

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Dion Tutuiri Church (Applicant)
AND Gunton Farms Limited (Respondent)
REPRESENTATIVES Jenny Guthrie and David Robinson, Counsel for Applicant
Christopher Eggleston, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 12 July 2005
DATE OF DETERMINATION 18 October 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] In April 2003 the applicant, Dion Church, was employed by the respondent as a high country shepherd at Argyle Station in Waikaia.

[2] Four of the applicant's cousins were also employed at the station during the time of his employment, brothers Mike, Aaron, Granger and Brendon Church. To minimise confusion I shall refer in my determination to the applicant as Mr Church and the other members of the Church family by their Christian names.

[3] Mr Church has two claims. The first claim is that he alleges he was led to resign on 30 March 2004 by breaches of duty on the part of the respondent and was unjustifiably constructively dismissed.

[4] His resignation letter provided:

To Whom it may concern

I would like to give notice of resignation. I have a new position to take up at the earliest convenient time to both my new employer and current employer. Ideally I would like to terminate my employment at Argyle Station on the 15th April 2004 and no later than the 30th April 2004.

[5] In response to the letter of resignation Mr Church received a letter from the respondent dated 1 April 2004 accepting his resignation and advising that his final day would be 2 April 2004. Mr Church was entitled to remain in the property he occupied on the farm until 16 April 2004 but was restricted to the area of the station around his house and was prohibited from using any facilities of the station. A toll bar was put on his telephone.

[6] The second claim Mr Church alleges is that by virtue of that letter he was unjustifiably summarily dismissed during his notice period.

[7] The respondent, Gunton Farms Limited, does not accept that the applicant's resignation amounted to a constructive dismissal and denies that the decision to pay the applicant in lieu of notice amounted to summary dismissal.

[8] The issues for determination in this case are:

- Was Mr Church unjustifiably constructively dismissed?
 - (i) Mr Church relies on the ground that there were breaches of the respondent's duty toward him that led him to resign. It is necessary to consider the matters relied on and whether they amount to breaches of duty by the respondent.
 - (ii) Was there a causal link between Mr Church's resignation and any breach of duty on the part of his employer? The answer to this question requires an assessment of the circumstances of resignation including but not limited to the letter of resignation?
 - (iii) If there was a breach or breaches of duty by Gunton Farms Limited were they of sufficient seriousness to make it reasonably foreseeable that there was a substantial risk of resignation by Mr Church?

- Was Mr Church dismissed during his notice period?

Was Mr Church unjustifiably constructively dismissed?

[9] The resignation letter written by Mr Church dated 30 March 2004 does not suggest Mr Church's resignation was for any other reason than to taken up new employment. It is apparent from the letter that Mr Church has considered both his new employer's needs and the needs of Gunton Farms Limited in terms of the notice period. Mr Church said in his evidence that he thought he was being fair by saying the notice could be a month if it suited Gunton Farms Limited although he would have preferred to have left on 15 April 2004. I do place some weight on this in terms of Mr Church's state of mind at the time.

[10] I also place some weight on Mr Church's written evidence where, referring to the letter he received from the respondent in response to his letter of resignation, he states; *Until I got the letter back, I never realised how much they didn't like me and after everything else it was like a kick in the guts...If they had talked to me about not having to work out my notice, if they let me leave normally and if they hadn't put the toll bar on the phone, I'm sure I would have felt differently about it.* I am of the view that evidence aptly summarises what Mr Church sees as his employment relationship problem which is the letter of 1 April 2004.

[11] Mr Church started looking for other positions before March 2004. He had turned two jobs down. Mr Church said to me that he *felt a bloke had to go forward* and in his written evidence that *shepherds are always on the look out for Manager's jobs.* It was clear to me that Mr Church realised during the term of his employment that it was unlikely he would become a manager at Argyle Station.

[12] Mr Church relies on a number of matters relating to the conduct of his employer that he says were causative of his resignation and amounted to breaches of duty. I am required to examine these matters and consider them in light of the respondent's implied and express obligations.

Terms and conditions of employment

[13] Mr Church was not provided with a written employment agreement. He received a salary of \$35,000.00 per annum which was paid on a monthly basis. He was provided with free accommodation and the usual farm benefits. Although an employment agreement should have been provided the evidence does not support that the failure to provide one was a cause of Mr Church's resignation. Mr Gunton advised me during the investigation meeting that employees on the farm now have written employment agreements.

Accommodation

[14] One of the concerns for Mr Church after he commenced employment in April 2003 was that he and his family did not get the choice of house on the station for accommodation that he was initially led to believe he would get. Mr Church accepts that he did not complain about this for the period of his employment and therefore I agree with Mr Eggleston's submission that Mr Church must be taken to have accepted the accommodation he was provided with.

Bereavement leave

[15] Mr Church was not paid for the time he took to attend the funeral of his grandmother who had played a significant role in his life. The respondent says that this was because Mr Church had not been an employee for six months at the time the leave was taken which was indeed the situation.

[16] Mr Church takes issue with respect to firstly what he says was disparate treatment of him and Granger with respect to payment for leave taken in different circumstances, and secondly that Granger advised Mr Church's partner Christine that bereavement leave would be paid.

[17] In terms of the disparate treatment I am satisfied that that matter was adequately explained by Mr Gunton and cannot be a matter that would amount to a breach of duty on that basis.

[18] In terms of the second issue there is a factual dispute as to whether Granger advised Christine to the effect that Mr Church *should* or *would* get paid whilst on bereavement leave. Having considered the evidence I am of the view that it is more likely that Granger used the word *should be paid* in terms of bereavement leave but did not go so far as to say that the leave would be paid. I have reached that conclusion because Granger had no control over what was paid to other employees. The payroll matters were handled by Kathryn Muir who worked in the office at Argyle Station. It is understandable that Granger would want to be as reassuring as possible to Christine in the circumstances but I am not satisfied that he gave an absolute assurance as to payment. I am strengthened in this view because it was not put to Mr Gunton during Mr Church's employment that Granger had given an assurance as to payment.

[19] I think it was unhelpful that no-one sat down with Mr Church and explained the reason payment had not been made to him for the period that he took bereavement leave. The communication difficulties around this caused resentment for Mr Church. I am not of the view that the failure to pay for the period Mr Church took bereavement leave in September 2003 amounted to a breach of duty or was causative of Mr Church's resignation on 30 March 2004.

Relationship with Granger

[20] Unfortunately shortly after Mr Church commenced his employment at Argyle Station his relationship with Granger deteriorated. It was Granger who had initially put forward Mr Church's

name for the position. I am not persuaded that the difficulties were completely the fault of either Mr Church or Granger. Mr Church tended to view any interaction with Granger in the worst possible light. For example Mr Church's response to Granger's message about his dogs coming down to the station was in my view an over-reaction. I do not think Granger was trying to wind Mr Church up on that occasion. Granger on the other hand could quickly become angry and defensive as was apparent to me at the investigation meeting. When it was necessary for the two of them to communicate they did so robustly, often using expletives. Granger properly accepted that the communication between him and Mr Church was poor and they both could have tried harder.

[21] Fortunately Mr Church did not have the same difficulties in his relationship with his other cousins and when Aaron Church started at Argyle Station that significantly reduced the contact required between him and Granger.

[22] Matters came to a head in February 2004. Mr Church was critical of Granger and Brendon's mustering in Boyers 3 paddock during a time when he was attending a rodeo. Granger and Brendon said they saw about 15 dead and dying sheep in Boyers 3 on or about 16 February 2004 and assumed they had starved because of poor pasture and competition for food.

[23] Mr Church was told about the dead sheep by Granger and Brendon and their view on the cause of death before he went himself to Boyers 3 on 23 February 2004. That disclosure in my view tends to support that there was no intention to cover up that there were dead sheep in the paddock. Mr Church said when he visited the paddock there were about 43 dead sheep and from their physical conditions it was likely the sheep had been smothered. A smother is when sheep crowd in on each other with the result that some suffocate.

[24] On that day Mr Church confronted Brendon about the sheep. Brendon told Mr Church that he thought the sheep had died of starvation and that *nobody was blaming anyone*. Mr Church did not accept that. I find that Mr Church did say to Brendon that he thought it was a set up. An angry exchange then took place which almost led to a physical confrontation. Granger became involved as did Mike and Aaron Church in trying to calm the situation down. A meeting was held with both Mike and Aaron Church but was unproductive.

[25] Mr Church inspected the paddock after he had raised his concerns with Brendon and Granger. He said that it seemed to him from holes in the dead sheep that someone had spread out the sheep in Boyers 3 using the forks of a tractor. Mr Church was concerned that he was being set up over the sheep and that there had been human error that had caused the deaths. He raised the matter with Mr Gunton when he visited the farm.

[26] Mr Gunton undertook his own inspection of the steep Boyers 3 paddock. He looked at the bottom of the paddock and the top. He could not see tractor marks. He also felt that moving dead sheep around the paddock would have placed both the employee and equipment at risk of injury and was very unlikely. Mr Gunton preferred Granger and Brendon's explanation as to the likely cause of death of the sheep rather than Mr Church's. He confirmed that he was not looking for anyone to blame and that sheep dying was something that happened on a station the size of Argyle.

[27] I do not think it was unreasonable for Mr Gunton to conclude that the sheep had not been moved by tractor given his inspection and the risks involved in using a tractor on the very steep paddock. Mr Gunton did not look at the sheep but preferred Granger's and Brendon's views that the cause of death was starvation. Mr Gunton said that he had a great deal of respect for Granger and Brendon's ability and felt that if there had been a smother they would have simply told him that. It was open to him to prefer one view of the cause of death over the other. The evidence in my view is insufficient to support the grave allegation of deliberate mishandling or gross negligence

with respect to the dead sheep in Boyers 3. The evidence does not support an intention to set Mr Church up particularly where Brendon had always got on well with Mr Church before the exchange on 23 February 2004.

[28] Mr Church's evidence was that he still felt unhappy about the sheep even though Mr Gunton was not concerned about the matter. I do not find that the actions taken with respect to this matter amount to a breach of duty by the respondent. Rather there was a need for a discussion to take place and for Mr Church to communicate the concern and resentment he was still feeling. The opportunity for that arose after Mr Church received a written warning and I now turn to that matter.

Written warning

[29] Mr Church received a written warning for verbal abuse toward another staff member as a result of his exchange with Brendon on 23 February 2004. The procedure in terms of the warning was deficient and there was no opportunity for Mr Church to explain his actions prior to receiving the letter. I am of the view though that there was substantive justification for the warning. This was an exchange between employees that got out of control. Mr Church's written evidence about the exchange between him and Brendon on 23 February was to the effect that *we were just as bad as each other and if anyone should be "warned" then it was both of us*. Brendon agreed that he should have been similarly warned. He wasn't given a warning because in Granger's view Brendon had not started the argument and there had been previous difficulties with Mr Church.

[30] Mr Church's warning letter provided *If you are in any doubt over this warning, or what is considered to be acceptable behaviour, or serious misconduct, you are to contact me and we will address the issues*. Mr Church wanted to meet with Mr Gunton about the warning and bring a support person with him. Two dates proposed by Mr Gunton for the meeting were not suitable. I find that there was some genuine confusion between Mr Gunton and Mr Church about who would try to fix a further date for a meeting. Both appeared to have left it on the basis that the other would provide a suitable date.

[31] In any event the meeting did not take place before Mr Church resigned. Mr Church provided me with a copy of the statement he intended to take with him to the meeting with Mr Gunton.

[32] I accept Mr Eggleston's submission that the warning could not properly be regarded in the circumstances of this case as a repudiation of the employment agreement. In any event there was to be a meeting to discuss that matter and any resignation prior to that was precipitous and the likelihood of a resignation was not reasonably foreseeable prior to that meeting.

Conclusion

[33] Mr Church was not happy at Gunton Farms Limited. He did not get on well with Granger and felt that he was treated differently to his cousins because he wasn't a manager or a member of the immediate family. These matters were not ones which Mr Church clearly communicated to Mr Gunton before he resigned. Indeed it was not until after the resignation that most of the matters that he had been harbouring historical resentment about were disclosed. I have examined the matters complained of by Mr Church and I am not satisfied that Gunton Farms Limited conducted itself in a manner calculated to or likely to destroy or seriously damage the employment relationship it had with Mr Church. I am not satisfied that the conduct shown toward Mr Church was such that he could no longer be expected to put up with it. I am unable to find a breach of duty on the part of Gunton Farms Limited that is serious enough to convert the resignation of Mr Church into a constructive dismissal. I find that Mr Church resigned to go to another job where he thought he would be happier.

[34] I do not find that Mr Church was unjustifiably constructively dismissed and his first claim does not succeed.

Was Mr Church dismissed during his notice period?

[35] An employee can be unjustifiably dismissed during his or her notice period – *Forever Living Limited v Kruesi* (unreported) 27 September 1995 AEC 100/95 Colgan J.

[36] Mr Eggleston submits that the termination date of 2 April 2004 was in accordance with *the earliest convenient time* expressed in Mr Church's letter of resignation and therefore no dismissal occurred. I do not accept that it is fair or proper to read one sentence from the letter in isolation from the balance of the letter. Mr Church said in his letter that ideally he would like to terminate his employment on 15 April 2003 and no later than 30 April 2004. It was open to Gunton Farms Limited to propose an earlier termination date to Mr Church but in this case Gunton Farms Limited unilaterally without consultation brought the termination date forward.

[37] I find that the letter from Gunton Farms Limited dated 1 April 2004 which unilaterally terminated Mr Church's employment from 2 April 2004 did amount to an unjustified dismissal.

Determination

[38] Mr Church does not have a personal grievance that he was unjustifiably constructively dismissed. Mr Church has a personal grievance that he was unjustifiably summarily dismissed during his notice period by the letter dated 1 April 2004. It is necessary now to consider remedies with respect to that grievance.

Remedies

Lost Wages

[39] Mr Church was paid for two week in lieu of notice by Gunton Farms Limited and was able to earn additional income during that period from his new employer. I asked for and was provided with all the details relating to Mr Church's earnings, leave and final pay. Everything appeared to be in order and there did not seem to me to be any claim for lost wages available. If there are any outstanding matters then I will as a precautionary matter reserve leave for either party to come back to the Authority within 7 days.

Compensation

[40] Mr Eggleston submits that there should be no compensation for what he describes as a technical breach. I have carefully considered his submissions in this respect and the evidence from Mr Gunton that it was in both parties interests for the relationship to be brought to a swift conclusion. Whilst I accept that the respondent did not set out to cause hurt to Mr Church by its letter I am of the view that he did suffer hurt and humiliation which went beyond simply not being required to work out his notice period.

[41] He was restricted in his movements around the farm and experienced some inconvenience around the use of his telephone. This added to a sense of isolation. He was not able to work out his notice or leave his employment following consultation in a dignified manner with his partner and four children. He felt punished. Mr Church is the strong silent type but it was clear to me that this matter hurt him. I am of the view that a claim for compensation has been made out. It became

apparent at the investigation meeting that there was no evidence to support that Mr Church's employer or his cousins spread rumours about him after he left. In all the circumstances I am of the view that an award of \$1,500.00 would be appropriate in the circumstances.

[42] I order Gunton Farms Limited to pay to Dion Church the sum of \$1,500.00 without deduction under section 123 (c)(i) of the Employment Relations Act 2000.

Costs

[43] I reserve the issue of costs. The applicant is legally aided. In terms of costs I observe that the applicant was not successful in his main claim that he was unjustifiably constructively dismissed. The evidence about that claim occupied a large part of the investigation meeting. I would encourage the parties to attempt to reach agreement about costs. In the event that agreement cannot be reached then the applicant has 21 days from the date of this determination to provide submissions as to costs and the respondent has a further 14 days to provide submissions in response.

Summary of Findings and Orders

- I did not find that Mr Church was unjustifiably constructively dismissed.
- I found that Mr Church was unjustifiably dismissed during his notice period by letter dated 1 April 2004.
- There does not appear to be a claim for any lost wages available to the applicant but I have reserved leave for either party to come back to the Authority within 7 days from the date of this determination in the event that there are any matters arising.
- I have ordered Gunton Farms Limited to pay to Dion Church the sum of \$1,500.00 under section 123 (c)(i) of the Employment Relations Act 2000.
- I have reserved costs.

Helen Doyle
Member of Employment Relations Authority