Employment Court of New Zealand

A Farmer v A Worker CC3/09 [2009] NZEmpC 15; [2009] ERNZ 7; (2009) 9 NZELC 93,132; (2009) 6 NZELR 377 (20 March 2009)

Last Updated: 2 April 2009

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 3/09CRC 49/07

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN A FARMER
Plaintiff

AND A WORKER
Defendant

Hearing: 10 & 11 July 2008

(Heard at Christchurch)

Appearances: Naomi Cervin, counsel for the plaintiff
Grant Slevin, counsel for the defendant

Judgment: 20 March 2009

JUDGMENT OF JUDGE A A COUCH

[1] This matter concerns the employment relationship between a farmer and a farm worker. The relationship ended abruptly after the farmer's young son alleged that he had been indecently assaulted by the worker but, although the allegations were investigated by the police, no criminal charges were ever initiated. In these circumstances, I made an order permanently suppressing the names of the parties and other witnesses and of all information which might lead to their identification, including the location in which the events occurred.
[2] Consistent with that order, the parties to this case and other persons mentioned in the evidence will be referred to by generic terms. The location of events will be protected by referring simply to "the farm" and to "the town" nearby. All relevant events took place within one calendar year which need not be specified. This judgment will record only those aspects of the evidence necessary to understand the issues and to put my decision into context.
[3] After the employment relationship ended, the worker raised a personal grievance alleging that he had been unjustifiably dismissed. The matter was referred to the Employment Relations Authority which gave a determination in favour of the worker. More specifically, the Authority found that the farmer was justified in sending the worker away from the farm in the first instance but unjustified in failing to take any further steps.
[4] The farmer effectively challenges only that second aspect of the Authority's determination but the matter proceeded before the Court by way of a hearing de novo.
[5] In the course of the hearing, a significant part of the evidence given was directed at persuading me to make findings of fact about whether the worker had indecently assaulted the farmer's son. This raised obvious difficulties as the alleged conduct was of a serious criminal nature and morally reprehensible in the extreme. In the course of the hearing, I expressed the view that such issues could only be properly determined by a criminal law process, something very different to the process of the Employment Court in resolving employment relationship problems. Through counsel, both parties accepted that view.

Background and sequence of events

[6] The farmer and his wife own and operate a farm. They have two children, a boy and a girl. At the time of the events in issue, the boy was between 4 and 5 years old and the girl was between 2 and 3 years old. For the most part, the farmer attended to the day to day operations of the farm. His wife was employed on a part time basis in the community.

[7] The worker was experienced in farm work. In May, the worker was employed by the farmer to work on the farm. As part of the employment agreement, the worker lived in a small building on the farm described as a "sleep out". This building was located about 20 metres from the homestead in which the farmer and his family lived. The boy and girl had ready access to the area in which the sleep out was located. Most days, the worker joined the farmer and his wife in their home for lunch. In the evenings, the worker generally went to the nearby town where he had his evening meal and sometimes did casual work in a hotel.

[8] For the first several months, the relationship between the worker and the farmer and his family was congenial. In addition to having lunch with the farmer and his family most days, the worker would sometimes have a beer with the farmer at his home at the end of the working day. They also engaged in sporting activities together on a regular basis.

[9] The farmer and his wife gave evidence of three events in September in which they say the worker behaved unacceptably in relation to their children. Two involved the boy, the other involved the girl. In his evidence, the worker denied any misconduct and disputed that one of the events described took place at all. In the context of evidence about surrounding events, I found the evidence relating to these three alleged incidents equivocal and have not drawn any adverse inferences from it.

[10] According to the farmer, the third of these events occurred on 21 September while he and the worker were having a recreational day out together. The boy had gone with them.

[11] At about 7pm that evening, in the family home, the boy behaved unusually by repeatedly grabbing his father's testicles. The farmer told the boy off for doing this and asked him *"Who does this to you?"* The boy replied that the worker had touched him in this way. The farmer and his wife gave evidence that, in response to further questioning, the boy made other disclosures including that he had touched the worker's genitals.

[12] The farmer and his wife believed that what the boy told them was true.

[13] At about 8.30pm, the farmer telephoned the police to make a complaint about the worker based on what the boy had said. At about 10pm, the farmer telephoned his family solicitor for advice. The farmer's wife then telephoned a family friend for assistance. He came to the farm at about 10.30pm.

