IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 195
5545784

	BETWEEN	TARAS NATALENKO Applicant
	A N D	NATHAN HOGG AND KATY GRIFFIN Respondents

Member of Authority:	Christine Hickey
Representatives:	Kirsten Maclean, Counsel for the Applicant David Carruthers, Counsel for the Respondents
Investigation Meeting:	22 October 2015 in Hokitika conducted with the assistance of an interpreter
Submissions Received:	At the investigation meeting
Date of Determination:	11 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Taras Natalenko was employed on a working visa to work at the respondents' dairy farm near Hokitika. His visa was for one year although Mr Hogg and Ms Griffin hoped that he would stay with them for two years.

[2] Mr Natalenko claims that he was unjustifiably disadvantaged in his employment by the respondents' unreasonable denial of parental leave and sick leave. He also alleges that he was unjustifiably disadvantaged by being discriminated against in his employment on the basis of his ethnic or national origins. He claims that the respondents bullied and intimidated him, and unreasonably required him to remain working on 19 and 20 January when his wife's labour was to be induced on 19 January 2015.

[3] By way of remedy Mr Natalenko claims compensation of $30,000 and legal costs associated with making this claim.

[4] Mr Natalenko also wished to have an apology from the respondents to him and his family for the way they have been treated. I do not have the jurisdiction to order an apology. However, I note that in the respondents' evidence Ms Griffin acknowledges that her post-employment emails were inappropriate and regrets having sent them. She was also remorseful at the investigation meeting.

[5] The respondents deny that Mr Natalenko was unjustifiably disadvantaged in his employment. They deny that they discriminated against Mr Natalenko on the basis of his ethnic or national origins. They also deny allegations of bullying and intimidation made by Mr Natalenko and that he was unjustifiably denied any leave related to the birth and the neo-natal care that his daughter required.

Determination

[6] In Ms Maclean's submissions and in some of the evidence given at the investigation meeting a number of matters that were not raised in the statement of problem were referred to. The following alleged examples of unjustified disadvantage were not included in the statement of problem and were raised for the first time in submissions. That means the respondents were unable to answer these allegations, and I am not able to consider them:

- Unsatisfactory process followed during the disciplinary process;
- Undue and unjustified threats of "further action" in a written warning and flaws in the written warning in that it was unjustified and without time limit;
- Threats that the applicant was going to lose his job.

[7] There are two further matters that I cannot consider as claims for unjustified disadvantage because they occurred after the employment relationship was over and therefore could not have caused Mr Natalenko to suffer a personal grievance of unjustified disadvantage **in** his employment:

- Unlawful deductions to the applicant's final pay. In any event, the correct payments have now been made.

- The emails sent by Ms Griffin on 4 March 2015.

[8] Originally there appeared to be a claim that the respondents had unreasonably refused Mr Natalenko leave on 26 January to go and spend more time in Christchurch with his family. That was not pursued at the investigation meeting.

[9] I was ably assisted by a Russian-English interpreter at the investigation meeting. Mr Natalenko's comprehension and command of English is very good but as is usual in proceedings of this kind certain technical legal language and the level of emotion at times meant he was better able to understand questions and evidence and to express himself in his first language.

The issues

[10] The Authority needs to determine whether:

a. any of the respondents' actions disadvantaged Mr Natalenko in his employment; and, if so,

b. whether the actions were unjustified and/or;

c. whether Mr Natalenko was discriminated against in his employment on the basis of his ethnic or national origins; and if so,

d. What remedies could be due, considering any contribution.

Events leading up to the claims

[11] Mr Natalenko was employed by the respondents from 5 June 2014 on a written individual employment agreement (IEA). He came to New Zealand specifically to work on the respondents' farm. He is a Ukrainian national and qualified veterinarian with dairy farming experience in Denmark and the Ukraine. Mrs Natalenko joined Mr Natalenko in New Zealand in October 2014.

[12] The parties agree that the working relationship was very positive to start with. Mr Hogg and Ms Griffin say that it remained so until near the very end. However, Mr Natalenko says in around October to mid November 2014 the relationship had become more difficult.

[13] On 11 November 2014 the respondents raised a number of concerns about Mr Natalenko's ability to follow their instructions, for example, of what time to do certain tasks, and held a disciplinary meeting with him. The result of the disciplinary meeting was a formal written warning issued on 16 November.

[14] At the investigation meeting Mr Natalenko said that generally speaking the allegations made against him were correct although he does not consider that the times included in some of the allegations were accurate. He says he admitted that he had made a number of mistakes. He said that the way the formal written warning was expressed to him meant that he believed he was being threatened with his employment being terminated in the event that he made a further mistake of the kind that had been outlined in the 11 November letter. He did not think that was fair.

[15] There are also some post-employment events which give context to the atmosphere and feeling that existed between the parties after the end of the employment relationship and that remained at the investigation meeting.

[16] Mr Hogg and Ms Griffin paid Mr Natalenko's final pay but withheld some amounts for cleaning the house vacated by Mr Natalenko and his family ($414.00), mowing the lawn ($97.75) and the cost of cancellation of herd testing that had been pre-booked and due to occur while Mr Natalenko was working out his notice period ($337.50). The withheld pay was eventually paid to Mr Natalenko and does not form part of my investigation.

[17] Mr Natalenko sent an email to the respondents on 4 March 2015 notifying them that he had requested a mediation meeting. As part of that email he noted that, amongst his other claims, he would be seeking compensation for:

> *… the non-allowance of Sick Leave / Parental Leave when my Wife gave birth and the subsequent admittance of the baby to the Special Care Facility at Christchurch Hospital.*

[18] Ms Griffin sent two response emails directly to Mr Natalenko, on the same day after she received that email, one simply read *You Cunt!!!* and the other read *Fuck off to your own country!!*

[19] It was only after this exchange that the monies that had been withheld from Mr Natalenko's pay were paid to him.

[20] To prove that he was unjustifiably disadvantaged Mr Natalenko first has to prove that a term or condition of his employment, in its widest sense and not restricted to written contractual terms, has been affected to his disadvantage. If he does, the respondents need to prove that what they did was justified.

[21] Section 103A of the Employment Relations Act 2000 contains the test I need to apply to consider whether Mr Natalenko was unjustifiably disadvantaged in his employment. I need to assess, on an objective basis, whether what the respondents did in each case, and how they did it, were what fair and reasonable employers could do in all the circumstances of the case at the time the action/s occurred.

Was Mr Natalenko unjustifiably disadvantaged in his employment by a failure to grant him leave on 19 and 20 January 2015?

[22] Mr Hogg and Ms Griffin were aware that Mr and Mrs Natalenko's first child had a due date of 5 January 2015. With that in mind, prior to Christmas they suggested to Mr Natalenko that he could take annual leave between 5 and 15 January. Both parties hoped that that would coincide with the birth of the baby.

[23] However, by the time Mr Natalenko returned to work on 16 January Sophia had not been born. Ms Griffin's evidence is that she saw Mr and Mrs Natalenko in the grocery store just before the end of Mr Natalenko's leave in January and they told her if the baby had not been born by then the labour would be induced on 15 January 2015.

[24] Mr Natalenko disagrees they would have told Ms Griffin the date of 15 January 2014. Instead, Mr Natalenko says that it was only on 17 January the doctor decided that Mrs Natalenko's labour would be induced on 19 January.

[25] On 17 January Ms Griffin told Mr Natalenko that she and Mr Hogg were taking a small holiday off the farm and had booked to go away on 19 and 20 January. Mr Natalenko protested and told her that 19 January was the day Mrs Natalenko's labour was being induced and he wished to take more time off to be with his wife and support her during labour. Ms Griffin told Mr Natalenko that that was not possible. She also told him that if he wanted to take parental leave he had to apply for it in advance and should have done so in writing. There was no further discussion about the issue.

[26] Ms Griffin and Mr Hogg left the farm for Nelson on 19 January where they had pre-paid for accommodation and had tickets to watch the Black Caps playing. They returned on 21 January.

[27] Mr Natalenko says that it was unreasonable of the respondents to effectively ensure that his wife would be left alone during her labour in hospital as they knew that she and Mr Natalenko did not have any family in New Zealand. He worked his usual hours on the farm on 19 and 20 January and after work went to spend time with his wife in hospital. On 20 January he arrived in time for Sophia's birth.

[28] The respondents and Mr Natalenko worked together on 22 January, the respondents having returned to the farm on 21 January. Neither Mr Hogg nor Ms Griffin asked about whether the baby had been born or how Mrs Natalenko was faring. Mr Natalenko did not tell them that Sophia had been born or give any details about this significant event in his life.

[29] On 21 January, the hospital staff told Mr and Mrs Natalenko that Mrs Natalenko and Sophia would be transferred to Christchurch Hospital on 22 January where Sophia was admitted into the neo-natal intensive care unit (NICU). It was discovered that Sophia had a cleft palate and needed special care to enable her to feed. Mr Natalenko had three rostered days of leave on 23, 24 and 25 January and spent those in Christchurch with his family. He came back to work on 26 January as rostered.

[30] The duty of good faith in employment relationships is mutual. Employers and employees are obliged to act in good faith:

> *The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be* ***active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative****; and …*

[31] Mr Natalenko says that he told Ms Griffin on the same day that he found out, that is, as soon as possible that Mrs Natalenko's labour would be induced in two days' time and he wished to take further time off to be with her from 19 January.

[32] Mr Natalenko returned to work on 16 January. Neither Ms Griffin nor Mr Hogg enquired about Mrs Natalenko or whether the baby had been born. This appears to show that despite Ms Griffin and Mr Hogg's evidence that the relationship between them and Mr Natalenko was a positive one all was not entirely well. It seems highly unusual for an employer not to enquire how such a significant event in Mr Natalenko's life had gone, or was proceeding, especially when by Ms Griffin's evidence she understood the labour to have been induced the day before.

[33] Equally Mr Natalenko did not tell Mr Hogg or Ms Griffin either the day before he was due back at work or on 16 January when he returned to work that labour had not commenced and that they would hear on the 17th when labour would be induced, if it did not start naturally before then, and that he wished to take further leave.

[34] By that time neither party was as communicative with each other as would have been ideal. However, neither party had breached their duty of good faith.

[35] However, clause 22 of the IEA provides that Mr Natalenko's parental leave entitlements would be in accordance with the Parental Leave and Employment Protection Act 1987 (PLEPA).

[36] PLEPA provides that an employee in Mr Natalenko's circumstances was eligible for a week of unpaid partner's or paternity leave.[1] That leave could have commenced on the date of Mrs Natalenko's labour or another claimed or agreed date.[2] However, there are strict notice obligations on an employee who wishes to take such leave and they would have had to be complied with before the respondents would have been obliged to grant such leave. Mr Natalenko was obliged to apply in writing for leave under s 31 of PLEPA, and to include:

> *(i) a certificate or a copy of a certificate from a medical practitioner or a midwife certifying that the woman named in the certificate is pregnant and stating the expected date of delivery; and*
>
> *(ii) a written assurance from the woman named in the medical certificate that the employee is her spouse or partner and that the employee intends to assume care of the child to be born to her.*

[37] I reject Ms Maclean's suggestion that the respondents were bound to try and get cover for Mr Natalenko at such short notice. It was not reasonable to expect the respondents to cancel their holiday either.

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[1] Sections 17(c)(ii) and 19 of PLEPA.
[2] Sections 21 and 22 of PLEPA.

[38] Mr Natalenko did not give the required notice. In the absence of him following the process set down in PLEPA, I do not find that there was a breach of any duty owed to Mr Natalenko by the respondents in relation to their refusal of leave on 19 and 20 January.

[39] Mr Hogg and Ms Griffin's refusal to cancel their holiday and allow Mr Natalenko to spend time with Mrs Natalenko while she was in hospital seems harsh to Mr Natalenko but I am unable to conclude the refusal was in breach of the respondent's duty of good faith or was not something a fair and reasonable employer could have done in all the circumstances at the time. This claim is dismissed.

Was Mr Natalenko unjustifiably disadvantaged in his employment by a refusal to grant him sick leave?

[40] The respondents both say that they were unaware that Mrs Natalenko and Sophia were in hospital in Christchurch when Mr Natalenko returned to work on 26 January. In fact, they say they remained unaware of anything to do with Sophia's birth until the evening of 2 February in the evening when Mr Natalenko rang and asked for half a day of sick leave the following day. He spoke to Mr Hogg. Mr Hogg says that he asked Mr Natalenko if he was unwell. Mr Natalenko replied that he was not unwell but that he had a sick baby. He asked for the time off to go to Hokitika airport to pick up Sophia and his wife because they had to be readmitted to Greymouth Hospital within about an hour of their flight arriving. The health system was not providing transport for Mrs Natalenko and Sophia from the airport to the hospital.

[41] Mr Natalenko says that he had already asked for the time off earlier in the day as annual leave. He says that Mr Hogg had refused him half a day's leave when they spoke during the day. Mr Hogg agrees that he did refuse half a day of annual leave because Mr Natalenko had already had so much annual leave in January.

[42] Mr Natalenko says that when he finished work for the day he went home and read his IEA and realised that clause 20.3 allowed him to use sick leave when *a person who depends on the employee for care is sick or injured.*

[43] Mr Hogg, Ms Griffin and Mr Natalenko agree that during the first telephone call Mr Hogg told Mr Natalenko could not have sick leave because in his view the baby relied on Mrs Natalenko for care and not on Mr Natalenko. Mr Hogg says he

knew nothing about the type of illness Sophia had and initially thought Mrs Natalenko would adequately be able to care for her. Mr Natalenko then told him he needed to pick them up from the airport and take them back to Greymouth Hospital.

[44] After the phone call Mr Hogg and Ms Griffin discussed the matter and telephoned Mr Natalenko back. They told him that he could leave work an hour early the following day to pick up his family from the airport. However, Mr Hogg and Ms Griffin requested that Mr Natalenko supply a medical certificate providing proof of his baby's illness. Mr Natalenko did that and the certificate is dated the following day, 3 February. I will come back to this.

[45] The respondents did not deduct any pay or any leave from Mr Natalenko for having left work an hour early on 2 February.

[46] Mr Natalenko says that he spent that night in hospital with his family. He returned to work the next morning, with the requested medical certificate.

[47] Mr Hogg's initial response during the day to deny Mr Natalenko half a day of annual leave the very next day was not unreasonable in the circumstances. He did not know why Mr Natalenko wanted the leave at that stage and he did not have any other employee cover for Mr Natalenko's work the following day. Nor was that refusal in breach of any of Mr Natalenko's terms or conditions of employment. Mr Natalenko was not disadvantaged by that refusal.

[48] Mr Hogg's refusal over the phone to grant Mr Natalenko half a day of sick leave the next day once he knew of the fact that Sophia was unwell was harsh and if that is how the situation remained I may have concluded that Mr Natalenko was disadvantaged. However, on reflection the respondents changed their mind and allowed Mr Natalenko to leave an hour early, with no deduction of time or money, to pick up his family and take them to Greymouth Hospital. Mr Natalenko did not suffer any disadvantage in his employment from the initial refusal to allow him to take a half a day's sick leave. The situation was appropriately resolved. This claim is dismissed.

[49] There is no claim that Mr Hogg and Ms Griffin unjustifiably disadvantaged Mr Natalenko by requiring him to produce a medical certificate to prove that Sophia and her mother were in hospital. Therefore, I cannot consider a personal grievance based on this. However, I note that Mr Hogg and Ms Griffin were not entitled to demand Mr Natalenko provide them with a medical certificate confirming that his

wife and daughter were in hospital. Clause 20.6 of the IEA allows the employer to require the employee to provide proof of sickness or injury, including by requesting a medical certificate, only in the absence from work on sick leave for a consecutive period of three days or more.

Was Mr Natalenko unjustifiably disadvantaged by the respondents' failure to provide the required notice of termination of the tenancy and their only allowing less than half an hour for the Applicant to vacate the premises?

[50] Sometime during the period after 19 January but before 22 January Mr Natalenko told the respondents that he did not intend to remain working on their farm for the next season. By this stage he had had some discussions with the neighbouring farmer, probably beginning on Christmas Day 2014, about whether he might move to work for her when another worker, who was a friend of his, left her farm in March 2015.

[51] Mr Natalenko's evidence is that after the refusals to allow him to take time off on 19 and 20 January he decided he definitely would go and work on the neighbouring farm. On 29 January 2015 Mr Natalenko gave his written resignation which recognised that he needed to give four weeks' notice in line with his individual employment agreement. Mr Natalenko says that at that time he did intend to give four weeks' notice and to continue working out during that notice period. Indeed his letter of resignation finishes with:

> *If I can be of any assistance during this transition, please let me know.*

[52] However, Mr Natalenko says that in the evening of 16 February 2015 he received a call from his immigration adviser who told him Immigration NZ had approved the changes to his working visa to transfer to the neighbouring farm with the result that he was now no longer able to work for the respondents. Mr Natalenko's evidence is that he believed that if he continued to work out his notice period he would be breaking the law. He did not want to do that or to act against Immigration NZ in any way because he and his family hope to apply for New Zealand residency when they are eligible to do that. Therefore, on 17 February Mr Natalenko told Mr Hogg that very day would be his last day of work.

[53] Mr Hogg and Ms Griffin were upset about the fact that Mr Natalenko was not going to work out his notice period. Towards the end of the day Mr Hogg and

Mr Natalenko met on a track at the farm and Mr Natalenko asked for a couple of extra days to be able to move out of the accommodation. Mr Hogg did not want to give him any further time in the accommodation and said *no you should be out by 6 pm and bring me back the key.* By this stage Mr Hogg says it was slightly after 5.30 pm. Mr Natalenko says it was already 5.45 pm. I find it was sometime between 5.35 and 5.45 pm. Mr Natalenko said *well that does not give me much time you should perhaps come and take the key from me* and they agreed that that would happen.

[54] Mr Natalenko's evidence is that Mr Hogg also said *if you don't get all your belongings out of the house by six o'clock I will take them out and put them on the side of the road.*

[55] Mr Hogg denies that and says that he told Mr Natalenko that if he did not have all his goods off the premises by 6 pm he should take them and put them out on the roadside so he could come back for them later.

[56] Mr Hogg's explanation for the difference in recall of the two men is that the message may have been *lost in translation* but says he did not threaten to put Mr Natalenko's family's belongings on the roadside.

[57] Mr Hogg says that Mr Natalenko finally got his last belongings out of the house by 6.30pm and that Mr Hogg had been waiting outside between 6pm and 6.30pm for this happen and the keys were given back.

[58] Clause 15.7 of the IEA provides that the tenancy ends on the termination of employment. Clauses 15.8 and 15.9 provide that the employee is generally entitled to 14 days' notice of termination of the tenancy, notice commencing no later than 14 days before the termination of the employment relationship.

[59] Under clause 15.10 the employer may provide less than 14 days' notice to vacate in two specific circumstances. Neither of them applies in this case.

[60] In reliance on the end date of 25 February 2015, in Mr Natalenko's written resignation, Mr Hogg and Ms Griffin should have given him 14 days' written notice of the termination of the tenancy, including the date on which he was required to vacate the tenancy. So that notice should have been given at the latest on 10 February, to allow 14 clear days of notice. That was not done and therefore the respondents have breached clause 15 of the IEA.

[61] Under clauses 23 and 24.1 Mr Natalenko was required to provide four weeks written notice of termination of his employment. Mr Natalenko did this initially but then only worked for 20 days, a little under 3 weeks. He breached clause 24.1 of the IEA.

[62] Both parties initially relied on the fact that Mr Natalenko's employment would end at the end of the working day on 25 February 2015. Both parties were entitled to consider that the tenancy would end as at the date the employment ended. Mr Natalenko brought that date forward.

[63] Mr Hogg did originally give an unreasonably short time, of less than half an hour, for clearing out the premises. Even if I found disadvantage to Mr Natalenko in that comment it was of a fleeting nature and greatly contributed to by his leaving that day without working out his notice period. I accept that Mr Natalenko believed he was legally precluded from continuing to work for the respondents, however; he did not take reasonable steps to check the correctness of that view and did not take any steps to work out how he could work out his notice period and not leave the respondents in the lurch. For example, he did not contact Immigration NZ to ask if he could be allowed work out his notice period.

[64] Both parties breached the employment agreement when it came to the termination of employment and the termination of the tenancy. Neither of them should have done so. In my view, that is where things should lie.

Was Mr Natalenko discriminated against on the basis of his ethnic or national origin?

[65] Ms Griffin's explanation for her two offensive emails is that she had been disappointed with Mr Natalenko for leaving when they had gone to so much trouble to recruit him from the Ukraine, angry that he did not work out his notice period and angry about him going to work for their neighbour. In addition, she read the words *and the subsequent admittance of the baby to the Special Care Facility* as an allegation that she and Mr Hogg had somehow caused that. Of course, that was not at all what Mr Natalenko intended.

[66] There were clear difficulties between the parties after the first few months. Perhaps cultural differences and different mother tongues contributed to those difficulties. However, Mr Natalenko's suspicion of discrimination happened

particularly because of Ms Griffin's second offensive email, and I can understand why Mr Natalenko suspected discrimination.

[67] Ms Griffin and Mr Hogg vehemently deny that their treatment of Mr Natalenko was in any way because of discrimination against him because of his ethnic or national origins. They say that they cannot have discriminated against Mr Natalenko because, knowing where he was from, they facilitated his coming to New Zealand to work for them and they were hospitable to him and to Mrs Natalenko.

[68] I accept that Mr Natalenko was engaged in the full knowledge that he was from the Ukraine. There is no claim that Mr Natalenko was discriminated against at or near the beginning of this employment.

[69] The respondents were disappointed that Mr Natalenko's dairying experience and knowledge was not directly transferrable to New Zealand and was different from the way they managed the farm and the herd. However, there is no evidence whatsoever that the respondents subjected Mr Natalenko to any detriment in his employment in circumstances in which another employee employed by them on work of the same description as Mr Natalenko would not be subjected to such detriment. That is what would be required under s 104(1)(a) of the Act to prove discrimination. The only evidence of any negative reference to Mr Natalenko's country or place of origin alluding to his ethnic or national origin was Ms Griffin's post-employment, offensive email telling him to go back to his own country. The claim of discrimination is not proved and I dismiss it.

Costs

[70] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[71] The parties are invited to agree on the matter. In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is $3,500. The investigation meeting lasted most of a day**.**

[72] If no agreement is reached any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in

which to file and serve a memorandum in reply. The parties should identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority