

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 6
5281181

BETWEEN Alicia Jane Callaghan

AND The Proprietors, Whareroa
 Station Inc

Member of Authority: Yvonne Oldfield

Representatives: Caryl Blomkvist for Applicant
 Robert Gordon for Respondent

Investigation Meeting: 25 June 2010

Submissions received: 9 July 2010, 22 July 2010, 26 July 2010 from Applicant
 22 July 2010, 5 August 2010 from Respondent

Determination: 11 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem involves allegations of sexual harassment, bullying, an unjustified warning, unjustified dismissal and a claim for unpaid holiday pay.

[2] Ms Callaghan was hired as a shepherd general at Whareroa Station in September 2008. There were just two other permanent staff on the station: farm manager Lance Kennett and head shepherd Andrew Kennett. Lance Kennett reported to the Respondent (the Incorporation) as owner of the Station but on a day to day basis he ran the farm. Andrew Kennett is Lance Kennett's son. He was also, at the time, Ms Callaghan's boyfriend. After starting work she lived in farm accommodation with Andrew Kennett.

[3] By April 2009 the relationship between the two young people (Ms Callaghan and Andrew Kennett were then 18 and 19 years old respectively) had ended. Ms Callaghan moved out of the house they had shared into single quarters elsewhere on the farm. Ms Callaghan says that over the next few months Andrew Kennett's behaviour towards her made her feel unsafe. She says that she brought the situation to the attention of Mr Lance Kennett but he did not take reasonable steps to address the problem.

[4] On June 29 there was an incident which led Ms Callaghan to complain to police that Andrew Kennett had assaulted her. No charges were laid and both young people were cautioned about their behaviour. Ms Callaghan's doctor did however authorise her to take two weeks off work during which time she returned to stay at the home of her mother, Johnette Callaghan. On 30 June Johnette Callaghan wrote to the Incorporation enclosing the medical certificate and alleging that Andrew Kennett was bullying and sexually harassing her daughter. The letter explained:

“As a whanau we would like to take this opportunity to work with you the trustees of Whareroa Station to resolve this matter before we consult with any employment dispute agencies, the Labor Department and or Police.”

[5] In a response dated 13 July (the day that Ms Callaghan returned to work) the Incorporation advised that the matter should be addressed through the farm manager, Lance Kennett. Ms Callaghan's view was that she had already tried this approach without success. She sought legal advice and on 4 August her representative wrote to the Incorporation repeating the allegations, this time with specific details. The letter asserted that Lance Kennett (along with the Incorporation) was already on notice of the concerns and had told his son “*not to bother*” Ms Callaghan, but that this had not stopped Andrew Kennett's behaviour. The letter concluded by saying that if a safe working environment could not be provided for Ms Callaghan, a personal grievance would be raised on her behalf.

[6] On 12 August the Incorporation replied saying:

“The Incorporation... will now take the further step of having a full investigation done by one of its Committee Members who will be in touch with your client shortly to meet with her and discuss her concerns...”

Once we have a report flowing from this investigation we will communicate with your again as to the steps, if any to be instituted by the Proprietors.

We trust you find this in order and confirm that this matter will be treated with urgency.”

[7] Meanwhile there had been fresh developments back at the farm. On 11 August Lance Kennett presented Ms Callaghan with a written warning bearing the date 3 August. It alleged that on two occasions (22 July and 1 August) she had left farm gates open putting stock at risk.

[8] Ms Callaghan denies ever having failed to shut a gate on the farm. She says that if a gate was left open, it was not by her.

[9] On 17 August Ms Callaghan’s representative wrote again acknowledging that steps had been taken to initiate an investigation into Ms Callaghan’s concerns, but advising that because of events since 4 August Ms Callaghan was now giving formal notice of a personal grievance. Details of the alleged harassment and bullying were set out, as were the following ‘*further issues*’:

- i. failure to execute a written employment agreement;
- ii. concerns regarding Lance Kennett’s response to matters raised recently by Ms Callaghan in relation to an incident with Andrew Kennett, it being alleged that he “*completely exonerates [his] son ...and in fact appears to blame Ms Callaghan for any incident,*” and
- iii. concerns regarding the written warning presented to Ms Callaghan on 11 August.

[10] The letter concluded:

“We suggest that our client is put on paid leave (without affecting any of her entitlements, such as holiday and sick leave) until this matter is resolved.

[11] On 28 August, Ms Callaghan, her mother and her representative met as planned with Board Member Mr Wilson. He questioned Ms Callaghan about the allegations of assault and advised that his findings would be considered by the Board at its next meeting. On 29 August Ms Callaghan was told that her paid leave would be extended for a further two weeks.

[12] Although she was not working during this time, Ms Callaghan’s dogs and belongings were still at the farm and she continued to visit to feed and exercise the dogs. From her point of view, it was taking an unacceptably long time for her concerns to be addressed. On 3 September Ms Callaghan’s representative wrote to the Incorporation reiterating concerns for her safety and advising that mediation was urgently sought. On 10 September the Incorporation wrote back saying that it would consider all matters at its next meeting on 16 September, and extending Ms Callaghan’s leave till then. Ms Callaghan’s representative responded on 15 September enclosing a medical certificate for the period to 26 September and asserting that Andrew Kennett was “stalking” Ms Callaghan.

[13] The Incorporation’s Board met the next day, 16 September. It passed the following resolution unanimously:

“That in order to preserve the safety of our staff and our farming operations, that Alicia be stood down without pay until this matter is resolved, with the following conditions, that she removes herself, her dogs and her belongings from the property by 10.00 am on Monday 21 September 2009, and that she is not to return to the farm without the authority of the Farm Manager. That if she fails to comply with these conditions, a trespass notice will be served.”

[14] In a letter dated 17 September the Incorporation set out this resolution for Ms Callaghan’s information and told her that it had taken this step because she continued to return to the farm every day to care for her dogs, sometimes with “unauthorised

people,” that she had again left gates open and that she “*taunted and intimidated Andrew whenever she could.*”

[15] The letter also stated that an additional reason for asking her to leave the farm was:

“That we were in the process of carrying out our investigation and working towards an amicable resolution, when we were advised that Alicia had filed a complaint with the Human Rights Commission thus stopping our process.”

[16] The Incorporation took no further initiative to report on or to address Ms Callaghan’s complaints or any other aspect of the employment relationship problems. Ms Callaghan never returned to work on the farm. She says that the letter of 17 September 2009 must be construed as a dismissal.

Issues

[17] Ms Callaghan says that she suffered disadvantage grievances in relation to the alleged harassment by Andrew Kennett, in relation to the respondent’s failure to investigate her complaints in a timely fashion, and in relation to the respondent’s failure to complete and report on the outcome of its investigation. She also says that both the warning and the termination of her employment were procedurally unfair and substantively unjustified.

[18] The respondent denies any harassment or bullying by Andrew Kennett. It says that the conflict was two sided and that by engaging in it Ms Callaghan contributed to the situation giving rise to her grievances. It says that Lance Kennett did his best to assist the two young people to manage the issues between them. As for the investigation into the complaints it says that it was progressed as quickly as possible in circumstances where the Board met infrequently and members were not (in all cases) readily contactable by phone or email.

[19] The Incorporation says that matter of the gates being left open was a serious one in a farm context and justified a warning letter.

[20] The Board denies that the letter of 17 September amounted to a dismissal. Witnesses for the Board told the Authority that at the time the letter was sent the Board did not see the employment as necessarily being at an end, but did consider it untenable for Ms Callaghan to continue living at the farm at that time. It said during her five weeks on paid leave her comings and goings had caused problems and were putting Andrew Kennett at risk of further accusations of harassment.

[21] As for the holiday pay claim, it arises because the Incorporation has off set holiday pay that would otherwise have been outstanding upon termination against the paid leave Ms Callaghan received before her employment ended. For Ms Callaghan it is argued that this leave cannot be taken off her annual holiday entitlement.

[22] The matters for determination here are therefore:

- i. whether Ms Callaghan has a disadvantage grievance in relation to the alleged bullying and harassment and/or in relation to the respondent's handling of her complaints about those issues;
- ii. whether the warning presented on 11 August was justified;
- iii. whether the letter of 17 September amounted to a dismissal and if so, whether it was justified;
- iv. whether the leave taken in the period leading up to 17 September should be treated as holidays;
- v. should any of Ms Callaghan's grievances be made out, whether and to what extent she contributed to the situation giving rise to those grievances, and
- vi. what if any remedies are to be awarded.

(i) The claims of bullying and harassment

[23] Initially the conflict between Ms Callaghan and Andrew Kennett was limited to arguments for which both must bear some responsibility. From early April Lance Kennett was aware of the tense situation between them (although he said he never saw them arguing) and attempted to mediate between them. He told the two of them that Ms Callaghan should henceforth take instruction from him rather than his son and directed both individuals to stay away from the other's living quarters.

[24] Unfortunately this was not enough to prevent the antagonism between Ms Callaghan and Andrew Kennett from escalating. By the end of June, circumstances were out of Lance Kennett's control, and the respondent was on notice that Ms Callaghan had concerns which she wished the respondent to address. An investigation needed to proceed without delay. In the meantime, both Lance Kennett and the Incorporation were obliged to keep an open mind as to whether Ms Callaghan's concerns had substance.

[25] None of this happened. Two and a half months later, when Ms Callaghan received the letter of 17 September, an investigation had been promised but still had not been progressed to completion. Ms Callaghan had been interviewed once, briefly, but had not been informed of any other information the respondent had gathered, or of any conclusions it had reached, apart from being told, in the letter of 17 September, that the respondent had decided that she was taunting and intimidating Andrew Kennett.

[26] The absence of a full investigation makes it difficult to establish what substance there was to the allegations of bullying and harassment. Many of the exchanges between Ms Callaghan and Andrew Kennett appear to have involved acrimony on both sides and were essentially petty in nature. However one piece of undisputed evidence serves to illustrate why Ms Callaghan felt unsafe and to show that there was foundation for some of her concerns. Very late one night during the period that Ms Callaghan was still working, she was asleep in her quarters on the farm when she was woken by Andrew Kennett banging repeatedly on her windows. Ms Callaghan was in a vulnerable position, living alone with no close neighbours other than Lance and Andrew Kennett. It was entirely understandable that she was fearful

that night. A full investigation by the respondent would have enabled such conduct to be discussed and addressed. The respondent has not given a satisfactory explanation for its failure to arrange this, with obvious disadvantage to Ms Callaghan as a result.

[27] I am satisfied that Ms Callaghan has established that she was unjustifiably disadvantaged by harassment from Andrew Kennett and in relation to the Incorporation's failure to investigate and address her complaints about that matter in a timely fashion.

(ii) The warning letter

[28] The written warning was presented to Ms Callaghan without prior identification of the alleged wrongdoing or opportunity for her to put her view of events. It follows that it is unjustified.

(iii) The letter of 17 September

[29] It is the respondent's case that the applicant was not dismissed and that the letter of 17 September amounted to a justifiable suspension.

[30] Had there been some sort of follow-up from the Incorporation after it sent the letter the assertion that the employment had not ended might have had some credibility, but Ms Callaghan was never advised what it would take for her to return to work. Nor did she was told what the respondent intended to do next. As things turned out, the respondent did nothing at all. Respondent witnesses (Board members) told me that they did not see the employment being at an end on 17 September but were unable to explain how they saw it continuing.

[31] It is not possible to reach any conclusion other than that the employment was terminated on 17 September at the employer's initiative. Ms Callaghan was dismissed, and dismissed unjustifiably.

(iv) **Holidays**

[32] As we have seen, Ms Callaghan had through her representative concurred with being on paid leave for a time before her employment was terminated. Correspondence from Ms Callaghan's representative noted the understanding that this leave would not be treated as annual holidays. There is no evidence that the respondent refuted this or in any way signalled that it planned to treat the leave as holidays. For this reason it is accepted that the respondent cannot now offset outstanding holidays against that leave. Outstanding holiday pay will be included amongst the remedies to be awarded.

[33] The respondent has also argued that further offset should be considered in relation to a power bill that remains unpaid for Ms Callaghan's quarters. However that the bill in question covered the period at the very end of her employment when she was spending much of her time off the farm. I am not satisfied that Ms Callaghan has an outstanding debt to the respondent.

(v) **Contributory conduct**

[34] I am satisfied that Ms Callaghan contributed to the acrimonious relationship between herself and Andrew Kennett. She did not however contribute to the respondent's failure to follow up on her complaint. Ms Callaghan's concerns were presented appropriately: in the first instance, she spoke to Lance Kennett, then, more formally, her mother and her representative put her concerns to the Board. Full details were provided by 4 August. There is no evidence to suggest that (after that) Ms Callaghan did not make herself fully available to cooperate with any requirements of the respondent.

[35] The complete absence of any kind of inquiry or fair procedure with regards to the warning letter renders it impossible to ascertain whether there was substance to it or not. I am unable therefore to conclude that Ms Callaghan contributed to the situation giving rise to the unjustified warning.

[36] Finally, with regards to the dismissal, it must be acknowledged that it was problematic for the Incorporation to have Ms Callaghan coming and going from the

farm while the ongoing issues had not been resolved. These problems have not been shown however to be primarily of her making, or capable of being rectified by Ms Callaghan on her own. Nor did the respondent ever attempt to discuss, with Ms Callaghan or her representative, any possibility of her moving her dogs elsewhere for a period until the issues were resolved. I am not persuaded that Ms Callaghan can be said to have contributed to the situation that gave rise to her dismissal.

[37] It follows that there will be no reduction in any remedies as a result of contributory conduct.

(vi) Remedies

[38] In relation to her disadvantage grievances Ms Callaghan claims \$5,000.00 compensation for hurt and humiliation. I am satisfied by her evidence that she was very distressed by the difficult working circumstances and by the delays in getting an appropriate response to her complaints. The full amount of compensation claimed should be awarded in respect of the disadvantage grievances.

[39] Ms Callaghan also seeks a further \$10,000.00 compensation for the dismissal. I accept her evidence that the abrupt nature of her termination, after all the time she had spent waiting for some action to be taken, was a great shock. However, I also conclude that by this stage Ms Callaghan saw a limited future for herself at the farm, and was not so much distressed by the loss of the job as by the manner of the dismissal. In these circumstances I consider a moderate award of compensation (a further \$5,000) to be appropriate for the unjustified dismissal grievance.

[40] Ms Callaghan was on an annual salary of \$31,000.00 gross. She did not obtain regular work for more than three months after the termination. She claims what she would have earned over a three month period with the respondent (\$7,750.00 gross) less a small amount (\$750.00) she earned from casual work. I am satisfied that Ms Callaghan made reasonable efforts to mitigate her loss and should be reimbursed three months lost earnings in full.

[41] As for the holiday pay, wage and time records provided by the respondent showed that were it not for the leave immediately prior to the dismissal, Ms Callaghan would have been entitled to 9.6 days holiday pay, amounting to \$1,144.62 gross.

(vii) Summary of orders

[42] The respondent is ordered to pay the following sums to Ms Callaghan:

- i. \$5,000.00 (in total) compensation for unjustified disadvantage;
- ii. \$5,000.00 compensation for unjustified dismissal;
- iii. \$7,000.00 gross lost wages, and
- iv. \$1,144.62 gross holiday pay.

(viii) Costs

[43] The issue of costs is reserved. Any application for costs should be lodged within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority