



New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2010](#) >> [2010] NZERA 816

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Shead v TJS Farms Limited AA465/10 (Auckland) [2010] NZERA 816 (29 October 2010)

Last Updated: 19 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 465/10 5283698

BETWEEN

JULIANNE SHEAD Applicant

AND

TJS FARMS LIMITED Respondent

Member of Authority:

Rachel Larmer

Representatives:

Simon Scott and Anamika Singh, Counsel for Applicant Robert Gordon, Counsel for Respondent

Investigation Meeting:

6 October 2010 at Hamilton

Determination:

29 October 2010

DETERMINATION OF THE AUTHORITY

A Julianne Shead was unjustifiably dismissed from her employment with TJS Farms Limited.

B TJS Farms Limited is ordered to pay Ms Shead \$13,750 being;

(a) \$8,250 gross pursuant to section 128(2) of the Employment

Relations Act 2000 (the Act); and

(b) \$5,500 pursuant to section 123(1)(c)(i) of the Act.

C TJS Farms Limited is ordered to pay \$1,500 towards Ms Shead's legal costs.

Employment Relationship Problem

[1] Julianne Shead was employed as a Dairy Farm Assistant by TJS Farms Limited (TJSF) on 26 May 2008. TJSF is a family company which has a sharemilking contract for the Thorburn family farm.

[2] Up until 31 May 2009 the shareholders (in equal shares) in TJSF were Paul Thornburn and his wife Orla Thorburn, and Emma Dingle and her husband Craig Dingle. Paul Thornburn and Emma Dingle are brother and sister, and the TJSF

sharemilking contract related to their parents' farm. On 1 June 2009 Paul Thorburn's shareholding was purchased by his mother Susan Thorburn.

[3] Mr Thorburn was the Farm Manager from 1 June 2008 until his departure overseas on 28 February 2009. The investigation of this matter was delayed to accommodate his return from England so he could give evidence in person.

[4] Despite making a number of requests, Ms Shead was never provided with a written employment agreement, contrary to the requirements of section 65 of the Act.

[5] Ms Shead worked closely with Mr Thorburn and would normally deal with him on employment related issues. If he was not available Ms Shead could approach Mrs Dingle, who dealt with administrative matters.

[6] Ms Shead found out in November 2008 that she was pregnant and she commenced parental leave on 1 June 2009. Whilst on parental leave Ms Shead gave a Housing New Zealand (HNZ) form to Mrs Thorburn to pass on to Mrs Dingle to sign as Ms Shead's employer.

[7] Upon receipt of the HNZ form, Mrs Thorburn told Ms Shead that TJSF was not her employer because she had resigned, so her employment had ended. An angry exchange occurred, which Ms Shead and Mrs Thorburn both found distressing. As a result of their exchange, Ms Shead formed the view that she did not have a job to go back to, so did not return to work from her parental leave. Instead she raised a personal grievance claim for unjustified dismissal.

[8] TJSF denies that there was a dismissal. It says that she verbally resigned during a conversation with Paul Thorburn in November 2008 and that her employment ended on 31 May 2009.

Issues

[9] Whilst the facts of this matter could have given rise to a parental leave complaint, Ms Shead pursued it as a personal grievance claim for unjustified dismissal.

[10] The issues for the Authority to determine are:

- a. Did Ms Shead resign or was she dismissed?
- b. If she was dismissed, has TJSF justified her dismissal?
- c. If not, then what (if any) remedies should be awarded?

Facts

[11] Ms Shead and Mr Thorburn agree that in November 2008 she told him;

- a. She was pregnant;
- b. She wanted to take parental leave;
- c. She hoped to start her parental leave *at the end of the season*;
- d. She could not give an exact date but would work as long as she could;
- e. She may have to start her parental leave before the season ended if, because of her pregnancy, she was unable to continue working.

[12] Although no specific date was discussed for the commencement of her parental leave, the parties agreed that at the time of their discussion they were both aware that *the end of the season* was 31 May 2009.

[13] Mr Thornburn and Ms Shead do not recall the exact date this conversation occurred, and they do not agree on where this conversation occurred. Ms Shead says she first discussed her pregnancy with Mr Thornburn after she had picked him up on the farm motorbike from Jack's place. Mr Thornburn says it occurred at the cowshed during an afternoon milking. For ease of reference, I am going to refer to the conversation identified in paragraph 11 as the "cowshed conversation".

[14] Mr Thornburn says that Ms Shead resigned during the cowshed conversation and indicated a desire to do some relief milking after her employment had ended. He says that she subsequently reiterated her resignation *on a number of occasions*. Ms Shead says she was discussing parental leave with Mr Thorburn, not a resignation and that he brought up the possibility of relief milking, not her.

[15] Ms Thorburn agrees that Ms Shead asked him during the cowshed conversation what she had to do to take parental leave, and he thinks he told her to ask IRD about it. Mr Thorburn said as a result of his conversation with Ms Shead he had a discussion with Mrs Dingle about parental leave forms, but cannot now recall what was discussed or when that occurred.

[16] Ms Shead says that Mr Thorburn told her to contact IRD to ask what she had to do to get parental leave. She duly did so and was told she had to get a medical certificate recording her due date to prove she was pregnant, which then had to be attached to a completed parental leave form.

[17] Ms Shead got a medical certificate dated 24 February 2009 which she stapled to the parental leave form which she filled out and signed on 14 March 2009. Ms Shead says she handed this to Mrs Dingle in March 2009 to complete and send away and that she did not see it again after that.

[18] Ms Shead says the IRD subsequently returned the parental leave form to her because the employer had not completed the date on which her parental leave was due to start. Ms Shead said she called IRD to see if she could fill out the date herself or whether she needed to return the form to her employer. She was told she could insert the missing information, so she called Mrs Dingle to ask if it was okay if she started her parental leave on 1 June 2009. Ms Shead says that Mrs Dingle agreed to that, so she wrote the date on the form and returned it to the IRD.

[19] Mrs Dingle's account of the completion of the parental leave form differs from Ms Shead's. Mrs Dingle's evidence was that she was presented with the parental leave form in May (not March), which she says she completed in front of Ms Shead and handed back to her. Mrs Dingle said that she put a line through the box on the form which asked for the date the parental leave was starting, and told Ms Shead she had crossed out that box because her employment was ending on 31 May 2009. Mrs Dingle says that she never saw the medical certificate so must have incorrectly ticked the box on the form which confirmed that she had been provided with it.

[20] Ms Shead received a letter from IRD dated 8 April 2009 which confirmed she had been granted parental leave from 1 June to 9 September 2009. The letter stated: *If you return to work or resign during this period, it is important that you let us know as your entitlements to Paid Parental Leave will end in either of these circumstances.*

[21] Upon commencing parental leave Ms Shead moved out of her farm accommodation which was suitable for one person only, and in with her partner Stanley Marshall. They subsequently faced some difficulties with their accommodation arrangements, so applied to HNZ for assistance. This required them to fill out a HNZ form which also had to be completed by Ms Shead's employer.

[22] On 29 August 2009 Ms Shead and her partner took the form to Mrs Dingle who was not available because she was in hospital, having given birth the day before. Ms Shead saw Mrs Thorburn in the farm driveway, so she gave her the HNZ form and asked her to get Mrs Dingle to fill out the employer's section.

[23] Mrs Thorburn told Ms Shead that TJSF was not her employer. A heated exchange occurred, which left Ms Shead in tears and Mrs Thorburn feeling threatened. Ms Shead insisted that she was entitled to return to work and Mrs Thorburn maintained she was no longer employed. Both parties got very upset.

[24] To defuse the situation Mrs Thorburn took the form off Ms Shead. Mrs Thorburn said she phoned HNZ and told them Ms Shead was no longer employed by TJSF because she had resigned, and was then told what parts of the form to complete. Mrs Thorburn recorded on the form that Ms Shead *was employed from 1.6.08 -31.5.09.*

Did Ms Shead resign or was she dismissed?

[25] TJSF's belief that Ms Shead resigned arises from;

- a. Mr Thorburn's evidence about his cowshed conversation with her in November 2008;
- b. Mr Thorburn's evidence that she confirmed her resignation *on many occasions* after their November 2008 conversation;
- c. Mrs Dingle's evidence that she told Ms Shead in May 2009 (whilst filling out the parental leave form) that she could not complete the parental leave commencement date box because her employment was ending on 31 May 2009.

[26] I find that Ms Shead was dismissed because the initiative for ending her employment came from TJSF. She did not resign.

[27] I do not accept that the cowshed conversation amounted to a verbal resignation. That conversation involved Ms Shead informing Mr Thorburn about her pregnancy and asking how she could get parental leave. I find that Mr Thorburn mistakenly interpreted Ms Shead's conversation with him disclosing her pregnancy as a resignation. Had Ms Shead been provided with an employment agreement, as she had requested, then this apparent confusion around notice requirements would have been avoided.

[28] I accept Ms Shead's evidence that her discussions about when she *would finish* referred to when she would finish working and start her parental leave, not about when she intended to terminate her employment. I accept her evidence that if she had wanted to resign she would have done it in writing (as she had always previously done) and would not have verbally resigned 6-7 months before she intended her employment to end.

[29] In forming this conclusion, I have relied on Mr Thorburn's evidence that;

- a. The conversation he relies on was the first time Ms Shead had disclosed her pregnancy to him;
- b. The conversation occurred whilst they were both in the cowshed doing the afternoon milking rather than in a more formal setting such as the farm office;

- c. Ms Shead never used the words *resign* or *resignation*;
 - d. He assumed her reference to finishing work meant she was resigning;
 - e. No specific termination date was discussed;
 - f. He interpreted Ms Shead's statement that she hoped to work to the end of the season to mean she wanted to end her employment at the end of the season, not that she wanted to start her parental leave at the end of the season;
 - g. The conversation occurred at least 6 and maybe up to 7 months before he says she intended to resign;
 - h. Her purported resignation was verbal only;
 - i. He did not ever ask her to confirm it in writing, nor did he confirm it in writing himself;
- j. She had made it clear she wanted to take parental leave; k. She asked about parental leave forms; l. She said she wanted to work as long as possible; m. He was unable to recall any details at all about the *many occasions* he says Ms Shead made it clear to him that she was resigning.

[30] I also find that Mrs Dingle did not appear to have a clear recollection of the matters recorded in her written statement. She was confused when giving her evidence, changing her mind about her answer several times, and she struggled to recall specific details about her involvement with the parental leave form.

[31] Mrs Dingle's evidence that her conversation with Ms Shead occurred in May 2009 is demonstrably incorrect in light of the IRD letter dated 8 April 2009 confirming Ms Shead's parental leave. Ms Shead could not have been granted leave before she had even applied for it. I also consider Mrs Dingle was likely to have been mistaken when she said that she had not seen the medical certificate, because this contradicts what she stated on the form and IRD would not have approved parental leave with it.

[32] Mrs Dingle told me that she did not know that an employee had to remain in employment to be able to qualify for paid parental leave. In light of that evidence, it does not make sense for Mrs Dingle to have told Ms Shead that she was putting a line through the box which asked for the date of commencement of parental leave because

Ms Shead's employment was ending on 31 May 2009 if she was not aware that was even an issue.

[33] Given Ms Shead's strong reaction to being told by Mrs Thorburn that her employment had ended, I consider it unlikely she would have remained silent if Mrs Dingle had in fact told her that her employment was ending on 31 May 2009.

[34] For these reasons I prefer Ms Shead's account of handing the parental leave form in to Mrs Dingle to sign and send off over Mrs Dingle's recollections of completing the form.

[35] I find it established, on the balance of probabilities, that Ms Shead was dismissed on 29 August 2009.

[36] Ms Shead had been intending to return to work and up until her conversation with Mrs Thorburn believed she was still employed by TJSF. She still had personal effects stored at the farm and she had put child care arrangements in place ready for her return to work on 9 September 2009. She had not wanted her employment to end and was visibly shocked and distressed when told she was no longer employed.

[37] Ms Shead said it was clear from what Mrs Thorburn said that she did not have a job to come back to, so she asked Mrs Thorburn on 29 August 2009 to provide her with a statement outlining the reasons for her dismissal. She received a letter from Mrs Thorburn dated 31 August 2009 which was effectively a certificate of service and which did not give any reason for her employment ending.

[38] I find that Mrs Thorburn's advice to Ms Shead on 29 August 2009, that she was no longer employed ended her employment. This was a sending away by the employer and therefore amounted to a dismissal.

Was dismissal justified?

[39] Having found that Ms Shead was dismissed, I now considered whether that was justified. TJSF's defence of Ms Shaed's claim was based on the fact there was no dismissal, so it did not seek to justify its actions on the grounds that it had a good reason (i.e substantive justification) for ending her employment.

[40] Mr Thorburn and Mrs Dingle both admitted to being unaware of an employer's parental leave obligations or an employee's parental leave rights. They also admitted that they did not take any steps to obtain this information. TJSF failed to comply with the obligations imposed on it under the [Parental Leave and Employment Protection Act 1987](#) (PL&EPA).

[41] If TJSF had complied with its [section 36](#) PL&EPA requirement to provide Ms Shead with notice about her entitlement to parental leave (see Form 1) within 21 days of receiving her parental leave application then it would have been clear to both parties whether or not her job would be kept open for her and when her parental leave would start and finish.

[42] TJSF also failed to give Ms Shead the [s38](#) PL&EPA notice (see Form 2 if job being kept open or Form 3 if job not being kept

open) it was legally required to provide her with. Had it done so, it is likely this situation would not have arisen in the way in which it did.

Remedies

Mitigation

[43] Ms Shead has a legal obligation to take reasonable steps to mitigate her loss. She says that after she was dismissed she contacted 23 farmers looking for work. Evidence of this was produced to the Authority.

[44] As a result of these inquiries she obtained part time work as a Dairy Farm Assistant on 8 July 2010 for 20 hours per week at \$15.00 per hour. She says she is still looking for full time employment.

[45] Ms Shead said after failing to find work in the first few months after her dismissal she became disheartened and gave up looking. She also said she got post natal depression so was not well enough to work until recently. Ms Shead said her post natal depression occurred after her dismissal and she attributes it to the stress of her dismissal. No medical evidence was produced in support of this claim.

[46] I find that Ms Shead did not take appropriate steps to mitigate her loss after her first three months without work, so this breaks the chain of causation.

Lost remuneration

[47] Ms Shead says she was on paid parental leave from 1 June to 9 September 2009. She was then out of work for 8 months until 8 July 2010. She is seeking ten months lost remuneration at \$634.62 gross per week plus an amount to compensate her for the shortfall in earnings from 8 July 2010 until the date of the investigation meeting. This was not quantified.

[48] Ms Shead has clearly lost more than 3 months' remuneration so it is appropriate to award her 3 months' lost remuneration pursuant to section 128(2) of the Act, on the basis she mitigated her loss over this period. However, I do not consider it appropriate to award lost remuneration for longer than three months because Ms Shead did not properly mitigate her loss after that.

[49] TJSF is ordered to pay Ms Shead \$8,250 gross being three months lost remuneration.

Hurt and humiliation

[50] I accept that Ms Shead suffered injury to her feelings as a result of her dismissal but consider that the evidence in support of an award pursuant to section 123(1)(c)(i) merits an average award. I therefore consider that \$5,500 is an appropriate amount to compensate her for her hurt feelings.

[51] TJSF is ordered to pay Ms Shead \$5,500 pursuant to section 123(1)(c)(i) of the Act.

Contribution

[52] I find that Ms Shead did not contribute towards her dismissal so no reduction to remedies pursuant to section 124 of the Act is appropriate.

Costs

[53] Ms Shead was legally aided. There is nothing in this case which would warrant a departure from the normal principle that the successful party should be entitled to a contribution towards their actual legal costs.

[54] This was a half day matter so I consider an award of costs of \$1,500 is appropriate.

Rachel Larmer

Member of the Employment Relations Authority