

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 181/09
5141297

BETWEEN PAUL DAVID CALVERT
 Applicant

AND ADG PASTORAL LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Keith Owen, Counsel for Applicant
 Greg Martin, Counsel for Respondent

Investigation Meeting: 13 May 2009 at Christchurch

Submissions received: 27 May and 10 June from Applicant
 27 May and 10 June from Respondent

Determination: 20 October 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant, Paul Calvert, claims he was unjustifiably disadvantaged and then unjustifiably dismissed on 13 August 2008 from his position as Herd Manager/2IC by the respondent. He seeks the remedies of lost remuneration reimbursement in the sum of \$9,600; compensation of \$10,000 and costs.

[2] The respondent says the applicant was not dismissed but left his employment *of his own accord where ADG wanted him to remain on the farm*. It therefore declines to meet the remedies Mr Calvert wants.

[3] The parties were unable to resolve the matter in mediation.

Essential facts

[4] Mr Calvert was working in Australia and wanted to return to New Zealand to rejoin his wife and children. He and his wife decided dairy farming offered sound

prospects as Mr Calvert had previous milking experience. He began monitoring the Fencepost.com website where he discovered the respondent's advertisement.

[5] The position advertised was full time and no previous management experience was required. Mr Calvert replied by email and received a reply from Mr Donald Ross, the manager of the farm which had the vacancy.

[6] A series of emails ensued and also a telephone interview. The result was an offer from the respondent was made. Mr Ross told Mr Calvert there was a one month trial period at the beginning of the employment which the applicant accepted. Mr Calvert's evidence was clear *my understanding of the position I was accepting was that it was a full time position, herd manager/2IC with a one month trial period at the start.*

[7] Mr Ross' evidence is *I consulted with Adam and Catherine Glass about Paul's application for employment. After this we decided to offer him a one month fixed term contract as Farm Assistant. Mr Ross says on meeting Mr and Mrs Calvert he found them pleasant to deal with, very conversational and forthcoming. I felt very positive about the working relationship and the future.*

[8] Some problems emerged. Mr Ross says Mr Calvert often did things his own way rather than follow his instructions. Further, Mr Ross says the applicant, when questioned on this, told the farm manager other staff had told him how to do the tasks, yet on other occasions told him he thought his methods would work better. Mr Ross cited a number of incidents which led him to believe the applicant was half-hearted in the position.

[9] Mr Calvert started work on Monday, 4 August 2008. On Monday, 11 August there was an altercation between Mr Glass and the applicant over what instructions Mr Calvert had been given when collecting calves. Mr Calvert explained his instructions to Mr Glass who told the applicant he did not believe him. Mr Calvert asked Mr Glass if he was calling him a liar. Mr Glass replied that he was and that he did not see much future for the applicant on his farm.

[10] Mr Calvert asked if Mr Glass was firing him and says Mr Glass replied *no, I'm not firing you.* Mr Calvert said he replied *that's good because I'm not quitting.*

[11] The applicant says he told Mr Glass he would finish his task of tending the calves then would go to his accommodation to wait for notice of a meeting involving Mr Glass, Mr Ross and himself to resolve the situation. By 9pm he had heard nothing and so went to bed. The following day was Mr Calvert's rostered day off but he stayed in the cottage awaiting contact from his employer regarding the meeting but none came.

[12] In the course of the day, he says he read the proposed agreement, which had been left on the seat of the farm truck the previous Thursday. Mr Calvert says *I was quite unhappy with the contract as it was only a casual contract and I felt it was in no way a reflection of the position I had been offered and accepted by email.* Being without transport, Mr Calvert asked a co-worker to take him to Ashburton so he could get some advice from the Department of Labour.

[13] Mr Ross appears not to have been told of Mr Calvert's request for a meeting. He says *Paul should have come to me immediately so that the situation could have been resolved.* Mr Ross went to the cottage later in the day on 12 August but found Mr Calvert was not there.

[14] In summary, Mr Ross said *he never told me he had a problem with his employment agreement. Given that I had been the one to negotiate it with him, I was the appropriate person to approach with regard to fixing any problems. Without knowing what his problem was, I wasn't able to do anything about it.*

[15] Mr Calvert says he and Brendan, a co-worker, were going into Methven for a poker night on 12 August at one of the local hotels. On the way, they stopped at the Glass home and the applicant attempted to hand his timesheet to Mrs Glass. She declined, saying it was late and Mr Ross was the person to give it to. Mr Calvert says he also told Mrs Glass that he was dissatisfied with the employment agreement and was going to Christchurch to get advice.

[16] The applicant says Mrs Glass told him *(the Glasses) had assumed that this (casual agreement) was obviously what I wanted as I was only working when it suited me ... I simply stated that I would not be signing the contract until I had received the advice I sought and left it at that.*

[17] On the following morning between 8am and 9am, Mr and Mrs Glass arrived at the cottage. Mr Calvert said they told him that *as I was only a casual employee, at*

that time they had no further casual work on the farm. They requested me to vacate the unit as soon as possible but did add that should I wish to find alternate accommodation in Methven they would be happy to consider me for any casual work if and when it became available ... I left the farm on the Friday (16 August 2008) after vacating the unit as requested.

The issues

[18] To resolve this matter, the Authority needs to make findings on the following issues:

- What was agreed between the applicant and Mr Ross at the time employment was offered and accepted; and
- Was the *casual contract* presented to the applicant consistent with the agreement between Mr Ross and Mr Calvert; and
- Was the applicant at fault in not raising his concerns with Mr Ross to whom he reported; and
- Was the applicant unjustifiably disadvantaged and unjustifiably dismissed;
- Did the applicant contribute to the circumstances giving rise to the dismissal and if so, to what extent should any remedies be adjusted?

The test

[19] The test of justification is set out in s.103A of the Employment Relations Act 2000 and says:

The question of whether 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.

The investigation meeting

[20] At the investigation meeting, the Authority heard from the applicant himself in person and also from his wife, Mrs Tracy Calvert. On behalf of the respondent, evidence was given by Mr Ross and both Mr and Mrs Glass.

[21] There was some disagreement, particularly between Mr and Mrs Glass and the applicant, in respect of the times and dates on which certain events occurred. Having considered these, I have found the evidence of Mr Calvert in terms of timing issues to be the more reliable.

[22] The meeting was conducted without undue difficulty and the Authority expresses its thanks to the parties who gave evidence before it.

[23] I also record my thanks for the efforts of Mr Owen and Mr Martin at the investigation meeting and for their submissions which I have considered insofar as necessary in coming to this determination.

Analysis and discussion

[24] Central to this problem is the evidence of Mrs Glass, a director of the respondent company. This witness told the Authority the timing of Mr Calvert's employment coincided with the onset of calving and the relocation of herds to different properties. Also, Mrs Glass pointed out her roles were that of a mother of two young children, calf rearer and office administrator. Those roles led to the agreement being delivered to the applicant several days after he had begun work as Mrs Glass' focus was on other tasks.

[25] Mrs Glass told the Authority, *there was some discussion at the time* [of the applicant's application] *between Adam, Donald and myself as to why someone would be prepared to relocate from Australia to Methven for a **temporary** job* (emphasis is mine).

[26] Later in her evidence, Mrs Glass said:

The employment agreement I completed was a casual employment agreement. This was based on my understanding that Donald and Paul had agreed to a temporary employment situation for a short trial period. I realised that a yearly salary had been agreed upon and so took that information and worked out the hourly rate. I also took the

roster that had been completed for the next month and put that information into the agreement.

In hindsight all of this information should have been completed on a temporary employment agreement. However, the information that was contained in the casual employment agreement would have been the same as in the temporary agreement. This could have been easily sorted if it had been brought to my attention. I am not a lawyer and was just trying, in good faith, to write down the agreement that had been reached between Paul and Donald ...

All the information on the contract given to Paul would have been the same. I was informed that the short term was for one month for the reason stated earlier. However, I decided to put "six weeks" in the agreement and not "one month", to give the parties a reasonable period of time to see if it was going to work out. When feeding calves I saw Paul virtually every day. At no time after I gave Paul the draft agreement did he query this agreement or state that he was unsatisfied with it.

[27] A little later on in her evidence, Mrs Glass also said of her discussion with Mr Calvert at the front door of her home on 12 August 2008, *he would not answer my questions but stated that if we paid him out his six weeks then he would go away. I was surprised by his response and said that, if he was thinking about leaving, we would rather him work out his six weeks ... It [the proposal] also didn't make sense in the context of what was going on. I simply wanted to get the contract issue resolved.*

[28] It appears Mrs Glass was poorly briefed on the terms agreed between Mr Calvert and Mr Ross. Further, she appeared unaware of the time off agreed by Mr Ross to allow Mr and Mrs Calvert to make accommodation inquiries with real estate people and to arrange schooling for the children when they arrived from Invercargill. Her assumption, and it clearly was an assumption, that the applicant was to be employed on a casual basis, is astonishing.

[29] It is evident Mr Ross told Mrs Glass what the agreed annual salary was to be, as her evidence is she broke that figure down to an hourly rate for casual employment.

