New Zealand Employment Relations Authority Decisions

McLauchlan v Cook CA226/10 (Christchurch) [2010] NZERA 922 (8 December 2010)

Last Updated: 23 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 226/10 5302351

BETWEEN SHAN NAUGHTON

McLAUCHLAN Applicant

A N D WARNER ELLIOT COOK

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

James Crichton

Patrick O'Sullivan, Advocate for Applicant Scott Williamson, Counsel for Respondent

22 September 2010 at Invercargill

8 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McLauchlan) alleges that he was unjustifiably dismissed from his employment as a milk harvester by the respondent employer (Mr Cook).

[2] At the time that the employment relationship was first contemplated, Mr McLauchlan was living with his partner, Nicole Hansen, and both Mr McLauchlan and Ms Hansen made inquiries about the employment. They were interviewed in the first instance by Mr Geoffrey Stewart who made it clear that the employment offered at Mr Cook's farm was for a couple. The expectation was that Mr McLauchlan would attend to the milking and Ms Hansen would attend to calf rearing when the time in the season came for that requirement.

[3] Mr Stewart, while noting that Mr McLauchlan was a slight young man, relied on Mr McLauchlan's evidence that Mr McLauchlan had worked on a *thousand head* farm previously and therefore Mr Stewart considered that Mr McLauchlan must have the necessary experience to perform the role satisfactorily. It was clear from Mr Stewart's evidence that he also relied on Ms Hansen's advice that she had reared calves before and had a relevant qualification. Mr Stewart took careful notes of all his interactions and I thought him an absolutely honest and trustworthy witness.

[4] When the employment relationship came to begin to be performed, Ms Hansen and Mr McLauchlan were no longer together and accordingly Mr McLauchlan moved out to Mr Cook's farm alone. Mr Cook suffered a stroke 18 years ago and has some physical disability as a consequence. Accordingly, when the relevant employment agreement came to be prepared, Mr Cook and Mr McLauchlan sat down together and Mr McLauchlan wrote in to the standard Federated Farmers dairy farmer employment agreement the relevant information which Mr Cook dictated to him. Two employment agreements were prepared, one for each of them. An examination of the two documents shows that they are not identical but for the purposes

of the dispute between the parties, it is common ground that the particular issues in dispute are not further confused by differences between the two versions of the relevant employment agreement.

[5] Both versions of the employment agreement provide for a termination date of 24 August 2009. It appears that date was chosen by Mr Cook because it was four days before his farm traditionally started calving and he wanted to be in a position to either confirm Mr McLauchlan's employment on into the future or not, as the case may be, before the commencement of calving. The difficulties with this arrangement are several fold. First, Mr McLauchlan protests that he did not understand that his employment agreement was to terminate on that date (and potentially be renewed thereafter), and the evidence of Mr Cook tends to confirm that the matter was not actually discussed explicitly when the two men sat down to prepare the employment agreements.

[6] Furthermore, the notion that there be such a short term of employment is inconsistent with the evidence of Mr Stewart who plainly told both Ms Hansen and Mr McLauchlan that the expectations of the employer were for a long term commitment of perhaps one full dairy season or maybe two.

[7] Further and finally, the employment agreement prepared by Mr McLauchlan effectively taking dictation from Mr Cook has all sorts of provisions in it which presuppose the continuation of the employment relationship beyond 24 August. In particular, there is reference to activities taking place in September and under the heading *job description*, there are a variety of provisions which, of themselves, imply a continuation of the employment beyond 24 August. Furthermore, there are provisions in the hours of work clause which again imply that work will continue through the various seasons in the life of a dairy farm and not just in the pre-calving period.

[8] Mr Cook's evidence is that he put the finish date in, in that way because he regarded the arrangement as temporary until Ms Hansen was available and the two of them could engage together, at which point apparently, Mr Cook would have entered into a longer term. In the meantime, there had been difficulties between Mr McLauchlan and Ms Hansen in the house property provided by Mr Cook, the upshot of which was that Mr McLauchlan was charged by Police with assaulting Ms Hansen. Mr Cook was concerned about the alleged assault and purported to dismiss Mr McLauchlan immediately he heard of the events complained of from Ms Hansen and her mother. Mr Cook was encouraged to stay his hand by Mr McLauchlan and his mother.

[9] On 24 June 2009, which was shortly after the events just briefly referred to, Mr McLauchlan was told by Mr Cook and Mr Stewart that the employer would not be renewing his employment agreement. Mr McLauchlan's explicit evidence is that he thought that the effect of this announcement was that he would only work until the end of that season (that is, until what the dairy industry refers to as *gipsy day*, 1 June, the following year). In fact, of course, the effect of the advice conveyed to Mr McLauchlan was that he would finish up on 24 August. Mr McLauchlan is clear that he had no idea that his employment was coming to an end on 24 August until Mr Cook came to him on that day to explain to him that 24 August was in fact his last day of employment.

[10] Having been dismissed from his employment on that day in circumstances which he says surprised him, Mr McLauchlan sought advice and promptly raised a personal grievance.

Issues

[11] The Authority will need to consider the following issues in deciding this matter:

(a) The nature of the interview with Mr Stewart;
(b) The effect of the employment agreement drafted with Mr Cook;
(c) The effect (if any) of the assault;
(d) The meeting on 24 June 2009.

The nature of the interview with Mr Stewart

[12] I have already made clear my positive impression of Mr Stewart as a witness. He told me that he had for many years assisted Mr Cook in the operation of his dairy farm at Mataura Island and that he regularly conducted initial interviews with prospective staff. He conducted such an interview on 10 February 2009 with the applicant and his then partner, Ms Hansen. He recorded diary notes of the interview and those notes inform his brief of evidence.

[13] The essence of those notes was that Mr Cook was trying to fill two positions on the farm; the first for a male milk harvester and general farmhand and the second for a female rearing calves and attending to property maintenance around the staff house. As there was one staff house on the property, the two positions were ideally suited, in a practical sense, to a couple working together. Having said that, the work of the male staff member was full time and more or less continuous whereas the work of the female staff member was, so far as rearing calves was concerned, absolutely seasonal.

[14] Mr Stewart's notes record that he made clear that each employee would be subject to their own individual employment agreement and there were clear arrangements made for the occupation of the staff house.

[15] Mr McLauchlan made a number of assertions in respect of that initial interview with Mr Stewart which Mr Stewart did not agree with. While nothing turns on which view of the meeting is to be preferred, I am satisfied that Mr Stewart's recollection of the principal events is able to be relied upon.

The effect of the employment agreement drafted with Mr Cook

[16] It is common ground that Mr Cook wanted a fixed term agreement. Equally, it is accepted that the written employment agreement provides for termination on 24 August. However, Mr McLauchlan did not understand that this was his termination date; he thought this was a wage review date. Whatever the understanding of the parties, it is absolutely plain that insofar as the employer attempted to impose a fixed term agreement on the employee, he was in breach of s.66 of the Employment Relations Act 2000 in a number of significant respects. First, I am satisfied there was no meeting of the minds between employer and employee as is required by subsection (1) of that section. Second, I am satisfied that the provisions of subsection (2) have also not been complied with. Subsection (2) requires that there be *genuine reasons* for the employment to be fixed term and for the employee to be told that this is the position. Nor does the agreement comply with subsection (3) which provides, inter alia, that it is not a genuine reason to operate a fixed term agreement simply to establish the suitability of an employee for permanent employment. Nor has subsection (4) been complied with which requires a statement in writing in the employment agreement about the way the employment would end and why.

[17] It is plain then that this was a comprehensive breach of the law relating to fixed term agreements and I do not accept Mr Williamson's submission that the breach *could be regarded as a technical one;* it cannot be minimised in the way that Mr Williamson seeks to have me accept.

The effect (if any) of the assault

[18] It is common ground that Mr McLauchlan assaulted his partner, Ms Hansen, during June 2009. After a Court appearance relating to the assault, Mr McLauchlan was returned to the farm by his mother. She gave evidence before the Authority. I am satisfied her evidence on this aspect was truthful. She said that when they returned to the farm, Mr Cook was there and purported to sack Mr McLauchlan because of the assault incident, saying *it was in his contract if he hurt anyone.* Mrs McLauchlan's evidence is that she pointed out that her son, who at that point had not pleaded, was innocent until proven guilty and on that basis Mr Cook *backed off.* It follows that I am satisfied that up to that point anyway, there was no dismissal.

[19] Importantly, I am satisfied that Mr Cook made the decision to rescind his earlier intention to dismiss Mr McLauchlan, not because of anything Mr McLauchlan said, but because of what his mother, Mrs McLauchlan, said. She said, as I have just noted above, that in effect her son was entitled to the benefit of the doubt until the criminal proceeding was complete. The evidence before the Authority does not support Mr Williamson's contention in submissions that Mr Cook relied on an erroneous and dishonest claim by Mr McLauchlan; what Mr Cook relied upon, quite properly, was the representations made on Mr McLauchlan's behalf by his mother. For the avoidance of doubt, on this point I prefer the evidence of Mrs McLauchlan and her son, Mr McLauchlan, to the evidence of Mr Cook, although I am satisfied that Mr Cook was an honourable man whose recollections of this particular discussion were not perhaps as clear as they might have been.

The meeting on 24 June 2009

[20] The 24 June 2009 meeting followed within a few days of the events I have discussed in the previous section of this determination. It was a meeting involving Mr McLauchlan on the one hand together with Mr Cook and Mr Stewart on the other. That meeting simply advised Mr McLauchlan that his employment agreement *would not be renewed.* Mr Cook's basis for reaching this conclusion seems to have been twofold:

> (a) It was felt that Mr McLauchlan was not physically capable of the work required; and
> (b) The original basis of the engagement was effectively for a couple and given the difficulties in the relationship between Mr McLauchlan and Ms Hansen, that was no longer a possibility in the present case.

[21] It is absolutely evident from the evidence that the parties had different expectations of what a failure to renew the employment agreement meant in practical terms. For Mr Cook, it meant that the agreement came to an end on 24 August 2009 (two months after this meeting). For Mr McLauchlan, it was absolutely evident that he expected work until the end of the current season, that is 31 May 2010.

[22] Mr McLauchlan explained that the dairy industry effectively worked from 1 June (known as Gipsy day) to the following 31 May and his expectation of his employment agreement was that he would be employed until 31 May 2010. I am absolutely satisfied on the evidence that Mr McLauchlan never understood that his employment was to cease earlier than that date; the evidence is as plain as can be that on 24 August 2009 when Mr Cook told Mr McLauchlan that that was his last day, Mr McLauchlan was genuinely shocked and confused.

Determination

[23] I am satisfied on the evidence before the Authority that Mr McLauchlan was dismissed from his employment effective 24

August 2009, that that dismissal was unjustified on its facts for reasons I have already made clear, and Mr McLauchlan has therefore satisfied the Authority that he has a personal grievance by reason of having been unjustifiably dismissed. This was a situation where the employer, Mr Cook, sincerely believed that he had employed Mr McLauchlan on a fixed term engagement terminating on 24 August 2009, but the legal requirements for such a fixed term engagement were, none of them, satisfied and thus the employment was open ended. As a matter of fact, the evidence is plain that Mr McLauchlan never understood that he was at risk of losing his employment on 24 August 2009; he thought the earliest his employment could come to an end was 31 May 2010, being the end of the dairy season year. There simply was no meeting of minds on the issue of the fixed term, nor had there been any compliance with any of the other strict requirements of the law concerning a fixed term engagement.

[24] The meeting which activated the dismissal took place on 24 June 2009 and that meeting relied on alleged performance deficits and an alleged failure to deliver employment services as a couple.

[25] While arguing that the breach of s.66 of the Act was *technical,* which submission the Authority wholeheartedly rejects, Mr Williamson for Mr Cook accepts that *Mr Cook could not terminate the contract in this fashion.* In other words, it is accepted that the termination of the employment was unjustified.

[26] Mr Williamson goes on to suggest that Mr McLauchlan has suffered no harm because he should have been dismissed in June 2009 when he assaulted Ms Hansen. Mr Williamson contends that Mr McLauchlan was not dismissed then (in June 2009), because he denied the assault. That submission is not supported by the evidence. The evidence supports the conclusion that the reason that Mr McLauchlan was not dismissed in June was because his mother pointed out that he had yet to be convicted of the assault, a fact which was demonstrably true and which Mr Cook quite properly relied upon to resile from his earlier intention to dismiss. There is simply nothing to suggest that Mr Cook relied on any statement from Mr McLauchlan himself as to whether there was or was not an assault. It follows that Mr Williamson's contention that any loss accruing to Mr McLauchlan must effectively be set-off against the fact that he has obtained an extra two months' employment entirely without justification, cannot be accepted.

[27] I also note for the sake of completeness Mr O'Sullivan's claim that Mr Williamson produced the submission I have just referred to by a sleight of hand having previously accepted in a telephone conference that the only issue in play in the substantive investigation meeting was the question of whether the individual employment agreement *was fixed term or not.* Mr O' Sullivan is quite correct that that was the basis on which the investigation meeting proceeded, but he was equally correct to leave it to the Authority to deal with the submission on its face.

[28] Having established the existence of a personal grievance by reason of an unjustified dismissal, I must consider whether the employee, Mr McLauchlan, has contributed by his behaviour to the facts giving rise to the grievance. I am satisfied that Mr McLauchlan has not contributed at all to the facts giving rise to the grievance. This is because I am satisfied on the evidence that the difficulties between Mr McLauchlan and Ms Hansen formed no part whatever of the employer's decision to dismiss Mr McLauchlan. It is true that Mr Cook **might** have dismissed Mr McLauchlan under the terms of the agreement for the assault, but the facts are clear that he did not. He purported to dismiss him on 24 August 2009 based on allegations about poor performance and allegations about failure to remain part of a couple. Aside entirely from the complete failure of the employer to apply the law correctly in respect of fixed term engagements, the whole dismissal was characterised by a want of process and even a lack of clarity, Mr McLauchlan believing that he had tenure until 31 May 2010. None of that is the fault of Mr McLauchlan; he is entitled to the normal remedies without contribution being a factor.

[29] It is evident on the evidence before the Authority that Mr McLauchlan was shocked and distressed by the dismissal and effectively, to use a colloquialism, had his life turned upside down by its effect. He is entitled to have that remedied.

[30] I direct that Mr Cook is to pay to Mr McLauchlan the following amounts to remedy the grievance:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $5,000;
(b) A contribution to wages lost in the sum of $7,995 gross;

(c) Reimbursement of the Authority's $70 filing fee.

[31] I note that these awards are significantly less than those claimed on Mr McLauchlan's behalf. The claimed figures, for a personal grievance of this kind, far exceed the Authority's jurisprudence. Of course, the Authority has a discretion, but as always, chooses to exercise it conservatively and in accordance with principle. In particular, a claim for compensation of $15,000 would place this case within a select band of one or two other cases in any year before the Authority; notwithstanding Mr McLauchlan's hurt, which is accepted, the case does not deserve a response of that magnitude. Nor is there justification for considering lost earnings and lost benefits for a total of 37 weeks as claimed; the usual rule is 13 weeks which, pursuant to s.128(2), is a mandatory requirement but the discretion to exceed that sum is provided in subsection (3). That discretion is exercised in accordance with principle. This is not a case where, in the Authority's view, anything justifies an exceptional award.

Costs

[32] Costs are reserved.

James Crichton
Member of the Employment Relations Authority
