

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 22
5465599

BETWEEN RICKY HENRY CONWELL
Applicant

AND SHERRYNDALE LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
Digby Livingston, Advocate for Respondent

Investigation Meeting: 27 January 2015 at Palmerston North

Submissions Received: Oral submissions from each party at the investigation
meeting

Determination: 17 March 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sherryndale Limited (Sherryndale) is a small family company comprising husband and wife; Dale and Sherryn Marshall (the Marshalls). Through Sherryndale, the Marshalls work as contract milkers.

[2] Ricky Conwell began working for Sherryndale in July 2013 as a farm assistant on a fixed term employment agreement. Prior to this engagement Mr Conwell says he had worked for nine years as 2IC on a large dairy farm.

[3] On 11 February 2014 there was a disagreement between the Marshalls and Mr Conwell about how the 'plant wash' and 'hosing out' functions should occur. Mr Conwell says that after the quarrel the Marshall's required him to re-train in all the procedures used in the milking shed. He says the format of re-training was

unreasonable, humiliating and designed to coerce him into resigning. He says if there was a concern about how he performed the plant wash-out and hosing down duties then any re-training should have been confined to those tasks.

[4] Mr Conwell claims he was constructively dismissed and seeks wages for the period of four weeks between leaving his employment with Sherryndale and commencing a new role. He requests the Authority to order payment of \$10,000 as compensation for hurt and humiliation.

The issues

[5] The onus lies with Mr Conwell to establish, on an objective basis, that the Marshalls' conduct, and in particular the way he was required to re-train was "*conduct with a deliberate and dominant purpose of coercing [him] to resign*"¹. Mr Conwell must establish that there is a causal link between the Marshalls' conduct and his termination of employment.

The Authority's investigation

[6] Ricky Conwell, Dale Marshall and Sherryn Marshall each provided written and oral evidence. At the Authority's investigation Mr Conwell was self-represented. The Marshalls were represented by an experienced advocate.

[7] I have not referred to all the information furnished to the Authority but have set out the material facts and have made findings on issues relevant to determining Mr Conwell's claims².

Summary of relevant information

[8] Mrs Marshall's evidence is that over the previous six years she and her husband had developed an integrated system of procedures and sequences in the milking shed and yard. She says their system has been successful and they have received an award for 'Best Practice' from Fonterra. Mrs Marshall says that the system of procedures and sequences needs to be followed without deviation to ensure high quality milk and avoid contamination.

¹ *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 327

² Pursuant to s.174

[9] The Marshalls each say Mr Conwell was a good worker and that the employment relationship was largely amicable. There is no dispute however, that Mrs Marshall and Mr Conwell, on occasion, held differing opinions about how some work activities should be performed. Mr Conwell agreed in evidence that in the first three months of his employment Mrs Marshall frequently emphasised to him how she wanted functions associated with milking shed and yard to be undertaken.

[10] In October 2013, Mrs Marshall gave birth to her second child and her presence in the shed and yard was reduced.

[11] Mr Conwell accepts that from November 2013 he “*did things a wee bit differently*” but says his modification of work procedures was only minor.

[12] On the morning of 11 February 2014 Mrs Marshall became concerned while observing Mr Conwell at the end of a milking session that he not following the expected sequences associated with the plant wash and hosing out processes. Terse words were briefly exchanged between the two and in the early afternoon the Marshalls met with Mr Conwell to discuss his approach to their system of work.

[13] Both parties acknowledge that meeting did not go well. Mr Conwell denies that he refused to follow the Marshalls’ routines but concedes he was argumentative. He says he had never before been told he was not performing to standards and the Marshalls’ concerns came as a surprise for him. At the end of the meeting Mr Conwell was informed that Mr Marshall would take him through the sequences associated with the shed and yard procedures during the milking scheduled for the afternoon.

[14] Mr Conwell says after the meeting Mrs Marshall told him that she “*had had enough of him*”. Mrs Marshall says that Mr Conwell has misrepresented her statement. She says she advised Mr Conwell that she had had enough of arguing with him over work procedures.

[15] Mr and Mrs Marshall each testified that the meeting had not dispelled their concerns. They remained anxious about whether Mr Conwell would follow their system of work and they sought external advice from an employment relations adviser about what to do.

[16] That afternoon Mrs Marshall devised a letter which was given to Mr Conwell. The letter stated:

Following our meeting today, this letter sets out our expectations of how we want you to carry out your duties as our employee.

We have established certain routines in the milking shed that we believe result in efficient milkings. These have been discussed with you and this letter is written confirmation that, unless you meet our expectations, your continued employment will be in jeopardy.

If you persist in ignoring our specific instructions, you will be called to another meeting to discuss our concerns. If you require further training to carry out our instructions, this will be provided. However, if it is apparent that you are simply refusing to comply with our instructions because you do not believe them to be necessary, this will be construed as deliberate refusal to obey instructions.

With your cooperation we look forward to a continued working relationship in which both parties can work in harmony.

[17] At the heart of Mr Conwell's claim is what happened during milking that afternoon and the following day.

[18] Mr Conwell says Mr Marshall made him "walk behind him like a dog" as he demonstrated processes during the course of both milking sessions. He says within five minutes (on 11 February 2014) he told Mr Marshall that he felt humiliated and belittled by the re-training process but that Mr Marshall persisted in repeating every minor sequence and procedure.

[19] Mr Marshall says he had no intention of humiliating Mr Conwell and does not believe he did. He agrees that Mr Conwell's told him that the retraining was humiliating but says he told Mr Conwell he could think of no other way of ensuring that he was clear about the sequences other than actively going through these with him.

[20] On 12 February 2014 Mr Marshall repeated the training over the course of the morning milking session which required some different activities. He says he was aware that Mr Conwell was unhappy with his approach but sought to de-escalate the situation by asking Mr Conwell to "chill out and relax and just let me work through the procedures". Mr Conwell ultimately told Mr Marshall to "f... off". Mr Marshall left Mr Conwell to perform the procedures alone for approximately 15 minutes and then returned to the shed to commence the next sequence. Mr Conwell says that he

warned Mr Marshall that the training was “*pushing me over the edge*”. In evidence Mr Conwell said that Mr Marshall was “*deliberately baiting me to the point where I would either snap or perhaps do something like hit him or walk off the job*”. Mr Marshall denies that allegation, and says he was trying to ensure that Mr Conwell was aware of the procedures and would follow the correct sequences.

[21] At the end of the morning milking session, Mr Conwell left the farm and he sought legal advice.

Analysis and findings

[22] It is clear that the genesis of the Marshalls’ insistence that Mr Conwell re-train occurred in the meeting held in the early afternoon of 11 February 2014.

[23] I do not accept Mr Conwell’s claim that the Marshalls were only entitled to address the plant wash and hosing out procedures with him. Faced with Mr Conwell’s express opposition to the Marshalls’ system of procedures and sequences I consider the Marshalls were entitled to address those matters by initiating a re-training programme going forward.

[24] Mr Conwell advanced his case in front of the Authority in an intelligent and forthright way. He advised that he does not like to be talked down to by anyone. In contrast Mr Marshall presented as having a reserved and quiet personality.

[25] Mr Conwell described the humiliation he felt as a consequence of Mr Marshall’s detailed approach to the re-training. I have no doubt that Mr Conwell’s response to Mr Marshall’s style of re-training was negative but that does not, in and of itself, lead me to conclude that the retraining was deliberately intended to humiliate or that it can be objectively regarded as humiliating such that that I can conclude Mr Conwell was effectively constructively dismissed.

[26] In *Wellington etc Clerical Workers etc IUOW v. Greenwich*³, the Court stated that for a dismissal to be constructive:

It is not enough that the employer’s conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 956

[27] There is no evidence to support Mr Conwell's claim that the dominant purpose of the retraining was to obtain his resignation. I consider it much more likely that the purpose of the retraining was to ensure Mr Conwell knew, and understood exactly, the procedures the Marshalls wished him to perform. While I agree that there may be other methods of achieving that goal (such as detailing the activities in a job description) I do not think it was unreasonable of Mr Marshall to provide the training in the way that he did. I accept Mr Marshall's evidence that Mr Conwell's response to the method of retraining was an over-reaction to the circumstances.

[28] I am further persuaded by a text sent by Mr Conwell to Mr Marshall before the scheduled afternoon milking, that it was not the events that occurred in the milk shed on 11 and 12 February 2014 that prompted Mr Conwell to leave his employment. The text was sent relatively soon after the meeting having been advised Mr Marshall was going to take him through the shed procedures that afternoon. It stated:

This aint gana work. I wuld like to leave now can we work sumthin out or this gana be a drama to.

[29] I find the content of Mr Conwell's text message indicates he was already contemplating leaving his employment before the Marshalls embarked on retraining, and it detracts from his primary argument that it was the way the training was conducted that caused him to resign.

[30] Evidence about what occurred between the parties after 11 and 12 February 2014 further cements my view that Mr Conwell was not constructively dismissed.

[31] The parties met again on 18 February 2014. In his written evidence Mr Conwell portrayed the meeting as being disciplinary in nature but I do not accept this aspect of his evidence.

[32] At the Authority's investigation meeting Mr Conwell accepted that the Marshalls (via their advisor) asked him to stay in their employ, sought to discuss how the employment relationship could be restored and offered him more responsibility in his role⁴. This action is wholly inconsistent with Mr Conwell's claim that the Marshalls were engaging in conduct with the deliberate and dominant purpose of coercing him to resign. During questioning Mr Conwell conceded that by 18

⁴ I accept the Marshalls' evidence that despite their concerns about Mr Conwell's level of compliance with their system of work, he was regarded as a valuable and experienced employee whom they did not want to lose.

February 2014 he had already decided to leave Sherryndale but that he wanted to discuss an agreed exit.

[33] No resolution was reached between the parties on 18 February 2014 and Mr Conwell did not return to work.

[34] Having assessed the evidence I consider the differing views between the parties about how work should be performed hit a tipping point on 11 February 2014. The Marshalls wanted to eliminate any further disputes over work practices by demonstrating their requirements and having Mr Conwell observe these. I consider it likely that Mr Conwell was unwilling to adopt the Marshalls' prescribed standards and in these circumstances he chose to leave his employment with Sherryndale. It follows that Mr Conwell was not constructively dismissed.

[35] Mr Conwell's claim is rejected.

Costs

[36] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority