

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Joseph Chitongo (Applicant)
AND Greg & Shelly Roberts (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
Werner van Harselaar, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 19 April 2005
DATE OF DETERMINATION 18 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Greg & Shelly Roberts operate a dairy farming business in the Patearoa district near Ranfurly. They employed Joseph Chitongo fulltime in that business from about March 2003 until his employment terminated on or about 5 April 2004. Mr Chitongo says that he was unjustifiably dismissed and he is seeking reimbursement of lost wages and compensation for distress as a result. He is also seeks the imposition of a penalty on Mr & Mrs Roberts for breaching section 130 of the Employment Relations Act 2000 which relates to keeping and producing time and wage records. Mention was also made in the statement of problem of an unjustified disadvantage grievance.

[2] The termination of Mr Chitongo's employment followed events on 5 April 2004 principally involving Mr Roberts and Mr Chitongo. There are some disputes between them about precisely what happened. There is also a dispute about whether Mr Chitongo was dismissed. In evidence, Mr Roberts says that he *stood down* but did not dismiss Mr Chitongo on 5 April. He says that Mr Chitongo ended the employment relationship the next day (or perhaps later). However, he also says that he had no alternative but to dismiss Mr Chitongo. To resolve the personal grievance claim, it is necessary to decide whether Mr Roberts dismissed Mr Chitongo. If he did, then it will be necessary to make findings about what happened on 5 April between the two men and then apply the law relating to summary dismissal for serious misconduct.

[3] The problem about the time and wage records will be resolved by outlining the statutory requirements about keeping and producing time and wage records and then assessing whether there was a breach of those requirements meriting the imposition of a penalty.

Did Mr Roberts dismiss Mr Chitongo?

[4] I find that Mr Roberts dismissed Mr Chitongo on 5 April 2004.

[5] During the morning milking on that day, Mr Roberts stopped the milking platform to talk to Mr Chitongo about an issue, more of which shortly. Mr Roberts then rang Mrs Roberts and asked her to come down to the milking shed to take over from him. Cellphone records show that this call was made at 7.11 am. Mrs Roberts arrived at the milking shed soon after. Mr Roberts then spoke to Mr Chitongo and drove him home even though Mr Chitongo had driven his employer's vehicle to get to work. Mr Chitongo had the use of his employer's vehicle to travel to and from work. None of this is disputed. Nor is it disputed that Mr Roberts returned to Mr Chitongo's house on another day and gave him a letter. The letter is dated *April, 2004* and reads *Dear Joseph, RE: TERMINATION OF EMPLOYMENT Yesterday, April 5, 2004 you were dismissed form our employment due to serious misconduct ...* The letter includes calculations of Mr Chitongo's final pay. Mrs Roberts told me that she got the information about the final wage calculations from the accountants and then typed the letter. Phone records show that calls were made to the accountants at 10.09am on 5 April and on 6 April. I find that Mr Roberts dismissed Mr Chitongo before driving him home on 5 April, that he or Mrs Roberts contacted the accountants on 5 April and 6 April to get details of Mr Chitongo's final pay and that Mr Roberts then delivered the letter to Mr Chitongo on 6 April.

[6] Mr Roberts said in evidence that he went to see Mr Chitongo after standing him down, took the letter with him but only gave it to him after Mr Chitongo said *It's finished* in the face of Mr Robert's attempt to discuss continued employment. Mr Roberts says that he did not have time to get another letter so he gave him the existing letter. However, the text of the letter is evidence created by the employer at the time that Mr Chitongo had been dismissed the day before. Having made the effort to ascertain Mr Chitongo's final pay, Mr Roberts did no more than deliver the letter to him. I do not accept that there was any attempt to restore the employment relationship.

[7] Because of the finding that Mr Roberts summarily dismissed Mr Chitongo for serious misconduct, it is necessary to consider whether that decision is justifiable.

Justification for the dismissal – the law

[8] In *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, the Court of Appeal held that an employer must show that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct in order to justify a summary dismissal.

[9] The April 2004 letter mentioned above referred to Mr Chitongo's refusal to carry out a reasonable instruction issued by the employer. That is a reference to what happened during the morning milking on 5 April 2004.

[10] On 17 May 2004 and 8 June 2004, Mr Chitongo's representative wrote to Mr & Mrs Roberts requesting the reasons in writing for the dismissal. Reference was made to section 120 of the Employment Relations Act 2000. In a reply dated 14 June 2004, Mr Roberts said that he dismissed Mr Chitongo when he would not reply to several requests for an explanation for problems with milking on 5 April. Section 120 is an important provision and I find that the dismissal was for the reasons expressed in the employer's letter of 14 June 2004: see *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421.

Events of 5 April

[11] Mr Chitongo was working on the *cups on* position and Mr Roberts was on the *cups off* position on the rotary milking platform. Mr Roberts noticed one or several cows with folded teats or one or several *3 teater* cows. A folded teat is caused by how the cups are placed onto the cow. The cow has to go round the platform again. A *3 teater* cow has a rotten teat, the milk from which

should not be included in the milking because it affects milk quality. There is potential for the milk to be graded causing a financial penalty. Those cows are clearly marked to avoid this. There is a dispute between Mr Chitongo and Mr Roberts about which problem, how many cows and about whether Mr Roberts stopped the milking platform once or twice. It is not necessary to resolve those disputes at this stage because Mr Chitongo was not dismissed for poor work performance. It merely set the scene for what happened.

[12] About 15 minutes into the milking, Mr Roberts saw a 3 teater come round to his position on the milking platform. He stopped the milking platform and went round to talk to Mr Chitongo. Mr Chitongo's evidence is that Mr Roberts was angry and aggressive. Mr Roberts denies that but says that he was frustrated by the problems. There was a second herd to be milked and milking delays are better avoided, hence Mr Roberts's admitted frustration. It is common ground that Mr Roberts asked if there was some problem. Mr Chitongo was experienced and should not have made either mistake. It is common ground that Mr Roberts asked several times but Mr Chitongo kept his head bowed and would not respond. Mr Chitongo told Mr Roberts that it was not his culture to respond. As Mr Roberts said in the 14 June 2004 letter *It was for this reason that I dismissed him from my employment. Mr Chitongo had worked for us for fifteen months. He failed to carry out a reasonable request asked by me and argued using previously unmentioned reasons that he didn't have to respond.*

[13] I accept that Mr Chitongo thought that Mr Roberts was angry. I also find that Mr Roberts was more frustrated that he is now prepared to concede and that his manner towards Mr Chitongo at the time reflected his level of frustration. The situation called for a cooling off period.

[14] Mr Roberts phoned Mrs Roberts who arrived at the milking shed soon after. Mr Roberts then told Mr Chitongo he was dismissed for serious misconduct and drove him home.

[15] It will be apparent from the above sequence that Mr Roberts did not forewarn Mr Chitongo that he might be dismissed for a failure to comply with an instruction, allow Mr Chitongo an opportunity to explain himself and then give any explanation his unbiased consideration. These are the minimum standards for an employer's investigation prior to taking the drastic step of summarily dismissing an employee: see *NZ Food Processing IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35. It follows that the dismissal is not justifiable.

[16] There is a second reason why the dismissal is not justifiable. Mr Chitongo offered no explanation for the problem or problems mentioned by Mr Roberts. At worst what he then risked was that Mr Roberts would conclude that there was no reasonable explanation for the problems and deal with established poor work performance in an appropriate disciplinary manner. I do not accept that a reasonable employer could escalate such a situation by treating the request for an explanation as a lawful and reasonable instruction, failure to comply with which would be serious misconduct. There was an issue about Mr Chitongo's work that morning that Mr Roberts was entitled to deal with but that was as far as the matter went or should have gone.

[17] For the foregoing reasons, I find that Mr Chitongo has a personal grievance because he was unjustifiably dismissed.

Remedies for the personal grievance

[18] Mr Chitongo told me that he started a new job on 1 June 2004 and that he had no income between the date of his dismissal and the date of the new job. Later, he admitted that he had some temporary or part-time work for which he was paid during that same period. On further questioning, Mr Chitongo was unsure about the duration of the work or how much he was paid. I

am left in a state of some considerable uncertainty about whether Mr Chitongo has lost any income or how much he might have lost during this period. As a result, I am unable to find to the standard of probability that he suffered any loss of remuneration and I make no award.

[19] There is a claim for \$10,000.00 compensation for distress. Only Mr Chitongo gave evidence. He says he was deeply hurt, disappointed and anxious about his and his family's immigration situation. On the evidence available, I consider an award of \$6,000.00 would be appropriate compensation. However, it is necessary to consider the extent to which Mr Chitongo's actions contributed to the situation giving rise to the grievance. No blame can be attributed to Mr Chitongo for refusing to give an explanation when confronted by an angry Mr Roberts. As mentioned above, the situation called for a reasonable discussion away from the heat of the moment. However, Mr Chitongo knew how to deal with 3 *titer* cows and how to properly puts the cups on. On 5 April he was careless and inattentive in his work and continued to be so despite at least one caution from Mr Roberts. Mr Chitongo's contributed to the situation but not in a substantial way. Accordingly, I order Mr & Mrs Roberts to pay compensation of \$5,000.00 to Mr Chitongo.

Penalty

[20] Section 130 (1) of the Employment Relations Act 2000 sets out the information an employer must keep in their wage and time records. Subsection (g) provides *where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:...* The obligation to keep a record of the hours or the days actually worked only arises when it is necessary for the purpose of calculating pay.

[21] Mr Chitongo was paid the same salary on a fortnightly basis. It was not necessary for the purpose of calculating that payment for the employer to keep a record of the hours or days actually worked. Mr & Mrs Roberts's wage records were kept by their accountant in a standard computerised payroll system. A printed copy of that information was provided to Mr Chitongo's representative following a request although I accept that there was a delay in the response. An employer is obliged to provide access to or a copy of wages and time records immediately upon request. Against that standard, it must be said that Mr & Mrs Roberts breached section 130 (2) of the Employment Relations Act 2000. All the while, Mr Chitongo had the computerised payslips he had received with his salary. There is no issue of underpayment of salary or holiday pay. In these circumstances, I find that there was no breach of section 130 (1) and the breach of section 103 (2) was not sufficiently serious to merit the imposition of a penalty.

Unjustified disadvantage

[22] The representative for Mr & Mrs Roberts correctly points out that Mr Chitongo is out of time to raise any grievance about any earlier warning. Mr & Mrs Roberts's practice of keeping file copies of correspondence on their computer rather than in printed format resulted in some uncertainty about in uncertainty about which letters had actually been given to Mr Chitongo but it is not necessary to resolve that since Mr Chitongo cannot pursue a grievance for the reason identified above without leave.

[23] Mr Chitongo's representative submitted that leave might be given on the basis that he was never given a written employment agreement. I prefer the evidence of Mr & Mrs Roberts that Mr Chitongo was given a written employment agreement in the same form as provided to the Authority.

Summary

[24] As a remedy for the personal grievance, I order Mr & Mrs Roberts to pay compensation of \$5,000.00 to Mr Chitongo pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[25] All other claims are dismissed.

[26] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority