

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 187
5323021

BETWEEN CRAIG PETER WALDRON
Applicant
A N D MKA HOLDINGS LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Riki Donnelly, Counsel for Applicant
Ashley-Jane Lodge, Counsel for Respondent
Investigation meeting: 21 May 2013 at Invercargill
Submissions Received: At the investigation meeting
Date of Determination: 6 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Craig Waldron, claims he was unjustifiably dismissed by the respondent, MKA Holdings Limited, on 12 October 2010.

[2] Mr Waldron also claims MKA improperly withheld holiday pay which he now seeks.

[3] There was also a claim of unjustified disadvantaged. Mr Donnelly now advises the facts giving rise to that claim are identical to those which underpin the claim of unjustified dismissal. He says the claim has been subsumed by the prime allegation and should be withdrawn as a separate allegation. I agree.

[4] MKA's response is Mr Waldron resigned of his own volition and it was authorised to retain the holiday pay by virtue of the consent Mr Waldron gave via his employment agreement.

Background

[5] Mr Waldron was employed by MKA to perform various tasks on its farm approximately 20 minutes from Gore. The employment arose as a result of his history of previous employment, and friendship, with the principals of MKA – Mr Michael and Mrs Rachel Drabble. The previous employment was undertaken near Oamaru.

[6] He commenced in May 2010 though the employment agreement was not signed until some time later. Pertinent to this dispute, is clause 4(d). It reads:

Deductions from the Employee's remuneration may be made by the Employer for any overpayment, default, by agreement, for debts owing to the Employer, for leave in excess of paid entitlements under statute or expressed herein, or as otherwise provided for in this agreement. This will include any costs to the Employer if accommodation has to be cleaned, tidied or repaired at the end of the tenancy.

[7] Initially the employment progressed well with the evidence suggesting the Drabbles' considered Mr Waldron a willing and capable asset as was his partner, Kathryn Noordermeer, who assisted Mrs Drabble with the rearing of calves.

[8] In early September Mr Waldron borrowed \$600 to assist with the purchase of a vehicle he intended *doing up*. It was also around this time the Drabbles first had concerns about Mr Waldron. In mid September Southland experienced a severe snow storm and, according to Mr Drabble, Mr Waldron struggled.

[9] Soon thereafter Mr Waldron took a weeks' leave and went to Oamaru with his family. Mr Drabble goes on to say:

Prior to going to Oamaru, the whole family came around to look at the calves in the paddock. While Craig was showing his kids the calves Rach and I spoke to Kathy about Craig's wellbeing. We said that we hoped Craig was well rested. Kathy replied that he was not really looking forward to coming back.

[10] The Drabbles came to the conclusion Mr Waldron had qualms about his decision to move to Southland and was considering a return to Oamaru. Mr Waldron denies their belief was warranted and Ms Noordermeer is adamant she did not make the alleged comment about a reluctance to return to Southland.

[11] In early October 2010 Ms Noordermeer became ill. This resulted in a day's hospitalisation during which tests were performed to try and ascertain a cause. None has been identified and this had a bearing on subsequent events.

[12] Mr Waldron, who had yet to complete sufficient service to have an entitlement to sick leave, sought time off to look after her. An agreement was reached whereby he would commence a period of three rostered days off earlier than originally scheduled and a return was envisaged on 10 October.

[13] On 9 October Mr Waldron sent a text message to Mr Drabble seeking more time off. A few more texts passed before Mr Drabble asked Mr Waldron to come and see him. He says he felt uncomfortable conducting such communication by text.

[14] Mr Drabble says when he came Mr Waldron unexpectedly returned a rifle he had borrowed a month earlier. He goes on to say Mr Waldron's demeanour was unexpectedly hostile and it was difficult starting a conversation. He goes on to say:

I asked him how Kathy was going and he replied that she was improving.

Craig asked if he could take some more time off without pay to look after Kathy and the kids. I asked him what sort of time frame he had in mind and when he would be looking to return. Craig replied that initially three days but it would probably be longer. He explained that he was unsure on exactly how long he would be off for, which was why he would take time off without pay.

I asked Craig whether he had thought this through and in particular how he would support his family... Craig replied that that was none of my concern.

I offered Craig a possible compromise where he remained on full pay but just helped out with milking only so he could care for his family during the day. I told him that milking took less than two hours but if he had to leave milking early that it would be fine. Craig then turned around and said that he didn't want to do that and that he would be better off to resign.

[15] The discussion then deteriorated with Mr Drabble claiming Mr Waldron *then flew off the handle and waved his arms in the air claiming that it was Rach's fault that Kathy was sick because of the calves*. Mrs Drabble took umbrage at the accusation and responded by loudly telling Mr Waldron to *grow up*. Mr Waldron then left.

[16] Mr Waldron's written evidence about the meeting is limited to the statement:

At this meeting Rachel Drabble yelled at me and told me that if I did not turn up for work on the Monday then legal action would be taken against me. She told me that I needed to grow up.

[17] He added, when giving oral evidence, he also threatened the Drabbles with a personal grievance at that point. The Drabbles deny they threatened legal action and while Mr Drabble recollects Mr Waldron mentioning a grievance, he placed no import on it.

[18] That evening the Drabble family had dinner at the residence of Ms Ellis, a friend who works as a human resource professional. Mr Drabble outlined the conversation with Mr Waldron and that it had ended with a resignation. He says he was advised not to accept the resignation and allow time for Mr Waldron to cool down.

[19] Mr Waldron and the Drabbles met again the following day with texts preceding the meeting. The meaning of one is disputed. It reads: *Its not about liking or disliking. Rach is simply drawing a line in the sand as an employer.*

[20] The Drabbles say it is a reference to their belief the calf pens are maintained in a clean and tidy fashion which was a response to Mr Waldron's accusation their condition was behind Ms Noordermeer's illness. Mr Waldron insinuates (but does not actually say) it related to the demand he return to work.

[21] The meeting was again tense with Mr Drabble saying they asked Mr Waldron to think about his position and tried to ensure he was aware their compromise was not *take it or leave it*. He had the option of time off without pay if he wanted.

[22] The two met again on a driveway. Mr Drabble says he enquired about Ms Noordermeer's wellbeing and resignation was again discussed. He says he told Mr Waldron that was not what they (the Drabbles) wanted. They valued his contribution and were keen for him to stay. Mr Drabble goes on to say Mr Waldron again reiterated a desire to resign and return to Oamaru as he and Ms Noordermeer found it difficult being so far from family support. Mr Drabble says his response was a request Mr Waldron reconsider. Once again Mr Waldron denies mentioning resignation. He says this discussion saw a reiteration of his request he have a couple of unpaid days off and Mr Drabble responded by saying something could be worked out.

[23] The following day, 11 October 2010, there was further interaction between Messrs Drabble and Waldron over whether the latter would be required to assist with milking. It appears Mr Waldron was advised all was in order and he need not worry. That evening he lodged an advertisement aimed at selling a diesel tank on TradeMe. The accompanying text reads: *i think it is 500l i got it off trademe and have not used it, need to sell as moven and cant take with me this in good nick, no holes or rust.*

[24] There is considerable disagreement about the events of the following day with Mr Waldron claiming it was the one upon which he was dismissed. He says:

On Tuesday the 12th of October 2010 Michael Drabble came to see me. I immediately told him I was available to do milkings. He then handed me a letter outlining the money that I owed him, told me that he didn't want me back and that I had two weeks to leave the house.

Michael Drabble also gave me a letter that he wanted me to sign indicating that it was I who was resigning and not Michael who was dismissing me. I refused to sign this letter as I had not resigned.

[25] This evidence is supported by Ms Noordermeer who claims she heard Mr Drabble tell Mr Waldron he didn't want the latter back and they had two weeks to vacate the house.

[26] Mr Drabble says:

On Tuesday 12 October 2010, I again met up with Craig at the top of the driveway by the gate. He reiterated his desire to resign and stated that if it was alright with us he would go back to Oamaru as soon as he could arrange it.

I explained again that it was not what we wanted and asked if he had discussed it thoroughly with Kathy, which, he said he had. I then brought up the issue of holiday pay and money owed. After our discussion with Aaron Drake (a lawyer consulted by the Drabbles), I had written a rough outline of what we owed him for final pay and holiday pay and what he owed us for power, phone and vehicle repairs and loans. I explained it to him and handed him the note.

[27] Mr Drabble says the two then discussed options for paying the debt.

[28] Later that day Mr Waldron gave Mr Drabble a medical certificate covering the next couple of days.

[29] The following day (13 October) Mr Drabble handed Mr Waldron a letter accepting his resignation. It had been prepared and dated the previous evening. It reads:

On the 9th October 2010 you indicated to us that you wished to terminate your employment with us. We have asked you twice to think about your decision as this is not what we wished.

On the 12th October 2010 I again discussed with you your decision to resign and reiterated to you that it was not what we wanted. You stated that you wished to continue with your decision to terminate your employment with us forthwith, as you needed to be closer to family due to the poor health of your partner Kathy.

It is with regret that we now accept the notice you handed us on the 9th October 2010.

Your employment will therefore end immediately...

[30] Mr Drabble claims that upon receiving the letter Mr Waldron stated *I should probably give you my resignation in writing as well* though that never occurred.

[31] Mr Waldron then sought assistance from the Department of Labour in respect to his holiday pay. That led to a conversation between the Department and Mr Drabble which was followed by the latter informing Ms Ellis of the approach. She says she phoned the Department on Mr Drabble's behalf and in what was a relatively quick conversation was told Mr Waldron had resigned and just wanted to make sure he got his holiday pay. She says she responded by advising it would be properly calculated but the Department should be aware there were monies owing which they were authorised to retain so he may not therefore get the amount in full.

[32] Mr Waldron denies the Department would have advised he resigned and refers to a letter from the Labour Inspector involved. It is to Mr Waldron and Ms Noordermeer, dated 10 November 2010 and summarises the issues raised. Contained therein is a statement Mr Waldron had advised his *partner Kathy got sick and I (you) needed to look after her and my (your) three kids and got the sack over it.*

[33] There were other exchanges including the serving of a trespass notice on 18 October and on 19 October 2010 the Southland Community Law Centre wrote to the Drabbles in respect of the holiday pay owing. The personal grievance was raised in a letter dated 2 December 2010 but the parties have been unable to resolve it.

Determination

[34] Notwithstanding the considerable differences between the parties as to what occurred, their positions can be quickly summarised. Mr Waldron argues the uncertainty over his wife's recovery made retention *just too hard* for the Drabbles. He claims they therefore decided to dismiss and the suggestion there was a resignation and subsequent attempts to confirm it in writing were devices to hide their true actions.

[35] The Drabbles contend Mr Waldron was under pressure from both his family and the work. He concluded it was best to return to Oamaru and resigned. He then discovered that incurred a 13 week stand-down before he could gain the unemployment benefit but the stand-down could be avoided by taking a personal grievance. It was only then he alleged he had been dismissed.

[36] Mr Waldron claims he was unjustifiably dismissed. It therefore falls to him to establish, *prima facie*, there was a dismissal before MKA can be required to answer the claim and justify their actions. I conclude he has been unable to do so.

[37] I prefer the evidence of the Drabble's over Mr Waldron's. At times Mr Waldron's evidence lacked specificity with an example being cited in paragraph 16 above. This was not always rectified when answering oral questions aimed at eliciting more detail and some reticence was apparent when asked to either confirm or deny some of the Drabble's evidence regarding when meetings occurred and what was said therein. With one exception (when the letter delivered on 13 October was prepared) the Drabbles evidence was devoid of such deficiencies.

[38] There are then some specific points which leave me doubting Mr Waldron has discharged the onus he carries.

[39] Mr Waldron claims words of dismissal were uttered on the 12th of October and that it was when the letter confirming resignation was handed over. Ms Noordermeer says she also heard this conversation yet oral evidence leads me to conclude the letter was handed over on the 13th at near a gate at the top of a drive. That is inconsistent with Mr Waldron's evidence and Ms Noordermeer accepts she could not have heard what was said out on the drive. There are inconsistencies.

[40] There is then the trade me advertisement. Mr Waldron's explanation is that he amended the advertisement after it was placed but undermines that by being unable to say when. I am left with an advertisement that says what it says. It predates the alleged dismissal and says Mr Waldron intends *moving on*. That is consistent with the Drabble's evidence and not Mr Waldron's claim.

[41] The evidence Mr Drabble raised Mr Waldron's resignation with Ms Ellis is uncontested. There is no evidence of a rationale for that conversation other than it being the result of a resignation already tendered as the Drabble's claim.

[42] There is then the initial letter proffered on Mr Waldron's behalf by Southland Community Law. It is primarily about payment issues. It notes the employment has ended but does not mention an alleged dismissal. When asked to explain this Mr Waldron replied he couldn't as he understood the alleged dismissal was to be raised. I find it incomprehensible a professional advocate would write such a letter yet forget to mention what is undoubtedly the key element of any potential claim. It creates further doubt about Mr Waldron's claim.

[43] Finally there is the letter from the Department of Labour. While it mentions Mr Waldron being dismissed it does not assist. Ms Ellis's evidence it was not mentioned when she spoke to the Labour Inspector again went undisturbed and the Department's notes of the meeting with Mr Waldron make no mention of the allegation. I am left with no idea when the Labour Inspector (who has now left both the Department and New Zealand) got the idea of dismissal as there is a delay before the letter was written and it records there had been further telephone conversations in the intervening period.

[44] These key points are all consistent with the Drabbles theory of the case and not Mr Waldron's. For the above reasons I conclude he has failed in his duty to establish a prima facie case which requires answering.

[45] Turning to the claim MKA improperly withheld holiday pay. I conclude this also lacks merit.

[46] The Wages Protection Act only allows deductions from wages and holiday pay with the authority of the employee. In this case that authority was given via the

employment agreement. Mr Waldron accepts he owed more than he was due upon cessation and this is reflected in both letters forwarded on his behalf by Southland Community Law. Indeed the first was accompanied by a cheque paying the residual difference after the unpaid wages had been taken into account.

[47] The argument appears to be Mr Waldron had an urgent need for the money. He should therefore have been allowed to receive monies owed and address his debts to MKA at a later date. By not being given that option he was disadvantaged.

[48] The argument fails to recognise the employment agreement and the right to deduct it bestowed on the MKA.

Conclusion

[49] For the above reasons I conclude Mr Waldron has been unable to convince me he was dismissed, let alone unjustifiably. His claim therefore fails

[50] Similarly, and again for reasons outlined above, Mr Waldron's claim MKA improperly withheld holiday pay also fails.

[51] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority