

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 456/09
5153161

BETWEEN CRAIG RICHARD REID
Applicant

AND MALCOLM AND
DONNA GREENE
Respondents

Member of Authority: K J Anderson

Representatives: J Parlane, Counsel for Applicant
 G O'Brien, Counsel for Respondents

Investigation Meeting: 6 October 2009 at Hamilton

Submissions received: 27 October 2009 from Applicant
 3 November from Respondents

Determination: 17 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Craig Reid, claims that he suffered an unjustified disadvantage in his employment and that he was dismissed, effective from 24th February 2009. Mr Reid asks that the Authority uphold his claims and award him the remedies of loss of wages and compensation.

[2] The respondents, Mr and Mrs Greene ("the Greens") deny Mr Reid's claims. Rather, they say that Mr Reid abandoned his employment. There is a counterclaim. The Greens say that Mr Reid was overpaid by the net sum of \$361.46 and they want him to repay this.

Background Facts and Evidence

[3] Mr Reid commenced his employment as a dairy farm worker on or about 25th August 2008 under the terms and conditions provided by a Federated Farmers standard employment agreement, modified for the circumstances. Mr Reid lived on the farm in a sleep out nearby the Greens' house. Mr Reid was only aged 18 at the time of his employment. The evidence of Mr Greene is that Mr Reid was not well qualified for the job but he was prepared to work alongside and assist him.

[4] Mr Greene says that he had some "issues" with Mr Reid in regard to how he carried out his work but it seems that Mr Reid only received one verbal warning. This was in regard to his failure to properly care for a calf, which as a consequence, had to be put down. Mr Greene says that the main problem he had with Mr Reid was that if he [Mr Reid] did something wrong, he would not be honest about it.

[5] On the evening of Tuesday, 17th February 2009, Mr Greene was out and didn't return home until around midnight. He says that he noticed that Mr Reid wasn't at the sleep out at that time but heard him arrive home later. Mr Reid failed to start work as required at 5:30 the next morning. The evidence of Mr Greene is that he milked the cows on the morning of 18th February but there was no sign of Mr Reid. Mr Greene subsequently discovered two text messages on his cell phone received at 6:12a.m. The texts from Mr Reid, informed (verbatim):

(a) "*Hey malcz it craig. Im nt feeling 2 gud a. I ben vomiting al thru th nite.*

(b) "*Angel wil take me 2 th dr. I ws vomitn blood.*" [Angel, (Ms Johnson) was Mr Reid's girlfriend.]

[6] Mr Greene says that he and Mrs Greene were concerned for Mr Reid, given the content of the text messages. Mrs Greene tried to locate Mr Reid but he wasn't answering his phone. Mrs Greene eventually discovered that Mr Reid was at the home of Ms Johnson's parents. Mrs Greene spoke to Mr Johnson. She advised him that Mr Reid had informed that he was vomiting blood and was too ill to work. Mr Johnson's response was that Mr Reid was not vomiting blood, was not ill, had a headache and a sore stomach and was sleeping. Mrs Greene says that she took from this that Mr Reid had a hangover.

[7] The evidence of Mr Greene is that he received a phone call from Ms Johnson at 1:21 p.m. on Wednesday, 18th February. Ms Johnson informed that Mr Reid would not be available for the afternoon milking as he still had a sore stomach. The evidence of Mr Greene is that he informed Ms Johnson that he wanted to meet with Mr Reid the next morning “*to sort things out.*” This conversation was taped by Mr Reid without the knowledge of Mr Greene. The tape and a transcript have been provided to the Authority.¹ The recording shows that the conversation was a little more expansive than Mr Greene’s evidence reveals. While it is confirmed that Mr Reid was expected to attend a meeting with Mr Greene the next day, the actual statement, taken verbatim from the transcript, was: “*Tell him we’ve got a meeting tomorrow and if he’s not here he’s got no job.*”

And further: “*It’s called common courtesy if he wants a town job he can go and get a town job, you just don’t keep on saying I’m sick see you later, it doesn’t work like that, so new rules and regulations He can hit the road.*”

[8] There was phone call from Mr Reid at around 6:15 on the evening of 18th February 2009. This conversation was also covertly taped by him. Mrs Greene took the call. She asked Mr Reid when he would be coming back to work and he responded; “*Probably Friday.*”

Mrs Greene: *What, it’s Wednesday today, you have 3 days off and you now say that you’re coming back on Friday?*

Mr Reid: *Yeah I won’t be able to make tomorrow because I’m too sick.*

Mrs Greene: *How do you know you’re still going to be sick tomorrow?*

Mr Reid: *Well I’m still fairly sick now, but I’m just saying if I’m better I’ll come back, I’ll come to that meeting at 10:00am tomorrow.”*

[9] Mr Greene then comes to the phone. The relevant extracts from the exchange are:

Mr Greene: *“You guess, anyway you’re just fucking using and abusing me and Donna, Donna is not happy eh.*

Mr Reid: *I’m not using and abusing you guys.*

Mr Greene: *Course you bloody are, we run you to your course, I’m doing everything for you boy and you treat us like fucking shit, this morning a bit of notice would have been nice eh? Why didn’t you fucking ring me, work starts at 5am no good ringing me at fucking 6:30am in the morning saying you’re not going to show up, especially when you’re supposed to get the cows in.”*

¹ The transcript is not a verbatim record of what is on the tape. Nonetheless, it is a substantive record of the relevant discussion.

Mr Reid: *Well I was up at 4:30am vomiting and then I went back to sleep and I slept till 6am and slept straight through my alarm.*

Mr Greene: *You have a job to do pal, you fuck me around.*

Mr Reid: *I know I fucked up.*

Mr Greene: *You should have fucking told me or text me at 4:30, what's wrong with texting me at 4:30?*

Mr Reid: *Because I thought I would have been alright to get up, but no I wasn't.*

Mr Greene: *Well it was only half an hour later when you had to get up, it's just blatant fucking disregard, I've got Donna's old man here, he's not fucking happy and he's doing everything by the law, basically dude I don't want you here, but I'm trying to work out how to get rid of ya."*

There is an issue regarding the above final comment from Mr Greene. This is as recorded in the transcript. But Mr Greene says that the word "legally" should be at the end of the sentence. The evidence of Mr Greene is that: *"At the end of the conversation I recall saying to Craig that I am looking to get rid of you legally. The word legally is missing."* The evidence of Mr Reid is that the word 'legally' was not used. I have listened to the tape and accept that this word was not used. Furthermore, the continuation suggests that it is unlikely that it has been edited out.

[10] The conversation between the two men continues:

Mr Greene: *"That's what it comes down to now and um if you know, your job's still here the job's still yours you take as long as you want, you show up whenever you fucking want to.*

Mr Reid: *Yep.*

Mr Greene: *Sweet as?*

Mr Reid: *When's our meeting?*

Mr Greene: *I don't care when you fucking show up Craig*

Mr Reid: *When's our meeting?*

Mr Greene: *We're not having a meeting, you just show up when ever you want to Craig ok, then it's going to start from there.*

Mr Reid: *Yep.*

Mr Greene: *I'm over you boy."*

[11] It appears that Mr Reid was not as ill as he had earlier portrayed, as approximately 20 minutes later, at around 7:00p.m, Mr Reid and Ms Johnson arrived at the Greenes' property. Mr Reid went to the sleep out and uplifted some clothes, contact lenses and an X-Box. Mr Greene spoke to Mr Reid. [This conversation was covertly taped by Mr Reid too but the quality of the recording is poor.] Mr Greene says that he didn't think that Mr Reid looked sick. There was some discussion about a meeting, with Mr Greene confirming there wouldn't be a meeting as Mr Reid was sick. Mr Greene says that he envisaged discussing matters with Mr Reid on Friday, 20th February when he came back to work. The further evidence of Mr Greene is that he thought it was "weird" that Mr Reid was taking away his property if he was going to be back at work on Friday. Mr Greene requested a medical certificate. This was provided the next day by Mr Reid's lawyer, Mr Parlane. Mr Greene does not dispute its validity. The certificate states that Mr Reid was: "unfit for work for 3 days from 18th February 2009." On the face of this certificate, it appears he was fit for work from 21st February.

[12] Clearly Mr Reid had no intention of returning to work on Friday, 20th February as later in the afternoon of Thursday, 19th February, Mr Parlane personally hand delivered a letter to the Greenes. In the letter, Mr Parlane makes reference to the recording of the telephone conversations and then goes on to inform:

You have no grounds on which to dismiss my client. If you do that then we will claim substantially in the Employment Relations Authority. Cl. 26 of your contract requires the parties to firstly settle matters themselves. Failing that the matter will be referred to mediation via the ERA. My policy is to first raise a personal grievance and then attend mediation. Mediation is all about a settlement and that involves cash. We suggest that to date the appropriate amount of cash owed to my client due to your breach of the good faith (sic) of the agreement would be about \$5,000.00 and that amount will increase if we are required to fill (sic) a full P.G.

[13] Mr Parlane then informed that Mr Reid accepted that he: "... may return whenever he likes and notes that he will be on full pay whilst you investigate." A meeting was proposed for 8:30a.m. or 5:30p.m. the next day.

[14] It was the evidence of Mr Greene that, given the covert taping of the phone calls and the manner of the delivery of the letter by Mr Parlane, he came to the conclusion that he was being "set up." I record at this point that the covert taping of

the conversations and the subsequent evidential weight has not been challenged but in any event, given my later conclusions, the taped evidence has limited significance in relation to the determination of this matter.

[15] At 9:30p.m. on 19th February, Ms Johnson and another person returned to the Greenes' property and removed more of Mr Reid's possessions. Upon being asked by Mrs Greene when Mr Reid would be coming back to work, Ms Johnson informed that she didn't know.

[16] The Greenes were unable to meet with their lawyer until Monday, 23rd February. However, Mrs Greene went to Mr Parlane's office on Friday, 20th February to inform him that it was not possible to meet him as he had proposed. She intended to discuss with Mr Parlane an alternative meeting time. The evidence of Mrs Greene is that Mr Parlane refused to allow her access to his office, told her she should leave and that she was trespassing.

[17] On 23rd February, the Greenes' lawyer, Mr O'Brien, wrote to Mr Parlane informing that Mr Reid was assumed to have returned to work on 21st February, albeit one would have expected that the Greenes would have informed Mr O'Brien when they met with him that day, that Mr Reid had not returned work. Furthermore, Mr Greene had sent three texts to Mr Reid on 20th, 21st and 22nd February informing Mr Reid that he was expected back at work. Mr Greene says that he had to text Mr Reid as when he tried to speak to him on the phone on one occasion, Mr Parlane took over the phone.

[18] The content of Mr O'Brien's letter is somewhat contradictory in that it informs that:

Mr Reid is not entitled to anticipated leave or sick pay and his wages have been suspended.

But then: There is no suspension of the employment and the work place is not unsafe.

[19] The letter concludes:

Mr Reid is to attend a meeting on 24 February 2009 at 1.15pm at the Greenes to discuss matters. He needs to bring a support person. Mr Greene (sic – Reid) needs to fully understand that his employment is in jeopardy as he has refused to work.

[20] Mr Reid failed to attend the proposed meeting. His evidence, following a question from the Authority as to why he didn't attend the meeting, was: "*Can't see why I should go to a meeting when they wouldn't.*" I understood Mr Reid to be suggesting that because the Greenes were unable to attend a meeting as proposed by Mr Parlane, he wasn't going to attend a meeting proposed by them.

[21] The conclusion of this saga was that a letter, dated 23rd February 2009 (but faxed at 14:46, 24th February), was sent to Mr Reid (via Mr Parlane) informing that:

Pursuant to Clause 23.0 of your client's contract he has been absent from work without notification to or consent from Mr Greene. Your client was to return to work on Sunday 21 February 2009. Accordingly, the period for abandonment expired at 5 pm on 24th February 2009. We treat this letter as your client's termination of his contract. Your client was text (sic) on Friday to return to work. His medical certificate has expired. This is not a situation where your client has been unable to notify us or our client. Your client's possessions will be boxed for collection. Please advise when he intends to collect them.

