

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 55
5301043

BETWEEN DAVID KYLE PILLIDGE
Applicant

AND PAUL GERARD BYRNE &
LEANNE MARGART BYRNE
Respondents

5316586

AND BETWEEN VANYA CHERIE YOUNG
Applicant

AND PAUL GERARD BYRNE &
LEANNE MARGART BYRNE
Respondents

Member of Authority: Philip Cheyne

Representatives: Teresa Lawrence, Counsel for Applicants
David Jackson, Counsel for Respondents

Investigation Meeting: 1 December 2011 at Oamaru

Determination: 2 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Pillidge and Vanya Young are partners. Paul & Leanne Byrne operate as sharemilkers on a farm at Glenavy. Mr Pillidge worked for Paul & Leanne Byrne as a milker from September 2007. Ms Young also worked for Paul & Leanne Byrne as a milker but from December 2007. Their employment ended when they resigned on 13 November 2009 in circumstances they say amount to constructive dismissal.

[2] There are some disputes about the circumstances of the resignations and other aspects of the employment which must be investigated in order to resolve these personal grievance claims.

[3] While Mr Pillidge and Ms Young were employed separately and have lodged separate statements of problem, the circumstances of the claims overlap. There was one consolidated investigation meeting and it is convenient to resolve the claims by this single determination.

Terms of employment

[4] There are signed written employment agreements based on the Federated Farmers printed individual employment agreement. The printed form for both reads:

3.0 *TERMS OF AGREEMENT*

3.1 *Commencement of Agreement*

This Agreement shall come into force on the (day) of (month) (year)

(This section for fixed term agreements only)

3.2 *Fixed Term of Employment*

A fixed term Agreement may only be used if the Employer has genuine business reasons based on reasonable grounds for offering the position for a fixed term. All of 3.2 must be completed prior to commencing employment if the parties intend the employment to be for a fixed period, rather than permanent employment.

3.2.2 *This agreement shall terminate on the (date)*

OR

3.2.3 *on the occurrence of the following event:*

3.2.4 *The position is for a fixed term because:*

[5] Mr Pillidge's agreement includes in hand writing *11 September 2007* as the commencement date, *COMPLETION OF THE MILKING SEASON* at clause 3.2.3 and *IT IS A MILKING ONLY POSITION* at clause 3.2.4. Mr Byrne and Mr Pillidge signed the agreement on 12 September 2007.

[6] Ms Young's agreement includes in hand writing *15 December 2007* as the commencement date, *COMPLETION OF THE MILKING SEASON* at clause 3.2.3 and *IT IS A SEASONAL POSITION AS IS A MILKING ONLY POSITION* at clause 3.2.4. Mr Byrne and Ms Young signed the agreement on 15 December 2007.

[7] The milking season runs from about August until about May. At the end of the first season (May 2008) Mr Pillidge and Ms Young stayed on but did different tasks for

June and July before resuming milking duties in about August 2008. This arrangement was not documented. They ceased work at the end of the second season in about May 2009 and resumed work again in about August 2009. It is common ground that the resumption followed Mrs Byrne receiving a text from Mr Pillidge saying:

Yeah we are keen to get back to work just let us know what time you want us there.

[8] No further written employment agreement was prepared or signed regarding the employment from August 2009 onwards.

[9] As lodged with the Authority Mr Pillidge's and Ms Young's problems concern the termination of their employment. The statements of problem include no complaints about the validity of the fixed terms. However, in the evidence there is a complaint about the seasonal lay-offs in May 2009. Mr Byrne's evidence is that he offered Mr Pillidge a fulltime farm job at the time instead of the milking position. Mr Pillidge and Ms Young have a different perspective on that. They say that they were asked to do some farm work and live in a farm house and told that one of them might lose their job if they did not agree to do some farm work. They declined to do any farm work. Mr Pillidge says that they were then given two weeks notice of the seasonal layoffs in about May 2009. The difficulty with raising this issue now is that no grievance about it was raised with the respondents within 90 days of the layoff. It is not a matter that the Authority can adjudicate on now.

[10] The employment involved morning and afternoon milkings working eleven days on followed by three days off. Mr Pillidge was experienced but Ms Young had almost no prior milking experience.

