

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 70/08
5087974

BETWEEN ROBERT BALLANTYNE
 Applicant

AND WAIKENE ADVENTURES
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Glenn Jones, Counsel for Applicant
 Tim McGinn, Counsel for Respondent

Investigation Meeting: 11 and 12 March 2008 at Christchurch

Determination: 21 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Ballantyne worked for Waikene Adventures Limited from January 2006 until he was dismissed on 23 February 2007. The dismissal followed an altercation between Mr Ballantyne and his manager on 21 February 2007 when Mr Ballantyne says he was assaulted. Mr Ballantyne says that the dismissal was procedurally and substantively unjustified and he seeks various remedies as a result. In addition to the personal grievance claim Mr Ballantyne says that he is also entitled to arrears of holiday pay and a bonus payment.

[2] Responding to the grievance, the company's main area of contention relates to the circumstances of the altercation between Mr Ballantyne and his manager, it being recognised that Mr Ballantyne was dismissed without having a full opportunity to put his side of the story. The arrears and bonus claims are also contested.

[3] Mr Ballantyne's partner's name at the time was Belinda Austin. They are now married. Mrs Ballantyne was also employed by Waikene Adventures Limited and her employment was terminated for redundancy soon after Mr Ballantyne's dismissal. By agreement there was one consolidated investigation meeting during which we canvassed the evidence and issues relating to the separate claims by Mr and Mrs Ballantyne against Waikene Adventures Limited. However, it is convenient to issue separate determinations that focus on the issues relevant to the separate problems.

The company

[4] Mark Edwards and Andrew Edwards are brothers who are the shareholders and directors of Waikene Adventures Limited. The company owns and operates a property called Waikene Station near Kaikoura. The business comprises a farm, a lodge and a hunting estate. Mark Edwards is based in New Zealand and he was the director principally involved in the matters now before the Authority.

[5] The company employed Mr Ballantyne as its farm manager reporting to the directors. From early 2007 the company appointed Gary Joll as its general manager to whom Mr Ballantyne then reported.

The incident

[6] Mr Joll lives in Fairlie. He had been engaged as a consultant by the company to assist with the development of Waikene Station so had worked with Mr Ballantyne and had some knowledge of the business prior to his appointment as general manager. Mr Joll met with the owners in Auckland in mid February 2007 following which he sent an email to Mr and Mrs Ballantyne about a range of business issues for discussion and arranged to meet them at Waikene Station on 20 and 21 February 2007.

[7] Mr Joll's previous visit to Waikene Station had been on 5 February 2007. Arrangements for that meeting had caused some friction because Mr and Mrs Ballantyne had planned some time away but Mr Edwards insisted that they make themselves available to meet Mr Joll, including on Waitangi Day if necessary. That caused Mr and Mrs Ballantyne to reflect on his working days and hours and Mrs Ballantyne prepared a schedule showing that he had worked nearly 3,500 hours during his first year. A 40 hour working week equates to 2080 hours over 52 weeks.

[8] As it transpired Mr Joll's visit started and finished on 5 February and the day proceeded in a business like fashion.

[9] Mr Joll had a substantial agenda for his 20 and 21 February visit. He and Mr Ballantyne spent some hours together discussing matters on 20 February. Mr Ballantyne's evidence is that one of the first issues concerned his hours of work and time off. He says all he was asking for at that stage was his entitlement for Waitangi Day but Mr Joll said to him in a deliberately threatening manner to think very carefully before pursuing the claim. Mr Ballantyne says that there was the implication that his employment and bonus payment would be jeopardised if he pursued a claim for his statutory holiday entitlement.

[10] Mr Joll's evidence about the tenor of this part of the discussion is different. He says that he told Mr Ballantyne that he needed to look at the reality of the situation which included Mr Ballantyne having had more time off recently than was his strict entitlement. He says that the meeting went smoothly and that he thought that Mr Ballantyne had taken on board his comments. Mr Joll believed that Mr Ballantyne as a salaried employee was not entitled to anything extra for working on a statutory holiday so was counselling him not to make a claim.