[30] The use of the Federated Farmers *Short-term/Intermittent Farm Employees' Agreement* to cover a permanent employment subject to a one month trial period situation is unsatisfactory and, following on the heels of the altercation between Mr Glass and the applicant, clearly threw Mr Calvert and led him to make arrangements to get advice.

[31] That said, Mr Calvert's approach to the situation was hardly active and constructive. He asked Mr Glass to organise a meeting, when nothing happened he did not seek out Mr Ross to explain the situation and his concerns. He says he read the proposed contract which at clause 11 states:

*Where an employment relationship problem arises, the **parties** will first attempt to settle the matter themselves.* [Emphasis added]

[32] As Mr Ross was the manager to whom the applicant reported, he was obliged to take his concern to him in the first instance. I am satisfied Mr Ross would have resolved the issues over the employment agreement had he been approached. He impressed me as a thoroughly approachable and pragmatic man.

[33] The visit by the Glasses to the cottage to attempt to resolve the problem was, most unfortunately, partly misconstrued by Mr Calvert. He understood the burden of the conversation was to have him leave the property with the offer of casual work should it be available. It is also evident the Glasses were trying to get the applicant's concerns regarding the employment agreement established, but Mr Calvert would not engage on this matter until after he had taken advice.

[34] The situation was far from irredeemable, but this interchange, given the *casual* element in the discussion, pushed it towards that condition.

Determination

[35] Returning to the issues set out above, I find:

- The agreement was for a position of 2IC herd manager. The position was full time, permanent with a one month trial period. This is what was offered by Mr Ross on behalf of the respondent and what was accepted by the applicant.
- The use of the short term/intermittent farm employee's employment agreement was inconsistent with the position as offered and accepted. To her credit, Mrs Glass accepted her error.
- The applicant had negotiated the terms of his employment with Mr Ross, had taken his day-to-day instructions from Mr Ross, and when faced with the problems referred to above, was required to go to Mr Ross to

have them resolved. He did not do so. Further, when Mrs Glass asked him what the difficulty was in respect of the employment agreement on the doorstep on 12 August 2008, Mr Calvert declined to discuss the matter and continued this stance the following morning.

- The evidence was unclear as to the alleged unjustifiable action giving rise to a separate disadvantage and I have considered the factual matrix as a whole.
- The applicant was unjustifiably dismissed. The dismissal was constructive in that the respondent breached the terms agreed with the applicant and unilaterally changed the agreement from permanent full time employment to casual. The applicant was entitled to repudiate the employment relationship on that ground.
- The applicant contributed significantly to the circumstances giving rise to the dismissal by declining to engage with his immediate manager or with the directors and have them assist in resolving the difficulties.

[36] Counsel for the applicant sought a penalty for a breach of s.4 of the Act. I decline the application as it did not feature in the statement of problem but arose only in closing submissions.

Remedies

[37] In considering remedies, I have had regard to two matters. The first is the letter from the Southland Community Law Centre on behalf of the applicant. In the letter, the applicant stated:

The following remedy would be sufficient to settle this grievance:

- \$900 travel and removal expenses;
- \$79 rental car expenses;
- \$80 petrol;
- \$1,000 for humiliation, loss of dignity and injury to feelings.

[38] The letter was not marked *without prejudice*.

[39] The second matter is that raised by *Chambers v. E N Ramsbottom Ltd*, (unreported, 8 December 1999, Shaw J, WC79/99). The applicant was on an agreed

trial period and the learned Judge found in such circumstances his expectation in a lost remuneration setting is restricted to the trial period and not beyond.

[40] For the respondent, Mr Martin submits this reduces Mr Calvert's claim to 17 days. This is on the basis of the balance of a one month trial period. The point is well made however, overlooks the evidence of Mrs Glass who told the Authority *I decided to put six weeks in the agreement and not one month to give both parties a reasonable period of time to see if it was going to work out.* That is supported by her evidence that the applicant stated to her *if we paid him out his six weeks then he would go away.* The agreement given to Mr Calvert *this agreement shall terminate on 15/9/08 – six weeks.*

[41] In considering the above matters, I order the respondent to pay the applicant the following sums:

- \$3,975.75 gross under s.123(1)(b) of the Act, being 31 days' ordinary wages;
- \$3,500 without deduction as compensation for hurt and humiliation under s.123(1)(c)(i) of the Act.

[42] Having considered the issue of contribution as required under s.124, I set the applicant's contribution at 15% and the awards set out above are to be reduced by that figure.

Costs

[43] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority