

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jess Lawrence Mulligan (Applicant)
AND Phil Kelly (Respondent)
REPRESENTATIVES Hamish Russ, Advocate for Applicant
Keri Kereru, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 22 November 2005
DATE OF DETERMINATION 28 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jess Mulligan says he was unjustifiably dismissed from his employment as a farm manager by the respondent. He further claims breaches of their individual employment agreement in that Mr Kelly failed to provide the cattle beast agreed, withdrew grazing for the applicant's 10 heifers and failed to pay the bonus agreed.

[2] Mr Mulligan says he was not paid wages and holiday pay, was owed money for power related to the business which he paid because some buildings were metered through the house the applicant occupied, and that while on ACC, the respondent charged him for rental on the house.

[3] The respondent rejects Mr Mulligan's claim of unjustified dismissal. He says the agreement was frustrated by the inability of the applicant to complete the season due to ongoing injury and ill health. Mr Kelly accepts that he has not provided the cattle beast, says that the withdrawal of grazing was due to the persistent failure of Mr Mulligan to contain his personal stock securely, and that the bonus was not paid as the farm failed to meet the agreed target of 78,000 units of milk solids. Mr Kelly accepts that he owes the applicant some money for power, but says that he has been unable to establish how much as the applicant has the accounts for the dwelling.

A brief history

[4] The applicant started his employment on 1 June 2003 under the terms of a written individual employment agreement which was for the 2003-2004 season. At his request, the respondent granted him a week's paid leave to have a break after moving from his previous position.

[5] There was an incident around 3 August 2003 when the applicant says he had planned a weekend away before calving began and had to cancel as the respondent insisted that 3 August was the agreed start date for calving. Mr Mulligan says he had no option but to cancel and was shocked by this incident.

[6] The applicant says that the relationship deteriorated seriously around 3 August 2003 over the quality of feed provided for his heifers. He also complained to the respondent about the age of some of the farm machinery he was expected to use. The applicant says Mr Kelly became verbally abusive and that he (Mr Mulligan) became more and more defensive. He says the tension grew and most of this centred around the heifers. He says an argument on 3 September 2003 over this issue got out of hand and that Mr Kelly grabbed him by the shirt collar while continuing to abuse him. Once able to loosen Mr Kelly's grip on his shirt, the applicant walked away with, he says, Mr Kelly continuing to verbally abuse him. So shaken by the incident was the applicant, that he went to a doctor who put him on stress leave for 10 days.

[7] Mr Kelly says there had been persistent problems with the heifers not being contained and that he had raised this matter several times with the applicant and he documented this in a letter he left in the applicant's letterbox on 10 September 2003. Mr Kelly says that in spite of his advising the applicant the heifers still continued to break out onto the road.

[8] The applicant says that Mr Kelly approached him around 20 September 2003 and told him that Mr Kelly had organised to graze the heifers at a contract grazier and that they would be trucked down to the farm in question within a few days. He says in his evidence:

I thought it sounded promising at the time, that he was going to pay someone to graze my heifers and fulfil his part of the agreement. The heifers were loaded and trucked down the road on 22 September 2003 which was all sorted by Phil. The next I heard was when I was given the bill for \$50 to cart them down the road and the first grazing bill from the contract grazier. I approached Phil about this and Phil said it was my issue. After some talk at one stage he came around to agree to pay for it all, but Phil in the end just continued to flip flop on the issue and in 2004 got his story set that he wasn't going to pay for any of it.

[9] A further matter arose between the parties when, on 14 January 2004, the applicant had an accident in the milking shed when he was kicked in the elbow by a cow. On 21 January, after the injury was worsening with ongoing work, the applicant approached his GP who signed him off for a week to rest the elbow. On 28 January he was given a further two weeks on ACC and was permitted to return to work on light duties on 8 February. At the time he was still receiving physiotherapy to his elbow and was told to undertake no heavy or repetitive tasks. The applicant says when he went back to Mr Kelly, Mr Kelly made light of the matter and had the applicant carry on with tasks the applicant says were not light duties. These included ongoing milking with no extra assistance. The applicant was particularly incensed when Mr Kelly insisted he dig a 5 metre trench for a water pipe by hand. He says he finished the trench and did the afternoon milking that day.

[10] The following day, 10 February 2004, the applicant says that Mr Kelly approached him and told him he was suspended without pay until he was fit and had a doctor sign off a full medical clearance to return to perform all tasks required of him. The applicant says that his employer then told him that he was to go onto ACC and that he was also expecting the applicant and his wife to pay him \$100 a week in rent for the time he was unable to work. The applicant says he disputed this at the time.

[11] It is clear from the evidence put before the Authority that there were serious communication difficulties between the applicant and the respondent. On 8 February 2004, Mr Kelly wrote to the applicant and his wife stating that

*Due to change in farm policy, your services for next season will not be required. We wish you well for the future, your contact [sic] ends on the 31st May 2004, or earlier if you wish by negotiation. As with any contract that ends, I require your house to be vacated by midday 1 June 2004, and to be in a clean and tidy condition ie; lawns mown, gardens weeded, hedge trimmed and the house carpets cleaned by a recognised carpet cleaning business. All tools etc that have been borrowed, returned.
Dairy bonus, or money owing to you will be paid on the satisfactory completion of these tasks, I am available to discuss anything you are not sure about.
Yours sincerely*

P M Kelly

This letter was hand delivered on 9 February 2004.

[12] The following day, Mr Kelly again wrote to the applicant and his wife. In it he writes:

*Dear Jess,
After discussing the condition of the borrowed hay rake with you, and the damage sustained to my tractor due to it not being greased, as you six weeks ago assured me it had, I have no choice but to issue you with this written warning, explaining to you that this abuse of my equipment is unacceptable to me and cannot be tolerated, your employment is at risk.*

[13] After raising issues of maintenance of various aspects of the farm equipment, the letter goes on:

*Following the discussion we had on 28 1 04 where you admitted to me that you where [sic] only doing the management role to half of your ability, as your employer I am suggesting to you to rethink this carefully and to complete your job description.
Yours sincerely,
P M Kelly*

This letter was also delivered on 9 February 2004.

[14] On 10 February 2004, Mr Kelly again wrote to the applicant:

*Dear Jess,
In regard to your elbow injury, I am unfortunately placed in the position of having to suspend you from all farming duties until a full medical clearance is given.
Because of the nature of the job and the repetitive [sic] nature of the work and the fact that you are on pain killers, I believe your injury will not heal and may in fact cause more damage. Your job remains available until the end of the season, hopefully your recovery is a quick one.
Your next step would be to contact ACC and because ACC will now be paying your wages, the farm will now be charging you rent at \$100 per week starting from tomorrow 11 2 04.
Yours sincerely,
P M Kelly*

[15] On 12 March 2004, Mr Kelly wrote to the applicant again. His letter is as follows:

Dear Jess,

Due to your ongoing injury, you are now unable to continue to complete your job obligations, and I have no choice but to terminate your employment effective from 9 3 04.

I take it from your lack of response that the job I offered Jacqui to milk evenings only in lieu of rent has not been excepted, [sic] and the only option I now have is to ask you to vacate your house by the 25th of March 2004.

Failure to do this will result in \$60/day rental charge. As previously discussed the house carpets are to be professionally cleaned, an a/c to verify this is necessary, lawns mowed and hedges trimmed, all property belonging to the farm returned and any a/c not paid or job not completed will result in deductions from your final pay, I will add that I am disappointed with your attitude towards me and your continual lack of communication, if these conditions are not met satisfactorily I will not hesitate to seek court assistance.

Yours sincerely,

P M Kelly

The issues

[16] The respondent has conceded that he owes Mr Mulligan the cattle beast that formed part of the agreement and money for power. I will return to these later. This leaves the following issues to be determined by the Authority:

- Was the applicant unjustifiably dismissed; and
- Was the withdrawal of the grazing in breach of the agreement; and
- Was declining to pay the applicant the bonus a breach of the agreement; and
- Was the respondent entitled to charge rent on the house while the applicant was receiving ACC; and
- What, if any, remedies are due to the applicant?

The investigation meeting

[17] At the investigation meeting, which took a little over 3½ hours, I was assisted by both the applicant and the respondent. Both were cooperative and each behaved respectfully towards the other in spite of the very different views they held.

[18] The Authority records its appreciation for the assistance of Ms Kereru and Mr Russ for maintaining their focus on key issues of the case.

Analysis and discussion

[19] The letter of 12 March 2004 clearly establishes that this is a case in which an actual dismissal took place. In defending its decision to dismiss, the employer essentially relies on two defences. In his submission, the respondent says *That the applicant was justifiably dismissed on the basis of there being no trust or confidence due to a combination of illness, injury and lack of communication by the applicant, and that the contract had become frustrated.*

[20] The difficulty the respondent faces in proffering the lack of trust and confidence in the applicant is Mr Kelly's letter of 10 February 2004 in which he states *Your job remains available until the end of the season, hopefully your recovery is a quick one*. From this it appears abundantly clear that even in the circumstances at that point, Mr Kelly was prepared to keep Mr Mulligan employed until 31 May 2004. This is hardly consistent with a dismissal based on lack of trust and confidence. I am also reassured in this view by Mr Kelly's evidence at the meeting and when questioned by the Authority on his reasons for the suspension, he replied *Because I needed a full medical clearance. Until I got the four month medical message that's what stuffed it*. I think it likely that Mr Kelly viewed the prolonged period over which the applicant would be on ACC as the final straw. However, up to that point, there seems no ground, in spite of the difficulties between the pair, for deciding to dismiss Mr Mulligan on the basis of trust and confidence.

[21] Turning now to the matter of frustration of contract, the Authority notes the stringent procedural requirements when an employer is considering dismissal on the basis of an injury sustained in the employee's employment. There is no need to traverse the extensive case law relating to injury or illness as in this particular case there was no evidence that Mr Kelly, who had already advised Mr Mulligan in writing that the agreement would come to an end on 31 May 2004, was considering summary termination in the light of the possibly prolonged absence of the applicant. It appears to me that, having advised the applicant on 10 February 2004 that his job remained available to the end of the season, Mr Kelly's dismissal letter of 12 March 2004, without discussions in the light of the new information on the injury, does not meet the requirements of procedural fairness.

[22] Clearly, the grazing issue was a major bone of contention between the parties during the period of employment. At the time the individual employment agreement was signed by the parties, a further page was added and dated 20 April 2003.

[23] One paragraph reads *I agree to pay Jess Mulligan who is employed as farm manager for a 12 month period commencing from 1 June 2003 an annual wage of gross \$45,000 and a \$5,000 bonus for production achieved above 110,000 milk solids*. The second paragraph reads *I have also agreed to Jess grazing 10 heifer replacements at no cost to himself however these animals remain his responsibility and the farm takes no responsibility for deaths/illness or similar*.

[24] It is very clear from the second paragraph of this appendix to the agreement that the applicant was to receive grazing for 10 heifers *at no cost to himself*. That undertaking by the employer is moderated by the clause *however these animals remain his responsibility*. In looking at the evidence before the Authority, it is fairly clear that Mr Kelly made no prior firm agreement with the applicant as regards the payment for grazing these heifers off the respondent's farm. It is also clear from the evidence that it was Mr Kelly who organised the transport and the location at which the grazing was to take place. I need to consider that evidence but also need to take into account the question of whether Mr Mulligan kept his part of the bargain by ensuring that his stock were well restrained at all times.

[25] This appendix also refers to the terms under which the bonus for production will be paid. Clearly this is for the season's production as is customary within the industry. The respondent says he declined to pay the applicant the bonus because the target of 110,000 milk solids was not achieved. The applicant argues that that may well have been so at the time of his dismissal, but that in the ensuing weeks prior to the end of the season, the target of milk solids was in fact exceeded. The question the Authority has to determine is first whether Mr Mulligan is entitled to any bonus and secondly, if so, what is owed to him. The failure to pay may arise from some confusion on Mr Kelly's part. It is in breach of the agreement. However, rather than impose a penalty, I will deal with this issue in the section on remedies.

[26] Addressing the issue of the rent charged by the respondent on the dwelling during the period the applicant was receiving accident compensation, the period of ACC was 21 January to 9 February 2004 when the applicant was cleared for light duties. This is a period of three weeks. From the evidence, it is clear that the respondent sought \$100 a week for rent, and the applicant's evidence states that he disputed this at the time. The applicant's submissions do not make a claim relating to this specific matter, but do claim the sum of \$1,950 (*15 weeks rent paid when evicted*) for reimbursement. This appears to be the period post-termination when the applicant and his family needed to find alternative accommodation.

[27] Returning to the respondent's defences of lack of trust and confidence in the applicant and frustration of contract, the letter written by Mr Kelly to the applicant on 10 February 2004 deals a rather fatal blow to both. In that letter, Mr Kelly wrote *Your job remains available until the end of the season*.

[28] On 12 March 2004, Mr Kelly summarily dismissed Mr Mulligan stating *Due to your ongoing injury, you are now unable to continue to complete your job obligations, and I have no choice but to terminate your employment effective from the 9 3 04*. It strains credibility for the respondent to assure the applicant that his job remained available until 31 May 2004 and dismiss him some four weeks later and then claim that the reason for the dismissal was his loss of trust and confidence in his employee. Apart from the relatively regular sniping which appears to have taken place between the parties, there is no evidence of a performance evaluation being formally undertaken by Mr Kelly in relation to Mr Mulligan.

[29] I think it is clear from the dismissal letter that Mr Kelly was attempting to dismiss Mr Mulligan on the basis he could not complete the contract as set out in the agreement, and therefore believed he was justified in dismissing on the grounds of frustration.

[30] Where illness or injury occurs which prevents an employee from returning to work, the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time. The employer must have substantive reasons for the dismissal to show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer to take such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated. It is significant in this particular case that, having reassured the applicant of the availability of his position, Mr Mulligan was not warned that his position was at risk before the final decision to dismiss was made by Mr Kelly.

[31] Another significant aspect of this case is that in fact apart from the three weeks previously on ACC, the length of Mr Mulligan's absence was not determined and it appears Mr Kelly made no inquiries of the applicant's GP before handing Mr Mulligan the notice of dismissal. It might have been that Mr Kelly may have been able to call a halt to the contractual arrangements between the pair, but Mr Mulligan needed to be fairly warned that Mr Kelly's view expressed in his letter of 10 February 2004 had changed.

The determination

[32] I find that the applicant was unjustifiably dismissed by the respondent.

[33] I find the withdrawal of the grazing was in breach of the agreement. However, I also find that the failure by Mr Mulligan to contain his stock as required needs to be taken into account in determining remedies on this matter.

[34] I find that the respondent's declining to pay the applicant the bonus is a breach of the agreement.

[35] I find the respondent was entitled to charge the applicant rent on the house while the applicant was receiving accident compensation but only for the three week period referred to above in this determination.

[36] I now turn to the remedies which are due to the applicant.

Remedies

[37] Having considered the matters at issue, I make the following orders:

- (A) **The respondent is to pay the applicant the sum of \$7,000 compensation pursuant to s.123(1)(c) of the Employment Relations Act 2000 in respect of the unjustified dismissal.**
- (B) **The respondent is to pay the applicant the sum of \$1,300 for the rent incurred by the applicant after eviction from the farm dwelling until 31 May 2004.**
- (C) **The respondent is pay the applicant rent in the sum of \$300 in respect of the period from 20 February to 12 March 2004.**
- (D) **The respondent is to pay the applicant the sum of \$450 in lieu of the provision of the cattle beast.**
- (E) **The respondent is to pay the applicant the sum of \$4,122 in respect of the grazing account (reduced by 33.3% from \$6,179.92 for contribution by the applicant).**
- (F) **The respondent is to pay the applicant the sum of \$4,038.30 being the pro rata sum due as the milk solids bonus, that is 42 weeks @ \$96.15.**
- (G) **The respondent is to pay the applicant the sum of \$387.97 gross being the wages unpaid between 8-10 January 2004 and deducted in breach of the Wages Protection Act.**
- (H) **The respondent is to pay the applicant the sum of \$600 in respect of reimbursement of the power used by the farm but metered through the house.**
- (I) **Finally, pursuant to s.11 of the Second Schedule to the Employment Relations Act 2000, I order in respect of the above orders (D), (F) and (G) the applicant is to be paid interest at the rate of 9% per annum from 1 June 2004 until the date of payment of the sums.**

[38] For the avoidance of doubt, I decline to award penalties.

Costs

[39] Costs are reserved.

Paul Montgomery
Member of Employment Relations Authority