



New Zealand Employment Relations Authority Decisions

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Byford v Newdick & Anor AA 304/07 (Auckland) [2007] NZERA 766 (3 October 2007)

Last Updated: 22 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 304/07 5087280

BETWEEN DARRON BYFORD

Applicant

AND DARRIN & LISA NEWDICK

First Respondent

Member of Authority: Vicki Campbell Representatives: Mike Olphert for Applicant

Lisa Newdick for Respondent Investigation Meeting 27 August 2007 at Hamilton Determination: 3 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Darron Byford commenced his employment as Assistant Farm Manager, with Mr and Mrs Darrin & Lisa Newdick on 31 August 2006. Mr and Mrs Newdick had entered into an agreement with Work and Income NZ (WINZ) to receive a subsidy on Mr Byford's wages. As a condition of that contract Mr and Mrs Newdick agreed to employ Mr Byford in a permanent position.

[2] Mr Byford is illiterate and is assisted by his partner when documents are required to be read and/or signed by Mr Byford.

[3] Two weeks into his employment Mr Byford was given a wage increase to \$14.00 per hour. This wage increase coincided with the approval from WINZ for the work subsidy.

[4] On 27 February 2007 Mr Byford was given notice of redundancy and dismissed. Mr Byford says the redundancy was neither genuine nor carried out in a fair and reasonable manner and is therefore unjustified.

[5] The respondent denies the termination of Mr Byford's employment is unjustified.

[6] I am required to scrutinise Mr and Mrs Newdick's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable 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 all the circumstances at the time the dismissal or action occurred.

[7] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ[2006] NZEmpC 92; , [2006] 1 ERNZ 825).

Credibility

[8] Where the evidence of the parties is inconsistent with each other, I have preferred the evidence of the respondent. Mr Byford's evidence overall was changeable and on a significant number of occasions he was unable recall details.

[9] The respondent produced witness statements which had been witnessed by the Police and which were made in relation to threats Mr Byford had allegedly made against Mr Newdick. These statements are contemporaneous statements and are therefore, on the balance of probability, more likely to reflect the situation that arose at the workplace on 7 March 2007 than Mr Byford's unreliable memory.

Was the redundancy genuine?

[10] The Employment Court in *Simpson Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[11] In *Simpson Farms* the Employment Court reiterated the longstanding principle that consultation requires more than a mere prior notification and must be allowed sufficient time. Further, it is to be a reality, not a charade and is never to be treated perfunctorily or as a mere formality.

[12] The Court went on to state:

Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[13] Ms Newdick provided a statement from her accountant which details a conversation they had in February 2007. This letter supports Ms Newdick's evidence that the farm was struggling with cash flow due to unexpected expenses which had occurred. Ms Newdick

discussed the possibility of redundancy with her accountant, and the accountant's advice to sell one of the farm motorbikes to try and relieve the financial pressure.

[14] The Newdick's took their accountant's advice and sold off one of the motorbikes and decided to review the farm structure. Mr Byford's evidence supports Ms Newdick's evidence regarding the selling off of the bike. Mr Byford complained at the investigation meeting that the motorbike he had been using had been sold to another farm worker and that farm worker had "...had a go at him", because he was using the bike.

[15] On or about 20 February 2007 Mr Byford received a staff handout which stated that the farm operation was being reviewed to identify ways to make cutbacks and reduce expenses. The review was to encompass staffing levels and identified that the Assistant Farm Manager's position may be disestablished and replaced with a general farm assistant role.

[16] Mr Byford then received a letter from the respondent reiterating the points made in the handout and inviting Mr Byford to a meeting on 27 February 2007 to discuss the situation. Mr Byford told me that he took the documents home and had his partner read them through and explain them to him.

[17] It was also about that time that Mr Byford suffered a work related accident which resulted in a back injury. He produced a medical certificate which required Mr Byford to work on medium duties only, for the period 27 February to 5 March 2007. Ms Newdick said that was very difficult to manage as very few jobs on a farm are only medium duties. Mr Byford says he was required to continue working as if he had not injury – that the level of work was not medium. Having reviewed all the evidence, I am satisfied that on the balance of probabilities Mr Byford

was only required to undertake milking, putting reels of standards up and to move stock from one paddock to another and that these duties were in the nature of medium duties.

[18] The parties met on 27 February 2007 to discuss the flyer and the letter and the possible impact on Mr Byford. Mr Byford had his partner with him at the meeting. Ms Newdick says that at the meeting she went through the flyer carefully with Mr Byford to make sure he understood what was happening and reiterated the point that Mr Byford may be made redundant. Ms Newdick says they explained the financial situation to Mr Byford and advised him they had to cut back on their expenses. Ms Newdick says she told Mr Byford that she understood the situation would be stressful on him.

[19] Mr Byford maintained at the investigation meeting that the handout indicated that he would be offered the new position of assistant farm worker but he said that was never offered to him. Ms Newdick disputes that and says the assistant farm worker job was offered to Mr Byford. However, Mr Byford and his partner said that financially they could not survive on the

rate of pay being offered for the job and that he would start looking for alternative work immediately. Mr Byford then conceded that he could recall stating that they would be unable to survive on that sort of wage.

[20] Mr and Mrs Newdick also discussed Mr Byford's injury and advised him that if he wasn't coping he should see his doctor and approach ACC.

[21] Mr Byford enquired as to what support would be made available to him in the event that he was made redundant. Ms Newdick advised Mr Byford that he would be given two weeks notice and that he could work out that time, with time off to look for another job. However, the time off would be dependent on the Newdick's being able to secure the services of a reliever to relieve him of his duties. Ms Newdick says they stressed to Mr Byford and his partner that the final decision about whether he would be made redundant had not been made at that stage.

[22] Mr Byford was also told that during the two week notice period he would be expected to vacate the farm house.

[23] Mr Byford continued to work up until 5 March 2007. On that day Mr Byford had an argument with Mr Newdick which resulted in Mr Byford walking away from the workplace. Ms Newdick says Mr Byford had been advised to attend his doctor because he was saying that he was not coping with the workload, given that he was on medium duties only. Mr Byford disputes he was ever told this. However, Ms Newdick told me neighbours reported seeing Mr Byford walking down the road away from the farm that day. Mr Byford then confirmed what he had earlier disputed. That he had been advised that day, to go to his doctor and he did and that is why he was seen walking down that road on that particular day.

[24] Mr Byford was put off work for the next two weeks by his doctor due to stress. Mr Byford says the stress was brought on by the duties being too heavy for him to undertake given his back injury. Mr Byford's partner provided a medical certificate to Ms Newdick on 5 March.

[25] By this time a meeting to advise Mr Byford of the decision regarding the proposal discussed on 27 February, had already been arranged for the following day, 6 March 2007. When she brought the medical certificate to Ms Newdick, Ms Newdick advised Mr Byford's partner that a decision had to be made about Mr Byford's job and that it was important for the meeting to go ahead the next day.

[26] On 6 March 2007 the respondent met with Mr Byford and his partner at their house. The Newdick's had decided that Mr Byford's job would be disestablished and as a consequence he would become redundant. A letter had been prepared and was read out to Mr Byford at the

beginning of the meeting. Mr Byford was given two weeks notice of redundancy and thanked for his contribution to the farm to date. It was agreed Mr Byford would return to work the following day.

[27] Ms Newdick says both Mr Byford and his partner became abusive. Mr Byford denies he became abusive. However, given the circumstances of the meeting I am satisfied it is more likely than not that Mr Byford and his partner did react to the news that Mr Byford was to be made redundant.

[28] Mr Byford had a history with the Newdick's of angering quickly and displaying his anger. The previous December, Mr Byford had asked for a Friday off work, however as Friday's were a busy day on the farm Mr Newdick told him he couldn't take that day off or the weekend, but he could swap his days off during the week. There is no dispute that Mr Byford became abusive towards Mr Newdick, and then walked away from his work and went home. That same day a medical certificate was provided from Mr Byford's doctor, excusing Mr Byford from work for the following six days.

[29] While he was away on sick leave a disciplinary meeting was set up to discuss Mr Byford's conduct toward his employer. The result was a written warning.

Dismissal

[30] Mr Byford returned to work at his normal time on 7 March 2007. Mr Byford told me that he was pretty peeved off when he arrived at work as he had just lost his job and he couldn't take any time off to try and find another one.

[31] The accounts of what happened that day differ. Mr Byford says that while he was working in the cowshed, Mr Newdick walked over to where his clothes were hanging up and threw them on the ground. He says he walked over and replaced them on the hook but Mr Newdick threw them on the ground again.

[32] Mr Byford says Mr Newdick became abusive about him and his family and told him he couldn't wait for a chance to fire him. Mr Byford says he then walked away from Mr Newdick, who jumped on his motor bike and started following him. Mr Byford then threatened Mr Newdick with physical violence when he said "...you need a bullet between the eyes."

[33] The police statements provided by two employees and Mr Newdick on the day, however, tell a different story. I am satisfied that it is more likely than not that Mr Byford, who was already feeling angry and upset about the redundancy, abused Mr Newdick before being taken to a paddock to work by another farm worker. About an hour later Mr Newdick approached Mr Byford, at which time Mr Byford again became abusive and threatening. The behaviour ended after Mr Byford threatened to shoot Mr Newdick between the eyes with his crossbow. At that point Mr Newdick contacted the Police. Mr Newdick's statement to the police indicates he was very concerned about his safety and that of his family. As a result of those concerns Mr Newdick obtained a trespass order against Mr Byford.

[34] The incident resulted in Mr Byford being called to a disciplinary meeting on 8 March 2007. Mr Byford was advised the incident was being treated as serious misconduct and that dismissal may result.

[35] On 8 March 2007 the respondent was advised that Mr Byford was unfit to undertake any further work and would not be at work for the remainder of his notice period. The respondent was also advised that Mr Byford was not in a position to attend a disciplinary meeting on that day or at any time over the following two weeks.

[36] On 9 March 2007 the respondent wrote to Mr Byford and advised that as the respondent's were in fear of their lives, the relationship had broken down irretrievably and pursuant to the Residential Tenancy Act 1986 Mr Byford was given notice to vacate the premises on or before 13 March 2007.

[37] Mr Byford told me that because he had to work out the last two weeks of his notice and because Mr Newdick was being very difficult with him, he asked for a list of duties to be

provided to him. Mr Newdick wrote out the list of duties and provided them to Mr Byford on a piece of paper. I am satisfied that it is more likely than not that the request for Mr Newdick to write the list of jobs Mr Byford had requested occurred during the incident on 5 March 2007. Further, I am satisfied that a piece of paper was given to Mr Byford with the jobs listed for him.

[38] I find the redundancy to have been carried out for genuine commercial reasons. The process implemented by the Newdick's became difficult for them due to Mr Byford's response. Redundancy at any time is a very difficult situation for all concerned. It results in the loss of a job or jobs where no one is at fault. Ms Newdick was clear in her evidence that they did not have any performance issues with Mr Byford.

[39] I am satisfied the Newdick's provided Mr Byford with an opportunity to input into the decision making

process and that he was provided with the relevant information. Mr Byford was also offered the opportunity to take on a newly created Assistant Farm Worker position. An offer Mr Byford did not wish to take up.

[40] I find that actions taken and the way the respondent acted was what a fair and reasonable employer would have done in all the circumstances of this case. Mr Byford's claim for unjustified dismissal by reason of redundancy fails and I am unable to be of any further assistance to him.

Costs

[41] The respondent was not represented at the Investigation Meeting. Therefore I will not make an order for costs.

Vicki Campbell

Member of Employment Relations Authority

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