[14] Throughout the evening, the worker had been working at the hotel in the town. He returned at about 11pm and went directly to the sleep out where he went to sleep.

[15] The farmer and his wife discussed with the family friend what they should do about the worker in light of the allegations made by the boy. It was agreed that the farmer and the family friend would go to the sleep out and tell the worker to leave. Following advice given by the solicitor, the farmer's wife then wrote out a cheque payable to the worker for what she believed to be a week's wages.

[16] At about 11.45pm, the farmer and the family friend went to the sleep out where they woke the worker. The farmer told the worker that the boy had accused him of sexual abuse and that he had to leave immediately. The worker denied the allegation and asked the farmer whether he believed it to be true. The farmer replied that it was the boy making the allegation not him. The family friend then intervened to tell the worker firmly that he must pack up all his belongings and leave. The farmer then gave the worker the cheque, apparently without explanation, and the two men left the sleep out. The worker left about half an hour later with all his belongings.

[17] After leaving the farm, the worker went into the town where he was able to find accommodation for the rest of the night with a friend. The next morning, he went to the police station in the town, told the officer on duty what had happened and asked what he should do. The officer in question was unaware of the complaint as it had been made after hours and taken by staff in a metropolitan centre. The worker was told to wait for the police to contact him.

[18] Over the next two weeks, the police investigated the complaint made by the farmer on 21 September. Two evidential interviews with the boy were conducted by an appropriately trained person. In those interviews, the boy did not repeat any of the allegations the farmer and his wife said he made to them or say anything else which suggested inappropriate behaviour by the worker.

[19] After the police reported the results of those interviews to the farmer and his wife, the farmer telephoned the worker on 2 October. He told the worker that the boy's interviews with the police had disclosed nothing and that he was *"off the hook"*.

[20] Within a few days after that, the farmer's wife reported to the police that the boy had made further allegations of indecent conduct by the worker in the sleep out. These further allegations were of a nature which could be investigated by forensic analysis. The police obtained samples from the sleep out and from the boy and then interviewed the worker. He denied the allegations and agreed to provide a DNA sample. Subsequent analysis did not support what the boy was reported to have said. The police then concluded their inquiry.

[21] Other than the telephone call by the farmer to the worker on 2 October, neither the farmer nor his wife contacted the worker. They explained this by saying that the police had told them not to contact the worker while

the allegations against him were being investigated. The worker received no further payment from the farmer.
[22] Very shortly after the worker was sent away from the farm, it became widely known in the town and surrounding district that the worker had been accused of indecent conduct with the boy. As a result, the worker was subjected to verbal abuse, he was assaulted and his car was damaged.

Was the worker dismissed?

[23] Before the Authority and before the Court, the case for the worker was presented as a personal grievance of unjustifiable dismissal. In response, the principal focus of the farmer's case was on justifying his action in sending the worker away.
[24] In this context, Ms Cervin submitted that the mere fact that the allegations against the worker were made by the boy made it impossible for the worker to remain on the farm, whether or not those allegations were true. This reflected evidence given by the farmer and his wife that, once the boy made the allegations, they could never trust the worker again, regardless of the outcome of any subsequent investigation. When that proposition was put to the worker, he agreed that *"things have changed forever".*
[25] Ms Cervin relied on this evidence in support of her submission that the dismissal of the worker was justifiable but it also raised the possibility of an alternative conclusion that the effect of the allegations made by the boy was to frustrate the employment contract between the parties and therefore bring it to an end.
[26] As neither counsel had directly addressed the issue of frustration in the course of the hearing, I issued a minute raising the possibility and inviting them to make supplementary submissions. Both Ms Cervin and Mr Slevin provided further memoranda containing succinct and helpful submissions.
[27] The doctrine of frustration has its origins in the 19th century as a means to avoid injustice when unforeseen events rendered the performance of a contract impossible. In the early 20th century, the doctrine was extended to include cases where, although performance was not actually impossible, there had been a change of circumstances which made further performance radically different.
[28] A simple statement of the modern law is that of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] UKHL 3; [1956] AC 696 at page 729:

... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

[29] In *National Carriers Ltd v Panalpina (Northern) Ltd* [1980] UKHL 8; [1981] AC 675, 700 Lord Simon summarised the doctrine this way:

Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[30] Most cases in which the doctrine of frustration has been applied have involved commercial contracts. Typical examples include the hire of a building which burns down or the charter of a ship which sinks. It has, however, also been applied in other types of cases. The availability of the doctrine of frustration in employment cases was confirmed by the Court of Appeal in *Karelrybflot AO v Udovenko* [1999] NZCA 331; [2000] 2 NZLR 24 where, on behalf of four of the five members of the Court, Blanchard J said:

[36] *Mr David has satisfied us that the doctrine of frustration is applicable to contracts of employment. Mr Kenworthy, who argued this part of the case for the respondents, accepted this as a general proposition but endeavoured to persuade the Court that it applies only in limited situations: where an employee is seriously ill or has been imprisoned or, in wartime, interned, or where the employer's ability to act as such is prevented by a legislative change. Mr Kenworthy submitted that no authority can be found for the proposition that the doctrine applies where an employee is still ready, willing and able to perform the duties required under the employment contract.*

[37] *We would be hesitant about accepting Mr Kenworthy's proposition, firstly because it seems to conflict with the legislative change example which he provided and, secondly, because it is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example (16* Halsbury's Laws of England *(4th ed), para 283).*

[31] It may be noted that the fifth member of the Court in that case, Gault J, did not differ on the principles of law

involved but only on their application to the facts. On that basis, the dictum of Blanchard J set above may be regarded as the unanimous view of the court.
[32] The essential guidance to be taken from the decision in the *Karelrybflot* case is that whether a contract is frustrated in any particular case will be a matter of fact and degree and that no particular categories of case are excluded as a matter of principle. I also take into account, however, what Blanchard J said in the remaining part of paragraph [37] of the majority judgment:

We bear in mind also the observation of Bingham LJ (as he then was) in J Lauritzen AS v Wijsmuller BV *[1989] EWCA Civ 6; [1990] 1 Lloyd's Rep 1 (The* "Super Servant Two"*) at p 8 that:*

"2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended . . .."

[33] This statement is problematic. The decision in *The Super Servant Two* was of the English Court of Appeal and, in making the summary point set out above, Bingham LJ relied on dicta in three decisions of the House of Lords.
[34] The first decision was *Bank Line Ltd v Arthur Capel and Company* [1918] UKHL 1; [1919] AC 435 where, at page 459 of the report, Lord Sumner rejected a claim of frustration and said:

I think also that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances.

[35] It is of some significance that this decision was given at a time when the doctrine of frustration was based on implied term and the reluctance of the courts to imply terms into commercial contracts necessarily restricted its scope.
[36] Next, Bingham LJ relied on two dicta from the decision in the *Davis Contractors* case. At page 715 of the report, Viscount Simonds rejected a claim based on implied term and then said:

Equally, if, as is held by some, the true doctrine rests, not on an implied term of the contract between the parties, but on the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain, I would emphasize that in this aspect the doctrine has been, and must be, kept within very narrow limits.

[37] At page 727 of the report, Lord Radcliffe said:

Frustration is not to be lightly invoked as the dissolvent of a contract.

[38] The fourth dictum relied on by Bingham LJ was that of Lord Roskill in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] AC 724 where, at page 752 of the report, he cited the classic statement of Lord Radcliffe in the *Davis Contractors* case and said:

It should therefore be unnecessary in future cases, where issues of frustration of contracts arise, to search back among the many earlier decisions in this branch of the law when the doctrine was in its comparative infancy. The question in these cases is not whether one case resembles another, but whether applying Lord Radcliffe's enunciation of the doctrine, the facts of the particular case under consideration do or do not justify the invocation of the doctrine, always remembering that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.

[39] Curiously, although Bingham LJ referred to the decision in the *National Carriers* case in another context, he did not appear to have regard to the endorsement by the members of the House of Lords in that case of the proposition that:

...the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula.

[40] I proceed on the basis that the summary statement made by Bingham LJ in *The Super Servant Two* and noted by the Court of Appeal in the *Karelrybflot* case must be put into the context of the decisions on which it was said to be based and of the views expressed by the House of Lords in the *National Carriers* case. The doctrine of frustration is not to invoked lightly but should be applied where the facts of the case warrant the intervention of the law to avoid injustice.
[41] Turning to the facts of this case, the issues are whether the boy's allegations:

a) were a "supervening" event
b) produced consequences for the farmer which rendered continued employment of the worker something radically different from what had originally been undertaken
c) were made without default on the part of either party.

[42] The use by the Courts of the word "supervening" to describe the type of event which may trigger frustration of a contract has two aspects to it. The first is the normal meaning of the word which is that the event must interrupt

or change the existing situation. The second aspect is that the event must be something which the parties to the contract did not anticipate or cannot have been expected to anticipate at the time the contract was entered into. In this case, the allegations of sexual misconduct made by the boy were undoubtedly "supervening" in both senses. They entirely disrupted the employment relationship between the parties. It must also have been beyond the contemplation of the parties at the time the worker was employed that such allegations would be made. Otherwise, the farmer would never have employed him.

[43] The consequences of the boy's allegations were the subject of direct evidence by the farmer and his wife. They both said that the immediate effect of the allegations was to make it intolerable for them to have the worker on the farm and that, regardless of the outcome of the police investigation, they could never trust the worker or have him back on the farm again.

[44] I accept that evidence. The relationship of parent and child made it highly likely that the farmer and his wife would believe the boy on a matter of grave importance such as this. I also accept that parents in these circumstances will find it extremely difficult, if not impossible, to entirely discount such allegations and expose their children to even a remote risk of harm where that can be avoided. A response such as this based on parental care and affection cannot readily be put aside on the basis of logic. Overall, I find the reaction of the farmer and his wife to the allegations was natural and predictable. Indeed, it would have been surprising if they had reacted otherwise.

[45] I am reinforced in this view by the response of the worker to this evidence from the farmer and his wife. As noted earlier, the worker agreed in his evidence that, since the boy made the allegations against him, *"things have changed forever"*. He also said that, had he been in the farmer's position, he would have had a similar response to the allegations being made and would probably have reacted in an even more forceful manner.

[46] Did this reaction by the farmer and his wife render the situation and the further performance of the employment contract something radically different from what had been originally undertaken? Undoubtedly it did. The farmer and his wife immediately lost the trust and confidence in the worker essential to the employment relationship and could not be expected to regain it. As a result, the essential nature of the relationship between the parties was fundamentally changed. To continue to employ the worker would have required the farmer to accept the unacceptable.

[47] The third issue is whether the boy's allegations against the worker were made "without default of either party". This expression was used by both Lord Radcliffe in the *Davis Contractors* case and by Lord Simon in the *National Carriers* case when setting out their classic summaries of the doctrine of frustration but the meaning and scope of it has never been authoritatively defined. The best explanation appears to be that of Griffith LJ in *Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854. Delivering a dissenting judgment in the Court of Appeal which was later approved by the House of Lords on appeal, he said at page 882 of the report:

The essence of frustration is that it is caused by some unforeseen supervening event over which the parties to the contract have no control, and for which they are therefore not responsible. To say that the supervening event occurs without the default or blame or responsibility of the parties is, in the context of the doctrine of frustration, but another way of saying it is a supervening event over which they had no control. The doctrine has no application and cannot be invoked by a contracting party when the frustrating event was at all times within his control: still less can it apply in a situation in which the parties owed a contractual duty to one another to prevent the frustrating event occurring.

[48] I adopt that approach in my consideration of this aspect of the matter.

[49] Mr Slevin submitted that the manner in which the boy was questioned by the farmer on the evening of 21 September prompted the making of the initial allegations and that the questions the farmer asked were always within his control. The logical extension of this submission is that the farmer was to an extent responsible for the boy making the initial allegations. While I accept that the farmer did ask the boy a question which effectively required an answer and that the farmer had control over the form of the question, he had no control over what the boy said in reply. The supervening event in this case was not that the boy answered his father's question but rather the nature of that answer. That was something over which the farmer had no control. Equally, it cannot be said that the worker had any control over what the boy said or the nature of the allegations he made.

[50] On this issue, I find that neither party had control over what the boy said and, in that sense, the allegations were made by the boy without default of either party.

[51] Overall, I find as a matter of fact and degree that the employment contract between the parties was frustrated on 21 September when the boy made his initial allegations. The change in circumstances caused by those allegations fundamentally changed the situation and made any further performance of the contract radically different from what the parties had undertaken when the farmer first employed the worker. The situation was such that it would have been unjust for the farmer to have been held to his obligations under the employment relationship after the allegations were made.

[52] In reaching this conclusion, I have had regard to the "floodgates" argument advanced by Mr Slevin. He submitted that, if the Court were to find that the employment contract in this case had been frustrated, a similar conclusion would have to be reached in other cases in which an employer believed that serious misconduct had occurred. He suggested this would include cases where there was a substantial theft or destruction of property in

circumstances where only one employee could have been responsible.
[53] I do not accept this submission. In this case it is the combination of a number of particular facts which has led me to the conclusion I have reached. The key facts include:

a) The relationship of parent and child between the employer and the maker of the allegations.
b) The particular nature of the allegations.
c) That the employer, his family and the employee all lived in close proximity in the workplace.
d) The isolated location of the workplace.

[54] Such a combination of facts will be rare and my decision in this case ought not to be seen as expanding the law in any way. Rather, it is the application of established principles to specific and unusual facts. Also, as I have done in this case, the Authority or the Court in other cases will apply the proposition adopted by the Court of Appeal in the *Karelrybflot* case that the doctrine of frustration is not to be lightly invoked.
[55] Mr Slevin also submitted that to find that the employment contract in this case had been frustrated *"would be to sidestep the rules of natural justice entirely"*. The difficulty with that submission is that, once the facts of the case warrant it, frustration of contract occurs by operation of law. That is a process to which natural justice is not applicable.
[56] In a similar vein, it has been suggested that the doctrine of frustration ought not to apply to employment contracts in which there is a right to dismiss because the effect would be to undermine statutory employment protection provisions, such as those in Part 9 of the Employment Relations Act 2000. Support for this proposition was, for a time, to be found in the decision of Bristow J in *Harman v Flexible Lamps* Ltd [1980] IRLR 418 but that view was rejected by the English Court of Appeal in *Notcutt v Universal Equipment Co (London) Ltd* [1986] EWCA Civ 3; [1986] 1 WLR 641 and, in the *Karelrybflot* case, our Court of Appeal imposed no such restriction.
[57] Once a contract is frustrated, the parties are immediately discharged from any further performance of it. In this case, I find that the employment contract between the parties was frustrated once the boy made the initial allegations to the farmer and his wife on the evening of 21 September. It follows that the employment relationship came to an end at that point and that the worker was not dismissed. His personal grievance of unjustifiable dismissal therefore cannot be sustained.

Holiday pay

[58] Part of the worker's claim in the Authority was for holiday pay owing at the time his employment ended on 21 September. The Authority's order in that regard was not challenged and is unaffected by this judgment.

Comment

[59] In deciding this case I have taken into account the circumstances of the farmer not only as an employer but also as a father. In his submissions, Mr Slevin urged me to separate those roles in my analysis but, in my view, it is impracticable and unrealistic to do so. The farmer could not do so in fact and, having regard to human nature, could not be reasonably expected to do so. That is because the allegations made by the boy were not only of serious criminal offending but also inevitably had a powerful emotional impact on the farmer. This is a factor likely to distinguish this case from others in which it might be suggested that an employment contract has been frustrated.
[60] Consistent with the view I expressed during the hearing of this matter and recorded in paragraph [5] above, I have formed no view about the substance of the allegations made against the worker. None should be inferred from this decision.
[61] In considering this matter, I have been conscious that the worker lost his job and subsequently suffered considerable hardship and distress. The effect of my decision is that he has now also lost the remedies awarded to him by the Authority. That decision does not reflect a view that the worker is undeserving. Rather, it reflects a view, based on the application of legal principles, that the farmer ought not to be held responsible for the losses and indignity suffered by the worker.
[62] I wish to commend counsel on the manner in which they conducted a very difficult case.

Conclusion

[63] The worker's personal grievance is not sustained. The challenge is successful. Other than the order made in respect of holiday pay, the determination of the Authority is set aside and this decision now stands in its place.

Costs

[64] Having regard to the outcome of this case and the fact that it was decided on a basis different to that relied on by the farmer for his challenge, my preliminary view is that costs should lie where they fall. In any event, the worker was legally aided and it would be inappropriate to order the worker to make any contribution to the farmer's costs beyond the extent of his contribution to legal aid. If counsel wish to be heard on costs, they may file memoranda within 21 days after the date of this decision. Otherwise, there will be no order for costs.

A A Couch
Judge

Judgment signed at 1.00pm on 20 March 2009
