family moved out of the farm cottage, but the Authority is not required to determine this, given that there appears to be a difference of only about two days and this does not influence the monetary claims.

[5] Mr Milham says that he was not paid the two weeks' annual holiday pay that was due to him. Upon contacting Mr Pye, he was informed that he would not be paid the monies due, because damage had been done to the house. Mr Milham subsequently contacted a Labour Inspector and Ms Keightley consequently became involved.

The Claims

[6] Following a series of communications with Mr Pye, without a productive outcome, pursuant to her role under the Holidays Act 2003 and the Employment Relations Act 2000, the Labour Inspector now claims on behalf of Mr Milham, the following:

- (a) Two weeks' annual holiday pay, being a net sum of \$1,386.44.
- (b) Payment in lieu of working on Labour Day 2008, plus a half time component for working on that day, being a total net sum of \$219.28.
- (c) The half time component for working on Waitangi Day 2009 being the net sum of \$80. 68.

The total net sum claimed is \$1,686.40.

The Employer's Response

[7] Mr Pye does not totally deny that Mr Milham is owed the monies claimed² but points to his right to withhold same under the terms of the employment agreement signed on 1st June 2008. Clause 11 of the agreement provides for the payment of wages and deductions. Specifically at clause 11.5 it is provided that:

The Employee authorises the Employer to deduct any monies owed by the Employee to the Employer from any monies owed or accruing, to the Employee to the Employer. These monies include, but are not limited to:

- Monies owed under [the relevant] clauses 10.9, 21.3.

Clause 10.9 provides that:

The Employee is liable for damage arising from the Employee's action/inaction which is not attributable to fair wear and tear. The Employee agrees to deductions being made from their final wages to cover any such damage.

And at clause 21.3:

Upon termination of employment, the Employee shall return to the Employer, all property and equipment belonging to the Employer. The Employer may deduct the value of any such property not returned from any final payment owing.

[8] Mr Pye has produced a number of photographs of broken glass panels on interior and an exterior doors of the cottage, and a broken window (laundry), as well as broken glass in an external electricity meter box that has been replaced with plastic

² Mr Pye denies that Mr Milham is entitled to two weeks' annual holiday pay and says that Mr Milham took some annual leave.

or something similar. There are other photos of broken and cracked windows in a run down looking Toyota Corolla, that was used as a farm vehicle at times until it broke down. Mr Pye has also provided a quote from a local glazier for repairs to the cottage (\$619.69) and the car windows (\$1,139.50), a total of \$1,759.19. Finally, Mr Pye says that the Milhams took away four kitchen or dining room chairs when they left. Essentially, the position of Mr Pye is that all of the glass was broken, most probably, by Mr Milham's two sons and now this becomes the responsibility of Mr Milham (along with the removal of the chairs), hence Mr Pye says he is entitled to deduct recompense from monies owing to Mr Milham.

Analysis and Conclusions

[9] Upon the evidence of the damage to the glass panels in the cottage and the Toyota car, being canvassed with Mr Milham, at the investigation meeting, he gave clear and specific explanations for each photographic portrayal whilst explaining away any responsibility or liability on his part. Setting aside the damage to the car windows, I found his explanations to be quite consistent and reasonably credible, as was the converse evidence of Mr Pye. However, in regard to the broken car windows, I do not accept Mr Milham's explanation that the windows were broken by stones thrown up by a milk tanker. Equally, I do not accept, given the dilapidated condition of the car, that the price obtained for replacement windows is reasonable or realistic. Indeed, it appears that the car is probably past any meaningful use, even apart from the broken windows.

[10] While I have some reservations about the reliability of some of what Mr Milham had to say, I find that there is not sufficient evidence to show, on the balance of probabilities, that Mr Milham can be held accountable for the damage to the house. Unfortunately, there is no evidence in regard to the condition of the house prior to the Milhams moving in. Mr Milham's evidence, which was not challenged by Mr Pye, is that the house was in a dirty and poor condition when he arrived and it took several days to clean it up.³ Also, while it is possible that Mr Milham's sons were responsible for the damage to the car windows, this has not been proven and it is apparent that the vehicle is of very low value, probably a lot less than the quote for the replacement

³ There is also the evidence of the local real estate agent as to the poor condition the house was left in, but there is no provision in the employment agreement for a deduction from wages for this, apart from carpet cleaning, and this has not been claimed.

windows. Taken overall, while there are questions about whether or not some of the damage to both the house and the car was pre-existing, I find that there is insufficient proof regarding how any of the damage in question was caused, hence Mr Pye is not entitled to withhold payment from Mr Milham of the monies due to him. Furthermore, adequate wage and time records have not been compiled, or if they have, they have not been produced. Therefore, I am left with the calculations of the Labour Inspector as the only evidence of Mr Milham's entitlements. There remains the matter of the four chairs that were removed by Mr Milham from the farm cottage. While Mr Milham says that he understood that he was given a table and the chairs by Mr Pye, I conclude that this is probably not correct and that the chairs rightly belong to Mr Pye. Given the time that has elapsed during which Mr Milham and his family have had the use of the chairs, it is not an appropriate solution to have the chairs returned. Rather, Mr Pye is entitled to be reimbursed at a fair value for them, albeit judging from the photo provided of the table left in the cottage, the likely value would not be much.

Determination

[11] I find that because it is not proven that Mr Milham (or his family) were responsible for the damage caused to the cottage and the car, the employer is not entitled to withhold the monies due to Mr Milham. Blisland Dairies Limited is ordered to pay to Mr Milham, within 28 days of the date of this determination, the following sums:

- (a) Two weeks' annual holiday pay, being a net sum of \$1,386.44.
- (b) Payment in lieu of working on Labour Day 2008, plus a half time component for working on that day, being a total net sum of \$219.28.
- (c) The half time component for working on Waitangi Day 2009 being the net sum of \$80.68.

The total net sum due to Mr Milham is \$1,686.40.

The Labour Inspector has sought that interest should be paid on the above sum. The Authority has discretion to order that interest be paid,⁴ but given the overall circumstances of this matter I conclude that an order for interest is not appropriate.

[12] From the total net sum (above), Mr Pye is entitled to deduct the fair and reasonable value of the four chairs that Mr Milham took with him from the cottage.

⁴ Schedule 2, clause 11, Employment Relations Act 2000.

[13] The Labour Inspector has also sought that penalties should be awarded against Blisland for failing to provide wage and time records and for failing to comply with the Holidays Act. However, given the overall evidence, I conclude that it was not simply a matter of Blisland failing to comply with the Holidays Act. Rather, Mr Pye was exercising his arguable rights under the employment agreement to withhold monies due to damage being inflicted upon his property albeit it has not been proven, to a reliable degree, that Mr Milham is responsible for the damage in question. In the circumstances, I conclude that it is not appropriate to award a penalty. However, there is no good reason for the failure on the part of Blisland to compile and produce wage and time records as required under s.232 of the Employment Relations Act 2000 (“the Act”). Pursuant to s.232(4) of the Act, Blisland Dairies Limited is ordered to pay to the Employment Relations Authority, for the use of the Crown, the sum of \$200.

Costs

[14] Blisland Dairies Limited is ordered to pay to the Labour Inspector the sum of \$70 being the application fee paid to the Authority.

K J Anderson
Member of the Employment Relations Authority