[11] To the extent that their accounts of this exchange differ I prefer the evidence of Mr Joll. His recollection is supported by a diary written up by him on the evening of 20 February 2007 as was his regular practice. Mr Ballantyne agreed that the remainder of the exchanges on 20 February were cordial. That evidence supports the conclusion that there was nothing threatening in Mr Joll's tone or manner on the statutory holiday issue. Mr Joll was wrong to think that Mr Ballantyne was not entitled to anything extra for working on a statutory holiday, but his mistaken view of the law is not significant for present purposes. The meeting on 20 February ended with an arrangement for Mr Ballantyne to pick up Mr Joll next morning at 8.30am for a look around the property.

[12] When Mr Ballantyne did not arrive at the expected time next morning, Mr Joll walked from the owner's house over to the manager's house. Mr Joll's evidence is that he could hear a loud voice (Mr Ballantyne's) as he came to the porch, he called out to alert Mr Ballantyne to his presence and then retreated some distance from the porch to avoid any embarrassment for him or them. Mr Ballantyne's evidence is that Mr Joll strolled into the house, that he and Mrs Ballantyne were shocked by his

rudeness and arrogance, and that he asked Mr Joll to wait outside until he had finished his conversation with Mrs Ballantyne. Mr Ballantyne believes that Mr Joll was annoyed with being spoken to like this.

[13] Neither Mr Ballantyne nor Mrs Ballantyne saw Mr Joll at this stage as they were in the bedroom. Mr Ballantyne says he heard an entrance door opening and they both say they heard the door shutting. Mr Ballantyne initially described the exchange with Mrs Ballantyne as a *work related conversation*. However, in his oral evidence he described it as a *debate, angry raised voices*. Mrs Ballantyne's evidence is that it was a *heated disagreement*.

[14] The point of this careful review of the situation Mr Joll found is to assess Mr Ballantyne's state of mind and demeanour leading into what happened next. Mr Ballantyne's evidence downplays his state of anger but it is unconvincing. During the investigation meeting it emerged that Mrs Ballantyne keeps a personal diary. Her diary account of the events starts *Rob really mad with everything. Went out. Slammed door, yelled out fucking Catholics ...*. Mr Ballantyne explained to the Authority that the last phrase is used by him as a general term of abuse rather than being directed at anyone's religious beliefs.

[15] I find that Mr Joll's evidence and Mrs Ballantyne's diary entry gives the best indication of Mr Ballantyne's state of mind. He was *really mad with everything* including his employer and lacking self control as he headed out of the house.

[16] There is some conflict between Mr Joll and Mr Ballantyne about what happened between them. Mrs Ballantyne says that she did not see the altercation and her evidence is that the line in her diary reading *then shove Gary out of way and called him a c...* came from Mr Joll's later description rather than her direct observation. However, Mrs Ballantyne was outside and probably heard at least some of what happened.

[17] Mr Ballantyne's evidence is that Mr Joll blocked his way, raised his clenched fists like a boxer taking guard and pushed his fists into his (Mr Ballantyne's) chest as he tried to get past. Mr Joll's evidence is that he raised his palms as Mr Ballantyne bore down on him in order to stop him and calm the situation but Mr Ballantyne pushed him aside. Mr Joll did not fall to the ground because he was standing in the gap in a hedge which broke his fall. In his diary entry made later that night, Mr Joll

says that Mr Ballantyne ... *roughly pushed me aside. He was totally out of control, swearing and roaring.*

[18] I prefer Mr Joll's account of this incident. There was no reason for Mr Joll to be the aggressor nor is there any evidence to suggest that he is short tempered. Rather, Mr Joll struck me as a composed man in control of himself. Mr Ballantyne on the other hand has an explosive temper. There is evidence of other situations where he behaved in an angry and impulsive manner. Here, he started out *really mad* and his anger continued to dominate his behaviour as he pushed Mr Joll aside. It is common ground that Mr Ballantyne was angry as he stormed back to the house after this altercation, got the vehicle keys, returned to the vehicle and drove off.

[19] Mr Joll's evidence is that the driving *could only be described as the actions of a demented boy racer.* Mr Ballantyne's evidence is that he simply *drove off.* Mrs Ballantyne's diary records *Rob got in car and did wheelies, Zane went what the f ...? Zane was another employee who apparently witnessed Mr Ballantyne's driving at least. Again, I prefer Mr Joll's account supported by Mrs Ballantyne's diary entry. It is clear that Mr Ballantyne's anger had not abated even as he drove away.*

[20] It is common ground that Mrs Ballantyne apologised to Mr Joll and that Mr Ballantyne also apologised later when he returned. Mr Ballantyne's evidence is that he went to find Mr Joll to offer an apology for his language. I note Mrs Ballantyne's evidence that she heard a lot of *loud language*, principally from Mr Ballantyne. *Loud language* is a euphemistic description of Mr Ballantyne's abuse and swearing. However, it will be apparent from the above findings that Mr Ballantyne had much more for which to apologise than merely his language. In any event the apologies restored a measure of civility to the situation.

[21] Mr Joll decided to report the incident to the directors and did so during a pre-arranged meeting on 23 February 2007. The directors instructed Mr Joll to report the matter to the Kaikoura Police which he did. Nothing has come of this. Next, Mark Edwards phoned Mrs Ballantyne's father. This was out of concern for her safety. Mr Edwards gathered from his conversation with Mr Austin that he already knew something of the incident and understood that Mr Ballantyne had left the property to attend counselling in Christchurch. There was no evidence from Mr or Mrs Austin but Mrs Ballantyne thought that she would not have told her mother about the incident not wanting to cause her mother any concern. It therefore remains unclear

how Mr Austin knew of the situation, assuming Mr Edward's evidence is correct. There is no sufficient reason to doubt what Mr Edwards says about his conversation with Mr Austin.

[22] Next, Mr Edwards rang Mr Ballantyne's cell phone. Mr Ballantyne's evidence is that he received the call between 9am and 10.30am but phone records show that the call was made at 2.12pm. The exchange was brief, less than two minutes. In response to my questions, Mr Ballantyne told me that Mr Edwards identified himself, referred to the altercation at Waikene and said *Gary says you assaulted him*. Mr Edwards then dismissed Mr Ballantyne, told him to pack his bags and get out by the end of the month and not to return to the property thereafter. To that point the account matches the brief letter of dismissal that followed and I accept it as substantially accurate.

[23] Following Mr Edwards' announcement of the dismissal, Mr Ballantyne denied an assault but Mr Edwards said that there were witnesses. Mr Ballantyne questioned that but Mr Edwards repeated that there were. Mr Ballantyne then said *whatever* and the call ended. Again, I accept this as a reasonably accurate account of the remainder of the exchange over the phone.

[24] Finally I should note Mr Edwards' evidence to the effect that he and his brother had made the decision to dismiss Mr Ballantyne before this phone call.

Personal grievance

[25] Justification for the dismissal must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in the circumstances at the time of the dismissal. On the morning of the second day of the investigation meeting, counsel acknowledged that no fair procedure had been followed by the company in reaching its decision to dismiss Mr Ballantyne so that rendered the dismissal unjustified. In light of Mr Edwards' evidence mentioned above that was a fair and appropriate concession. The case now centres on what if any remedy should follow.

[26] The Authority must consider the extent to which Mr Ballantyne's actions contributed to the situation giving rise to the grievance and if those actions so require, reduce any remedies accordingly. Because of the concession just mentioned, it was convenient to make some findings earlier in the determination as to what actually

happened during the altercation between Mr Ballantyne and Mr Joll. To recap, Mr Ballantyne emerged from the house in a temper, repeatedly swore at Mr Joll, angrily shoved him out of his way and drove off in a demented fashion. There is some more detail to the incident but it does not throw a better light on Mr Ballantyne's behaviour so I will not canvass it. I do not accept that Mr Joll caused or contributed to these events in any material way that is blameworthy. Mr Joll did not provoke Mr Ballantyne's temper and Mr Joll acted defensively in the lead up to being pushed aside by Mr Ballantyne. The abusive language was initially and principally from Mr Ballantyne. Properly, one of Mr Joll's concerns was Mrs Ballantyne's distress and he tried to calm and control the situation. On the other hand, Mr Ballantyne's behaviour on 21 February 2007 is blameworthy. The dismissal arose from this incident alone. The only part of the situation giving rise to a grievance not wholly caused by Mr Ballantyne is the company's predetermination to dismiss.

[27] Mr Ballantyne's conduct was completely inconsistent with his obligations to his employer in the person of Mr Joll. It is clear from Mr Joll's diary that he recommended a dismissal. As it has turned out Mr Edwards had a reasonably accurate picture of Mr Ballantyne's behaviour and it is highly probable that a justified dismissal would have ensued even if a proper opportunity for Mr Ballantyne to give his side of the story had been allowed.

[28] The just result after assessing the impact of Mr Ballantyne's contribution to the circumstances of the grievance is to reduce any remedy to nil. So while Mr Ballantyne does have a personal grievance he is not entitled to any remedy.

Bonus claim

[29] There is a letter dated 23 May 2006 which the parties agree sets out the terms of Mr Ballantyne's bonus arrangement. It reads:

Dear Rob,

This letter confirms the goals for FY07 (April 06 to March 07) we have agreed to as being:

- 1. Establish Angus beef herd of at least 250 cows*
- 2. Independent certification that Waikene Station can carry 4,500 SUs*
- 3. Waikene Lodge achieves Qualmark 4 star rating*

4. *Waikene Lodge to join Heritage Inns association and get at least 20 room nights booked via the Heritage Inns website.*
(www.heritageinns.co.nz)

In recognition of your increased level of responsibility we have decided to increase your bonus for FY07 to \$10,000 (gross pay). In order to be eligible to receive your bonus all of these goals will need to be achieved by March 2007. Note that the second and third goals are also assigned to Wayne and the third and fourth goals are also assigned to Belinda.

Rob, we recognize your commitment to the regeneration of Waikene Station and we are confident this can be accomplished with you in charge.

[30] Mr Ballantyne is not entitled to the bonus payment. It is convenient to focus on the first goal as that is the only goal that applied solely to Mr Ballantyne. The evidence is to the effect that more than 250 cows were purchased. Mr Ballantyne says that he had about 275 cows in winter 2006. Mr Edwards thinks that about 265 cows were purchased. However the goal required more than just the purchase of at least 250 cows. Mr Joll's diary for 5 February 2007 refers to 54 cows either dead or missing. It appears that 40 cows were missing at that time. There is no evidence to the effect that those 40 cows were ever located alive.

[31] By early February 2007 the beef herd numbered no more than 221. It follows that Mr Ballantyne fell well short of establishing a beef herd of at least 250 cows and is not entitled to a bonus payment.

Holiday pay

[32] Mr Ballantyne was a salaried employee required to work six days per week and entitled to four weeks annual leave as verbally agreed with Mr Edwards. He started work on 16 January 2006 so was entitled to four weeks leave in January 2007. His records show that he took 27 days annual holiday in advance. The net result of this is that three days holiday must be deducted from the proportionate holiday pay owed for the period from 16 January 2007 to the end of February. That probably leaves a deficit but there must also be further adjustment for statutory holidays. Mr Ballantyne worked on five statutory holidays. He is entitled to an alternative holiday for each day plus half-time extra for the hours actually worked on those five days. I accept Mr and Mrs Ballantyne's records in the absence of any other records.

[33] I will leave it to counsel to calculate the quantum on the basis of these findings but reserve leave in case of any difficulty.

Summary

[34] Mr Ballantyne was unjustifiably dismissed but is not entitled to any remedy due to his contribution.

[35] Mr Ballantyne is not entitled to a bonus payment.

[36] Mr Ballantyne is entitled to holiday pay as set out above. Mr Ballantyne is also entitled to interest on the holiday pay at the rate of 10% per annum starting 1 March 2007.

Costs

[37] Costs are reserved. An open offer was made during the investigation meeting to resolve this and Mrs Ballantyne's proceeding. The impact of the offer and the different outcomes of the two proceedings will need to be considered.

Philip Cheyne
Member of the Employment Relations Authority