[11] It is common ground that both employees were good workers although Mr Byrne says that occasionally small issues arose which he spoke to Mr Pillidge and/or Ms Young about at the time. Mr Pillidge and Ms Young describe this as *nit-picking* and *bullying*. No-one made any notes of any issues at the time and the *nit-picking* and *bullying* of Mr Pillidge and Ms Young is alleged to have happened after other employees had finished up so was not witnessed by others. I am left to assess matters based on the conflicting evidence of the parties.

The resignations – Friday 13 November 2009

[12] Friday 13 November 2009 would otherwise have been the start of their three rostered days off but Mr Pillidge and Ms Young had to do the morning milking to make up for some earlier time off. Mr Byrne was there because he was selecting cows to be drafted out for AI. There are different accounts of the relevant events.

[13] In an affidavit Mr Pillidge says that he saw Mr Byrne yelling at Ms Young about not hitting the cows with her hand, that later in the morning Mr Byrne accused Ms Young of making the cows pass excessive excrement and that Mr Byrne kept picking on Ms Young until she left the shed crying. Mr Pillidge then left as well, being unable to put up with Mr Byrne's bullying. Ms Young rang Mr Byrne later that afternoon to say that neither of them would be back to work for him.

[14] In his oral evidence Mr Pillidge told me that Mr Byrne told him to go outside and see Ms Young. He then returned to the cowshed and told Mr Byrne that he was going but did not at that point say anything about resigning.

[15] In an affidavit Ms Young says that Mr Byrne started yelling at her and accusing her of hitting the cows with her hand. Later in the morning Mr Byrne accused her and Mr Pillidge of making the cows pass excessive excrement by saying *move* rather than *pack up* which agitated the cows. Soon after, Mr Byrne yelled something entirely different at the cows. Ms Young says that Mr Byrne continued to *nit-pick* her to the point that she could not take it any more and she walked out of the cowshed crying. Mr Byrne followed her to the car and told her to go back and milk the cows. Ms Young refused and told him that she had had enough. Mr Byrne told her she was *Full of shit* and went back to the milking shed. Mr Pillidge came out to the car then told Mr Byrne he was leaving too. Later that afternoon Ms Young rang and told Mr Byrne that neither she nor Mr Pillidge would be back to work for him.

[16] In her oral evidence Ms Byrne told me that she was working with her MP3 player going, that Mr Byrne came up to her and accused her of hitting cows on their udders and causing them to shit more. Ms Young chose to ignore Mr Byrne and carry on with her work although she did look at him. Mr Byrne came back to her saying *Have you got something to say Vanya?* He asked her about her attitude. Ms Young's

evidence is that *On that day I did [have something to say]. I quit, that's what I had to say!* Her evidence is that she said she had had enough of this, that there was maybe a five minute exchange of words between them, that she cannot recall now what he was saying, that she did not really have time to listen to what he had to say, that she was angry and had a lot of emotions that morning and that she walked off.

[17] Mr Pillidge and Ms Young made some notes sometime after this incident for the purposes of getting legal advice. The relevant part reads:

Paul had said a couple of things to Vanya, she ignored him and just continued to work, Paul spoke up twice more accusing me of hitting the cows with my hand saying the cows were shitting because of me saying "move" instead of "Push up". Paul & Vanya exchanged words and Vanya ended up walking out of the shed in tears. Vanya went to her car where her 10 year old son was, Paul followed her to the car, Told her to get back in the shed & milk "his" cows. She said "No" I've had enough, Paul & Vanya exchanged words again, Vanya was told by Paul she was full of Shit and Paul walked back into the shed.

[18] Mr Byrne gave evidence that he noticed Ms Young hitting the cows on the udder so he suggested she stop hitting them and instead call them on so they would enter the dairy better and not shit so much. His evidence is that he also spoke to Ms Young about using the instruction *packup* which the cows understood rather than *move* so as to not agitate them. His evidence is that when he spoke to Ms Young about these matters she got upset and angry. She yelled at him and left the shed. Mr Byrne could not leave the shed immediately but he rang his son to come and help. He then went out to the car to see Ms Young intending to calm things down but ended up getting further abused by her. He returned to the shed, contacted his wife for further assistance with the milking and suggested to Mr Pillidge that he should go out and see Ms Young. Mr Pillidge did so. He returned soon after and said they were going home but also said he would be back the next day. Mr Byrne did not materially depart from this account when questioned.

[19] Mr Pillidge and Ms Young in their note, Ms Young in her oral evidence and Mr Byrne in his evidence say that there was an exchange of words between Ms Young and Mr Byrne before Ms Byrne left the shed. I accept that as the probable sequence of events. Mr Byrne in his evidence might be understating his tone but he did not do anything at that time to warrant the strong reaction he got from Ms Young. She regarded the instructions as *nit picking* or similar but Mr Byrne was entitled to give such instructions even if he did not always comply personally (as is part of Ms Young's

complaint). If Ms Young had an issue with inconsistency or the manner of the instruction she should have raised it properly with Mr Byrne.

[20] There is a dispute in the evidence about whether Mr Byrne immediately followed Ms Young out to the car (Ms Young's evidence); or rang to get his son to come and assist with the milking and went out to the car once his son arrived (Mr Byrne's evidence). It is not necessary to resolve that point. It is however common ground that there was an exchange between them at the car with Mr Byrne asking (his evidence) or telling (her evidence) Ms Young to go back to work. Ms Young made it clear that her employment was at an end. After the exchange at the car Mr Byrne told Mr Pillidge to go and see if Ms Young was alright. Mr Pillidge did that. He returned soon after and told Mr Byrne that they were going home. It is common ground that Mr Pillidge did not communicate his own resignation at that time. Mr Pillidge and Ms Young left together.

[21] Later that day Ms Young rang and told Mr Byrne that they were both resigning and to pay them their final pay and holiday pay. Ms Young's resignation was not a surprise because she had made it clear earlier that day that she no longer would be working for Mr Byrne. Mr Byrne was surprised about Mr Pillidge's resignation communicated via Ms Young and he did not want to accept it. He rang to speak to Mr Pillidge later that evening and again on 17 November 2009 but had to leave a message both times. Mr Pillidge did not return Mr Byrne's messages. As requested Mr & Mrs Byrne paid the final pays to Mr Pillidge and Ms Young.

[22] Next, Mr and Mrs Byrne received a letter dated 17 December 2009 from solicitors acting for Mr Pillidge and Ms Young raising a personal grievance of constructive dismissal. The factual basis of the claims as described in the letter is as follows:

*Unreasonable demands and expectations were placed on Mr Pillidge and Ms Young such that they were not able to achieve what you expected of them....
...you have behaved in an insulting and abusive manner towards Mr Pillidge and Ms Young. As an example, we record that on one occasion you told Ms Young that she was "full of shit", further examples include you threatening Ms Young with further disciplinary warnings where none were due, nit-picking comments around noise in the shed and rarking up the cows (in circumstances where you and others were the culprits) physical intimidation towards Vania.*

Constructive dismissal

[23] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. There is no persuasive evidence that Mr Byrne gave any ultimatum or intended to coerce Mr Pillidge or Ms Young into resigning. Only the third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[24] Before turning to what caused the resignations I should first refer to some of the evidence of earlier events.

Earlier events

[25] There is evidence from Mr Pillidge that, on one occasion, Ms Young told Mr Byrne that if he did not start treating them better they would take further action against him. Ms Young's evidence is that there were many occasions when both she and Mr Pillidge told Mr Byrne that they would take him to court if he did not start treating them better. These claims lack specificity but relate to the working relationship prior to the 2009 seasonal layoff.

[26] There is a complaint that Mr Byrne tried to change the employment agreements in pen following an exchange between him and Mr Pillidge and Ms Young about their

entitlement to days in lieu if they worked on a statutory holiday. The changes were apparently intended to avoid this statutory obligation. At the investigation meeting counsel for the respondents provided the original signed and initialled agreements. There are lines through some clauses in the agreements which could have been placed there after signing. However, Mr Pillidge and Ms Young told me in evidence that they either had a paid holiday on statutory holidays or if they worked statutory days they were paid time and a half and received an alternative holiday. If Mr Byrne did attempt to make any change to the employment agreements he nonetheless complied with his legal obligations. This issue also seems to relate to the working relationship prior to the 2009 seasonal layoff.

[27] Mr Pillidge and Ms Young both looked for other work leading up to and during the seasonal layoff in May 2009. They were not able to find any other suitable employment.

[28] Shortly after the commencement of the 2009 season Ms Young again told Mr Byrne that there was no need to speak to anyone in the manner he did and that they would take further action if he did not stop mistreating them. That was because the working environment had become extremely tense according to Ms Young. Neither Ms Young nor Mr Pillidge told me specifically what it was that caused this exchange. To generalise it appears that Ms Young and Mr Pillidge were unhappy with Mr Byrne's tone and manner directed at them once other employees had left.

[29] It was usually Ms Young's job to control the change over between the herds. In about September 2009 there was an incident where the cows were let out of the milking shed into the wrong paddock. Mr Byrne started yelling when he saw what was happening. When he came into the yard Mr Byrne accused Ms Young of letting the cows out into the wrong paddock, shouting at her. Ms Young's evidence, which I accept, is that Mr Byrne flew into a rage shouting and swearing. Her evidence is that she felt intimidated and backed away from him. However, Ms Young impresses as a person well able to stand up for herself. She was no doubt angry at the time for being blamed but I do not accept that she felt intimidated. On that occasion it was Mr Byrne who had done the change over but had not put the chain across. In evidence Mr Byrne appeared somewhat sheepish about this incident. It seems that he wrongly blamed Ms Young for the incident.

[30] On 12 November 2009 Mr Byrne spoke to Mr Pillidge about the need to keep cups clean during milking. Mr Pillidge did not mention this in his evidence. It was of course a reasonable instruction.

[31] From Mr Byrne's evidence there were occasions when he felt the need to instruct or admonish both Mr Pillidge and Ms Young concerning relatively minor matters connected with the proper performance of their duties. Ms Young saw this as Mr Byrne needlessly picking on Mr Pillidge. Ms Young also thought that Mr Pillidge should stand up for himself in these situations and she was critical of him (away from Mr Byrne's hearing) for not doing so.

Reasons for the resignations – Mr Pillidge

[32] As noted above, the first inquiry with the present category of constructive dismissal claim is to assess whether the employee's resignation was caused by a breach of duty on the employer's part.

[33] For Mr Pillidge the alleged breach of duty is based on his evidence about his dissatisfaction over Mr Byrne's manner with him. However, that relates primarily to events prior to the commencement of the 2009 season. Those events simply formed the background to Mr Pillidge's resignation on 13 November 2009. What caused Mr Pillidge to resign when he did was Ms Young's resignation and more particularly their discussion after the incident between Mr Byrne and Ms Young.

[34] I find that Mr Pillidge's resignation was not caused by a breach of any duty owed to him by his employer. It follows that Mr Pillidge cannot succeed with a constructive dismissal personal grievance claim.

Reasons for the resignations – Ms Young

[35] Ms Young says that she resigned because of Mr Byrne's conduct towards her on 13 November 2009 and previously.

[36] I do not accept that Ms Young can rely on the September 2009 incident when she was wrongly blamed for leaving a gate open and yelled at as a breach of duty entitling her to resign in November 2009 on the basis of a constructive dismissal. Too much time had elapsed. A similar principle applies to incidents during the previous season or earlier.

[37] On balance I do not accept that on 13 November 2009 there was any breach by Mr Byrne of any of the duties or obligations owed by an employer to an employee. Rather, Ms Young reacted angrily to an instruction because she thought it was a further example of Mr Byrne *nit picking*. The situation escalated at Ms Young's instigation and she left the shed. During the further exchange near the car, in the face of Ms Young venting her pent up frustrations, Mr Byrne may have told her that she was *full of shit*. By that time however, Ms Young had made it abundantly clear that she no longer intended to work for Mr Byrne. The comment cannot be regarded as causative of the resignation.

[38] In the absence of any breach of duty it follows that Ms Young's resignation cannot be treated as a dismissal or a sending away at the employer's initiative. Ms Young does not have a sustainable personal grievance.

Summary and orders

[39] Mr Pillidge and Ms Young resigned but not in circumstances supporting a finding that they were constructively dismissed. Their personal grievance claims do not succeed.

[40] Costs are reserved. In the event that there is a claim for costs, the respondent must lodge and serve a memorandum within 28 days. Mr Pillidge and Ms Young may then lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority