

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Bruce Newland (applicant)
AND	Waewaepa Station 2002 Limited (respondent)
REPRESENTATIVES	Andrew Gallie for the applicant Peter Lindström for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION MEETING	Napier, 12 May 2005
DATE OF DETERMINATION	18 May 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Bruce Newland says he was actually or constructively dismissed by the Company – statement of problem received on 14 March 2005. He seeks reimbursement for salary and related benefits to him (to be specified in the event of his claim succeeding), compensation for humiliation, etc amended on the day of the investigation from \$20,000 (as set out in his statement) to \$10,000, and costs.

2. The Company denies the allegations – statement in reply received on 31 March.
3. The parties underwent mediation in respect of this employment relationship problem but it remained unresolved.
4. Agreement was reached on a one-day investigation in Napier on 12 May. The parties also attempted to settle this matter on their own terms during the investigation but were unsuccessful.

Relevant Chronology

5. The respondent operates a farm. Its two directors and part-owners are Messrs Shaun Currie and Bob McVitty.
6. Mr Newland commenced employment with the Company as a stock manager on 1 July 2002. During his employment his role evolved into that of a farm manager.
7. Mr Newland's terms and conditions of employment were not set out in a written employment agreement.
8. Mr Newland agrees that, on 14 April 2004, an incident occurred between himself and another employee, and that he was spoken to about it by his manager, Mr Shaun Currie. The applicant disputes Mr Currie's claim that he was given a verbal warning in respect of this incident.
9. On 11 November another incident took place involving Mr Newland and the same employee. The applicant did not report the incident to Mr Currie but the other employee did. Mr Newland says the Mr Currie came to his house on the evening of the following day, 12 November, and said *"I'm going to have to give you a written warning. (The other employee) has made a complaint. He reckons you threatened him"*. Mr Currie agrees he saw the applicant but says that he only asked why he had not told him of the incident, required that he put his account in writing and said they would meet the following day to discuss the matter.

10. The two men met on the following day, 12 November. Mr Newland provided Mr Currie with his written account. It was agreed that Mr Newland would continue to be stood down on pay while the matter was investigated. In the meanwhile Mr Currie sought statements from those who had witnessed the 11 November incident.
11. In a letter dated 15 November Mr Currie gave the applicant 48 hours notice of the next meeting, advice of what the meeting was about, that a final written warning or dismissal could be one of the outcomes and that Mr Newland was entitled to be represented.
12. The parties met on 18 November. Present were the applicant and Messrs Currie and McVitty. A discussion ensued about the 11 November incident and a review of Mr Newland's position.
13. On the 19th of November Mr Newland received a letter of the same date which, amongst other things, placed the applicant under a final written warning. It concluded with the words,

"We have considered your request to redefine your role away from the livestock to the development and better utilization of the farm. As such you will concentrate on"
14. Mr Newland says the letter caused him enormous distress. He went on sick leave (from 23 November) and also sought legal advice. By way of a letter dated either 25 (the date on his counsel, Mr Andrew Gallie's, copy) or 30 November (the date of the copy received by the Company) Mr Newland personal grievance was communicated to the respondent. In it Mr Newland alleged that the issuing of the written warning and the decision to reassign his duties were unjustified and disadvantaged him.
15. On 28 November Mr Newland moved his dogs off the Company's property. On 1 December he packed up his belongings and commenced working on another property.
16. Mr Newland confirmed he commenced paid casual employment elsewhere from 5 January 2005.

17. Mediation between the parties took place on 18 January.

Mr Newland's Claim

18. Two fundamental claims are advanced on the applicant's behalf, in support of his claim that he was unjustifiably disadvantaged and constructively dismissed:

- a. Firstly, the final warning was unjustified because it was predetermined; and
- b. The company unilaterally, and substantially, reduced his job content and responsibilities, in breach of the parties' employment agreement, to the extent that it caused Mr Newland to resign: *Auckland Shop Employees IUOW v Woolworths* (1985) ERNZ Sel Cas 136 (CA).

Discussion and Findings

19. Mr Newland's first claim requires a credibility finding: did Mr Currie say he was going to issue a warning, before he had heard the applicant's account of events and before the Company had carried out an investigation?
20. Or did, as Mr Lindström argues in the alternative, the respondent subsequently correct the situation by ensuring there was a fair investigation into the incident involving Mr Newland and the other employee on 10 November?
21. The second allegation also involves a credibility finding, as the Company says it acted to change Mr Newland's duties only after obtaining his agreement during the meeting of 18 November. Mr Newland disputes that claim.
22. In respect of the second allegation, the Authority must also undertake an objective evaluation of the respondent's conduct, to measure if it was likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer: *Malik v Bank of Credit and Commerce International SA* [1999] 3 All ER 1.

23. I find against Mr Newland's version of events, and in favour of the Company's version, for the following reasons:

Predetermination

24. My difficulty in reaching a credibility finding in respect of what was said on 11 November is that I find no reason to favour one man's account over that of the other: Mr Newland and Mr Currie are equally credible. Instead, I prefer to adopt the alternate approach advocated by Mr Lindström, that an initial procedural defect (which is not admitted in this instance) can be cured: *Rankin v A-G (no.2)* [2001] ERNZ 476, 527.
25. In the event that Mr Currie did, as the applicant claims, advise the latter he 'would have to issue a warning', I am satisfied the process subsequently adopted by the Company – as reflected in the witness statements and minutes of the 18 November meeting (attached to the statement in reply) – put any predetermination to right. The Company's records make it clear that, after hearing from the witnesses (the applicant included) it had good reason to conclude an ugly and unacceptable incident had occurred for which the applicant was in part to blame. It was therefore open to the respondent, fairly and reasonably, to issue – as it did – both Mr Newland and the other employee with a final written warning. That conclusion was reached by the two directors. The effect of Mr McVitty's involvement is significant, as there is no suggestion that he acted unfairly or unreasonably. He can therefore be relied on to have corrected any shortcomings in the process to date. I find the applicant suffered no unjustifiable disadvantage as a consequence of the Company's overall approach.

Unilateral Variation

26. Mr Newland does not accept he asked the Company "*to redefine (his) role away from the livestock to the development and better utilization of the farm*" (Company's letter of 19 November 2004). The parties do agree that, at the 18 November meeting, there was discussion about Mr Newland's duties and responsibilities. Mr Newland gave strong and clear evidence that, from his perspective that, because of significant growth arising out of the Company increasing its farmland, changes were required to communications, time management and planning.

27. At odds with the likelihood of the applicant's claim of what was discussed, and that the Company's subsequent decision amounted to a significant unilateral reassignment of his duties, is the fact that,
- a. His duties had never been set out in writing;
 - b. They had changed during the applicant's two-years' employment; and
 - c. Mr Newland (as he confirmed to the investigation) asked at the meeting on 18 November that his job be reviewed and roles redefined.
28. In the event that the change of duties set out Company's letter of 19 November was, as Mr Newland claims, inaccurate and a simplification of what had been discussed, such as to amount to a "*draconian*" redefining of it, I am satisfied that his resignation was any way not reasonably foreseeable. That is because the decision is only very generally stated and because it cannot be seen as immutable. Good relations largely prevailed between the parties. Clear and constructive communication remained available. Because of his request for a review, and because of these positive communications, it is reasonable to expect Mr Newland to have attempted to explore, from his perspective, the possibility of serious misunderstanding and/or miscommunication, before he took the serious step of finishing his employment. Relations between the parties could not be said to be such that ongoing, constructive communication was no longer possible.
29. As it happened, Mr Newland's personal grievance advice of either 25 or 30 November raised only claims of unjustified disadvantage. Constructive dismissal was identified only as an option in the event that his employment relationship problems were not resolved. Mr Newland cannot be said to have attempted to resolve those problems. No further communication appears to have occurred between the parties until they underwent mediation on 18 January 2005. By that time Mr Newland had elected to seek work, albeit casual, elsewhere. A balance of probabilities finding tilts toward the finding that the applicant elected to leave his employment for reasons other than those set out above.

30. I am therefore satisfied that, looked at objectively and in all the circumstances, the employer's actions were not of sufficient seriousness to warrant Mr Newland's termination action: *Wellington Clerical Workers IUOW v Greenwich* (1983) ERNZ Sel Cas 95 and *Malik* (above).

Determination

31. For the reasons set out above I find against Bruce Newland's claims that he was unjustifiably disadvantaged and constructively dismissed by the respondent, Waewaepa Station 2002 Limited.
32. Costs are reserved.

Denis Asher

Member of Employment Relations Authority