

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 156
5523778

BETWEEN

JESSICA SAYWELL
Applicant

A N D

BOWERS FARMS LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
D Whitehead, Counsel for Respondent

Investigation Meeting: 28-29 May 2015 at Whangarei

Submissions: At hearing

Date of Oral
Determination: 29 May 2015

Date of Written
determination: 4 June 2015

ORAL DETERMINATION OF THE AUTHORITY

- A. The application is dismissed.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment Relationship Problem

[1] This is an application about a constructive and unjustified dismissal that occurred on or about 4 August 2014.

[2] The applicant, Jessica Saywell, also alleges there was some misleading and deceptive behaviour around the time she negotiated a new employment contract on 1 June 2014 leading to a breach of her rights to sick leave.

Facts giving rise to this dispute:

[3] On 18 December 2010 Ms Saywell was employed as the herd manager, later becoming the farm assistant manager on a dairy farm at Dunn Road, Ruawai, Northland. There was no employment agreement. She was provided with a house as part of the employment package.

[4] During 2013 there seemed to be some difficulties with the house water tanks and a collapsed ceiling. During this period the respondent directors and farm owners, Heather and Barry Bowers purchased extra water for Ms Saywell. They fixed the ceiling collapse in or around October 2013.

[5] On or about 8 July 2013 there was a communication between Mrs Bowers and her accountant about Ms Saywell's ongoing employment.

[6] In September 2013 Ms Saywell was offered a promotion.

[7] On 28 March 2014 Ms Saywell fell pregnant. She notified Mrs Bowers and indicated she wished to stay in her current position.

[8] On 1 June 2014 a new employment agreement signed. There was some dispute about what was discussed around sick leave when Ms Saywell met with Mrs Bowers.

[9] Matters came to a head through July 2014. Ms Saywell was working up to 70 hours per week when she was six months pregnant. During this period Mr Bowers started working in the milking shed with Ms Saywell.

[10] In July 2014 Ms Saywell stayed to oversee calving resulting in a missed maternity appointment. It was during this period an incident occurred where Mrs Bower accepts she used the words "*for f** ks sake*".

[11] By 4 August 2014 Ms Saywell was unhappy and resigned from her position as herd manager.

[12] The parties have been referred to mediation of this matter. Ms Saywell now seeks a determination of her applications from the Authority.

Issues

[13] At an earlier teleconference the parties agreed the following issues were for determination. These are:

- a) Was the applicant constructively and unjustifiably dismissed by the respondents' conduct during her employment?
- b) Did the respondents breached the terms of the applicant's employment agreement by removing her sick leave entitlements?

Was the applicant constructively and unjustifiably dismissed by the respondents' conduct during her employment?

The law

[14] There is an implied term that employers ought not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy the relationship of trust and confidence. Constructive dismissal may arise where an employee has resigned due to an employer following the course of conduct with the deliberate and dominant purpose of coercing the employee to resign.¹

[15] Constructive dismissal cases often involve a series of events over a period of time. No single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect of those events may well result in repudiation none the less.²

[16] To found a claim for constructive dismissal the breach of duty by the employer must be of such a character as to make the employee's resignation reasonably foreseeable.³

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

² *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (CA); *Commerer v Red Eagle Corp Ltd* EmpC Wellington WC29/00, 18 May 2000; *Jeffries v Adis International Ltd* EmpC Auckland AC69/06, 7 December 2006 at [12] (dictum)

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA)

[17] There is a substantial conflict of evidence between the parties. This requires me to make express findings of credibility based upon evidence given to me by briefs as well as orally at hearing. Credibility can be assessed on two bases – the witness personally and the story the witness tells. The factors that are relevant to a witness's personal credibility include demeanour, inconsistencies and contradictions of all kinds, prevarications, reasons to lie and concessions made where due despite any perception by the witness of a risk to credibility in giving that evidence. The credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making this conclusion inevitable?

[18] I may draw inferences and fill in gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of a situation.

[19] The onus is upon the applicant to prove that there was a constructive dismissal. The burden of proof is on the balance of probabilities.

Factual Findings

[20] The course of conduct alleged by Ms Saywell as giving rise to her reasonably foreseeable dismissal falls into four categories. These are the removal of her responsibilities, increased hours and type of work given, housing issues and aggressive behaviour by Mr and Mrs Bowers.

Removal of Responsibilities

[21] Ms Saywell tells me the removal of responsibilities was shown by Barry Bowers. She alleges he took over management of the milking shed, refusing to allow her to treat the herd, refusing to talk to her for up to three days and inappropriately used the herd home.

[22] From the evidence I have heard there is little to show Barry Bowers took over management of the shed. He denied it and Mrs Bowers told me they wanted to lessen their time in the shed not increase it. Both Mr and Mrs Bowers told me Ms Saywell had asked them for Barry Bowers to go to the shed to assist her. Ms Saywell's co-workers, Kyle Holden and Cody O'Neil, denied Barry Bowers behaved this way or

that he and Jessica Saywell were not speaking to each other. Given both were working in the shed with Ms Saywell at the time I place some weight on their evidence about this.

[23] The alleged refusal to allow Ms Saywell to treat an animal appears to arise from an incident where Barry Bowers had been caring for a cow with possible mastitis. He says he asked Ms Saywell not to treat the cow because the Veterinary surgeon was coming in that afternoon. Ms Saywell's evidence confirmed this. Mr Bowers said Ms Saywell went ahead and treated the cow anyway.

[24] Mr Bowers accepted he was angry. It is possible he was not in a position to speak to her at that stage because he was angry. However given the context in which this issue appears to have arisen, I do not consider that incident in and of itself was an example of any removal of responsibility. It appears to be a one off incident. It appears more likely to be an incident where Ms Saywell refused to follow reasonable instruction from her employer.

[25] No disciplinary action was taken nor was any grievance raised by Ms Saywell at the time about that incident.

[26] The evidence of the herd home appears to be a disagreement between the parties about the best way to manage the cattle. I cannot see how this evidence is deliberate conduct with the dominant purpose of coercing Ms Saywell's resignation.

Hours and Type of work

[27] I turn to the hours of work alleged. Ms Saywell's allegation that she was working up to 70 hours per week is evidenced by the timesheets that have been filed. However she conceded at hearing 70 hours per week is not unusual during calving. The issue appears to be the fact Ms Saywell was pregnant at the time and apparently struggling. Her evidence was that she was fatigued. Mr and Mrs Bowers evidence was that they did not recognise she was fatigued at the time.

[28] There is a dispute whether Ms Saywell told the Bowers on 23 July 2014 she was tired and wished to step down. She alleged Heather Bowers 'propped her up' and asked her to stay.

[29] At the end of the evidence I am uncertain as to who to believe about the respondent's knowledge of Ms Saywell's fatigue and unhappiness. It may be that something was raised by Ms Saywell during the time but may not have been recognised by Mrs Bowers or Mr Bowers at the time. In any event I am not convinced or not sure on the balance of probabilities that this issue of fatigue was properly raised with her employers. Equally I am unsure that the employers ignored her fatigue as suggested or in any way forced her to continue working those hours. There is insufficient evidence to show a deliberate course of conduct such that the employers would have reasonably foreseen her resignation.

[30] I wonder if Ms Saywell was so fatigued why she did not go to the Bowers with suggestions to reduce her workload. She seemed to expect the Bowers to come to her instead. She gave evidence that when she had her second child she continued working but had reduced her work from two to one milking per day. She made no similar suggestion here.

[31] I heard evidence from Renee Gatehouse as to her situation whilst working for Mr and Mrs Bowers during her pregnancy. She was very clear that it was her duty to make arrangements to ensure she was not undertaking inappropriate jobs such as heavy lifting.

[32] This brings me to the issue of the type of work Ms Saywell alleges she was required to do. She alleges she was inappropriately directed by Barry Bowers to physically lift a downed cow. There is some disagreement as to the date this may have taken place. However Mr Bowers and Ms Saywell's evidence is consistent that she was involved with a downed cow during her pregnancy where she was holding its leg whilst it was being lifted on to a tractor by others.

[33] I can understand Ms Saywell's concern about her involvement in such an activity and the possibility of her being kicked in the stomach or any other area whilst pregnant. Mr Bowers conceded that that may have been possible whilst she was holding the leg of the cow. He did not turn his mind to it at the time. It appears Ms Saywell did not raise it at the time it occurred. The holding of the cow's leg did not appear unusual at the time to these parties.

[34] Under Ms Saywell's employment contract she is required to report hazards, incidences or other accidents to her employer. She did not until after resignation. If

she does not take action this must surely to have negate an employer's ability to reasonably foresee resignation.

[35] I accept the evidence of several employees that Ms Saywell was not involved in the physical lifting of a downed cow other than holding its leg. Kyle Holden gave evidence it was near impossible for two young strong men to lift a cow let alone Ms Saywell on her own or Ms Saywell and either himself or Cody O'Neill.

Accommodation

[36] I turn to the issues of accommodation. The water issues appear to arise in 2013. Ms Saywell alleged she was forced to use unclean unsafe water by the respondents. I am told the tanks were continually emptied over a very short period of time. Ms Saywell alleged that that was due to a leak.

[37] Evidence has been presented of a recent visual examination of those tanks by an expert where no leak was found. Prior to this examination, the respondents bought water for Ms Saywell at their own expense up and until November 2013. The respondents then determined there was no leak but rather Ms Saywell was not conserving the water. They required Ms Saywell to purchase any excess water from then on. Ms Saywell decided to use the farm water instead of purchasing extra water when they ran out. Both parties confirmed the farm water is unclean and unsafe. Ms Saywell did not obtain her own expert report on the tank.

[38] Similarly the collapsed ceiling issue that arose in October 2013 appears to have been fixed that afternoon through the insurers.

[39] Both of those issues appear to have been dealt with in 2013. I cannot see how that conduct can be part of any pattern. Both issues were resolved by either agreement or by the problem being fixed.

[40] The only accommodation issue arising in 2014 was a broken stove. Ms Saywell alleges it took too long to fix. Mrs Bowers alleged it was raised with her in late July 2014, two days prior to her contacting an electrician which was on 29 July 2014. Ms Saywell gave me no dates for when this issue arose.

[41] Commonsense and my own personal knowledge of this area is that it is unlikely an electrician will be able to attend a rural address quickly to fix a stove. The

nearest town to Ruawai is Dargaville which does not have a large population. Given Ms Saywell resigned on 4 August, the delay in getting an electrician is short and not unexpected in this rural community. Although Ms Saywell alleged the stove was easy to fix by replacing the fuse, it appears from the information filed by the respondent's electrician that substantially more was required.

Aggressive Behaviour

[42] Finally I turn to the allegation around the aggressive behaviour. The parties agree there was at least one incident where Heather Bowers said "*for f** sake*" in July 2014. This occurred when she attended the shed and saw Ms Saywell's children there and shortly thereafter a cow slipped off the rotary. Mrs Bowers made her exclamation towards the area where Ms Saywell was standing, although she says it was said about the situation not Ms Saywell.

[43] It is possible Ms Saywell perceived that she may have been the object of the swearing. However she does not raise this with Ms Bowers at the time despite her protestations now of being hurt by this.

[44] This is a farm where swearing is not encouraged but certainly is not uncommon. I would expect somewhat robust language to be used amongst the employees. The parties agree it was unusual for Heather Bowers to swear. That infers this was not a course of conduct by Mrs Bowers rather a one off exclamation.

[45] Ms Saywell pointed to a hand written note from the Bowers' accountant dated 8 July 2013 as evidence of a course of conduct. The note recorded "*Jessica is causing Heather concerns at present, her attitude is not what it used to be, will probably only keep her on another year.*"

[46] Such a conversation with an accountant was incredibly unwise. There was no privilege attached and it has caused some upset for Ms Saywell. However I do accept Mrs Bowers explanation that this occurred but was about her frustration with Ms Saywell at that time and not evidence of any deliberate conduct to cause resignation. She explained there were ongoing problems with Ms Saywell's pay which required some time to resolve. There was evidence of later conduct between the parties which supported Ms Bowers explanation. Both parties agree Ms Saywell was offered a subsequent promotion in September 2013 and a new employment contract was signed on 1 June 2014.

[47] I do not accept Ms Saywell's assertion these actions were done for the Bower's to 'save face' in the community. There was no evidence this was the case. Both parties accept they had a close personal relationship. It appears this relationship may have at times ebbed and flowed resulting in frustrations being expressed. However the evidence shows the employment relationship continued even in the face of querulous behaviour between the parties.

[48] Standing back I find the applicant was not constructively and unjustifiably dismissed by the respondents' conduct during her employment.

Did the respondents breached the terms of the applicant's employment agreement by removing her sick leave entitlements?

[49] There is a dispute about whether sick leave entitlements were raised at the meeting between Ms Saywell and Mrs Bowers on or about 1 June 2014 when she signed the new employment agreement. Both parties gave almost polar opposite evidence of what was discussed. Ms Saywell tells me that sick leave was specifically raised and she was told her previous sick leave was 'void.' Mrs Bowers denies sick leave was discussed at all. She said she had no reason to discuss sick leave and the purpose of the meeting was to sign the contract.

[50] There is no corroborating evidence. Logically there seems little reason for Mrs Bowers to raise sick leave given the sick leave clause in the contract does not 'void' Ms Saywell's entitlements as alleged.

[51] I must be satisfied on the balance of probabilities that the conversation as alleged by Ms Saywell occurred. I am not.

[52] In the circumstances the application is dismissed.

[53] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