[22] The letter was faxed at 2:46p.m. on 24th February thereby pre-empting the 5:00p.m. deadline imposed.

The Issue for Determination

[23] The substantial question that requires determination is: Was Mr Reid unjustifiably dismissed on 24th February 2009, or did he abandon his employment after being medically fit for work from 21st February 2009? While there has been some mention of an unjustified disadvantage existing, this has not been included in the unintelligible *Statement of Problem* or in the submissions presented for the applicant. But in any event, while there was certainly some unusual and inappropriate behaviour displayed by various parties, the Authority has not been asked to interpret any behaviour on the part of the employer as constituting an unjustified disadvantage to Mr Reid's employment, nor do I reach any such conclusion.

Analysis and Conclusions

[24] While there were a number of issues regarding the manner in which Mr Reid carried out his work prior to 18th February 2009, from the evidence available to the Authority, there is nothing that suggests that Mr Reid was other than a young,

inexperienced farm worker who probably required some further training and appropriate performance management along with taking some personal accountability for his behaviour.

[25] While Mr Reid produced a Doctor's certificate which confirms that he was ill, it is most unlikely that his symptoms were as serious as he portrayed to his employer. He appears to acknowledge this in the taped conversation with Mr Greene. Nonetheless, that in no way excuses the conduct of Mr Greene in regard to the manner in which he spoke to Mr Reid on the evening of 18th February 2009. Had Mr Reid chosen to resign after this conversation, it is likely that a constructive dismissal action would have followed.

[26] The evidence is that, following the conversation which took place between Mr Greene and Mr Reid at around 7:00p.m. on Wednesday, 18th February, Mr Greene was expecting Mr Reid back at work on Friday, 20th February, bearing in mind that the medical certificate was not produced until later the next day via Mr Parlane. Mr Reid was still enquiring about a meeting with Mr Greene but the latter had wisely decided to wait to Mr Reid was well again and back at work. For all intents and purposes, despite the fact that Mr Reid was gathering up some of his possessions, Mr Reid led Mr Greene to believe that he would be back at work on 20th February.

[27] But it seems to be more probable than not that Mr Reid had another agenda. He had covertly taped conversations with Mr and Mrs Greene and then he consulted a lawyer the next day, 19th February. Also later that day, more of his possessions were removed from his accommodation indicating that he did not intend to return to work in the immediate future, if at all.

[28] Nonetheless, at this point, rational thought would have seen the parties meeting up to discuss where the employment relationship was heading. But rationality was not on obvious display in this matter, quite the contrary. Firstly, Mr Reid refused to attend a meeting on 23rd February where both parties could have discussed their immediate concerns.

[29] Then, without any further attempt to contact Mr Reid, the Greens concluded that he had abandoned his employment, pursuant to the employment agreement, and dismissed him.

Was Mr Reid unjustifiably dismissed?

[30] In deciding this question I must apply the test provided by s103A of the Employment Relations Act 2000 and determine, on an objective basis, whether the action of the employer in dismissing Mr Reid, was what a fair and reasonable employer would have done in the circumstances.

[31] I conclude that the dismissal of Mr Reid was not what a fair and reasonable employer would have done in the circumstances. My reason for reaching this conclusion is that the Greens wrongly applied the abandonment of employment provisions of the employment agreement. The clause provides that:

If the employee is absent from work without notification to, and consent from, the Employer for more than 3 consecutive days, the Employee shall be deemed to have terminated his/her employment. The Employer shall make reasonable attempts to contact the Employee to confirm that abandonment has occurred and that the Employee is not in a situation in which he/she has been unable to notify the Employer of his/her absence.

[32] Breaking the clause down into its active components, I conclude firstly, that when the decision to dismiss Mr Reid was sent by fax at 2:46p.m. on 24th February, Mr Reid had not been; “*absent from work without notification to, and consent from, the Employer for more than 3 consecutive days*” The letter of 24th February itself confirms this by the purported 5:00p.m. deadline for that day. Therefore, notwithstanding my further conclusions, Mr Reid was dismissed before the supposed 3 days had expired.

[33] Then; “*The Employer shall make reasonable attempts to contact the Employee to confirm that abandonment has occurred*” While Mr Greene sent a text to Mr Reid on Friday, 20th, Saturday, 21st and Sunday, 22nd February, informing that Mr Reid was expected back at work, there was never any reasonable attempt made to contact Mr Reid to confirm that abandonment had occurred after the 3 day period provided expired. Nor was there any indication given that activation of the

abandonment of employment clause was being considered. This does not excuse the failure of Mr Reid to communicate with his employer and I will address this soon.

[34] Given the above findings in regard to the wrongful application of the abandonment of employment clause, it follows that I must find that the dismissal of Mr Reid was unfair and unreasonable and hence unjustified. He has a personal grievance.

Remedies

[35] Section 123 of the Employment Relations Act 2000 (“the Act”) provides that where the Authority determines that an employee has a personal grievance, it may provide various remedies. Also relevant is s124 of the Act. The Authority must, in deciding the nature and extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[36] Mr Reid says that he obtained full time employment two months after his dismissal. He also obtained some relief milking after three weeks and says that he got four days work some weeks and only one day of work other weeks, earning in total \$400 or \$500 in cash, albeit this evidence was all rather vague.

Reimbursement of Wages

[37] Taken that Mr Reid was out of full time employment for 8 weeks and he was being paid \$483.00 gross per week by the Greens, I calculate he lost \$3,864 in wages less the approximately \$500 he earned relief milking, leaving a remainder of \$3,364. I find that Mr Reid did contribute towards the situation which gave rise to the personal grievance and that this remedy should be reduced accordingly. The major contribution of Mr Reid was that he failed to communicate with his employer as to his intentions in regard to returning to work; despite the fact that Mr Greene contacted him several times informing that he was expected back. While I cannot be certain, given Mr Reid’s overall behaviour, particularly the removal of his possessions, there is a strong possibility that he had no intention of continuing his employment with the Greens and attempted to manipulate the situation to his advantage. On the other hand, I take

into account Mr Reid's youth and the abusive and possibly intimidating nature of Mr Greene's language on the evening of 18th February 2009. In the round, I assess Mr Reid's contribution to be 60% and reduce the above remedy accordingly ($\$3,364.00 \times 60\% = \$2,018$) to \$1,346.00.

Compensation

[38] Mr Reid seeks an award of compensation pursuant to s123(1)(c)(i) of the Act, of \$10,000 for humiliation, loss of dignity and injury to feelings resulting from his dismissal. I have not seen or heard any evidence from Mr Reid of such harm. On the contrary, I found Mr Reid to be entirely relaxed about his circumstances. I decline to make any award of compensation.

The Counterclaim from the Greenes

[39] The Greenes say that Mr Reid was overpaid in the net sum of \$361.46. The calculations provided on 3rd November 2009 show that he was paid three days' holiday pay in excess of his entitlement, and three days' extra wages. In regard to the latter, two of the days were purportedly at the beginning of his employment and one was at the end. While the overpayment of the holiday pay (\$230.83) is established to my satisfaction, the claim for the overpayment of wages (\$130.63) is not and I must decline this accordingly.

Determination

1. Pursuant to s123(1)(b) of the Act, Mr and Mrs Greene are ordered to pay to Mr Reid the gross sum of \$1,346.00 as reimbursement of lost wages.
2. An order for compensation pursuant to s123(1)(c)(i) of the Act is declined.
3. Mr Reid is ordered to repay the gross sum of \$230.83 that he has been overpaid as holiday pay. This sum is to be offset against the above reimbursement of wages due to Mr Reid.

Costs

[40] Given the outcome of this matter it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority