

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 190A/08
5145529

BETWEEN MARK JOSEPH CROWE
 Applicant

AND GREENBURN DAIRY FARM
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Greg Martin, Counsel for Applicant
 Linda Penno, Advocate for Respondent

Investigation meeting: 12 December 2008 at Christchurch

Determination: 15 December 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Crowe worked for Greenburn Dairy Farm Limited. He was employed as Greenburn's farm manager and started on 21 October 2008. He reported to the company owners, supervised several staff and had full day to day responsibility for the operation of the dairy farm near Fairlie.

[2] Following his involvement in an altercation Mr Greenburn was dismissed. He seeks interim reinstatement pending resolution of his personal grievance claim of unjustified dismissal. After reading the affidavits and considering the submissions of both representatives I determined not to reinstate Mr Crowe. That decision was communicated to the parties on Friday. This determination sets out the reason for the decision.

[3] As always in this situation the findings expressed in this determination are solely for the purpose of resolving the claim for interim reinstatement. Final findings of fact will have to await the opportunity to test the evidence. I will set out briefly

what happened leading up to and including the dismissal before applying the law about interim reinstatement.

The altercation

[4] Mr Crowe lived on the property as did other employees. In fact he shared accommodation with David and Tracey Ivory and their young child. Mr Ivory is a farm assistant and Mrs Ivory is a relief milker. Mr Crowe says that they were sharing because the owners had failed to provide adequate housing for everyone in a timely manner. Building work to provide additional separate accommodation is continuing. The evidence of the owners is to the effect that there was sufficient accommodation despite the unfinished building work if Mr Crowe had been prepared to move to another house temporarily. For present purposes I must accept that Mr Crowe will be able to prove in due course what he says about the accommodation. As well as Mr Crowe, Mr & Mrs Ivory and their child, Mr Ivory's father was also living in the house.

[5] There was an altercation between Mr Crowe and Mr & Mrs Ivory about the shared living arrangements on the evening of 19 November 2008. Mr Crowe says that he was confronted by Mr Ivory and felt extremely threatened and intimidated. He thought he had to defend himself so he punched Mr Ivory and *grazed* his lip. That stopped Mr Ivory's assault on Mr Crowe. Next Mrs Ivory came at Mr Crowe *yelling and spitting* so he pushed her away. Mrs Ivory lost her balance and fell over. Mr Ivory then tackled Mr Crowe to the ground and had him in a headlock threatening to kill him. Another employee (Michael Millard) intervened and Mr & Mrs Ivory went inside the house. Mrs Ivory came back out yelling at Mr Crowe but Mr Millard intervened again. Mr Ivory senior came out of the house and confronted Mr Crowe. Mr Millard intervened again. That brought the altercation to an end, one of the owners turned up and arrangements were made to separate Mr Crowe and Mr & Mrs Ivory for the night.

[6] There are affidavits from Mr Ivory and Mrs Ivory. They say that Mr Crowe was the aggressor putting Mr Ivory in a headlock, punching him and pushing Mrs Ivory over before Mr Ivory pushed Mr Crowe to the ground. Mr Millard intervened. When Mr Ivory senior came outside Mr Crowe tried to pick a fight with him too.

[7] Mr Millard no longer works for Greenburn but has provided an affidavit. His evidence helps establish the immediate context for the altercation. Mr Crowe and Mr Millard were drinking at the former's accommodation for at least two hours beforehand. Mr Crowe was expressing annoyance at the lack of building progress and having to live with the Ivory family, their cat, their dog and their budgie. During this time the power went out and they decided to drive to the house to look at the building progress and to see if power was on there. Mr Millard says that after they arrived Mr Crowe *got angry really quickly*. Mr Crowe then phoned one of the owners (Kieran Guiney) and told him how unacceptable the living arrangements were. Next Mr Crowe went into the house briefly then came back out and made another phone call. This time he rang a furniture removal company and organised for a removal truck to take the Ivories' gear to Mr Guiney's place. Mr Crowe rang and spoke to Mrs Guiney telling her that the Ivories' gear would be trucked to her place on Friday morning. Mr Crowe then went into the house. There is nothing in Mr Crowe's affidavit to throw any doubt on Mr Millard's evidence about the lead-up to the altercation.

[8] Mr Millard says that Mr Crowe came back out then Mr & Ivory came out, both of them angry with Mrs Ivory yelling. Mr Ivory yelled *What the fuck's going on Mark?* At that point Mr Millard went inside the garage since he thought this was none of his business. He did not see the start of the physical altercation between Mr Crowe and Mr & Mrs Ivory. When he heard Mrs Ivory screaming he came back outside and saw her on the ground *on her butt in a sitting position* and Mr Crowe and Mr Ivory wrestling. Mr Millard saw that Mr Ivory had a bleeding lip. Mr Ivory wrestled Mr Crowe to the ground and Mr Millard intervened by sitting on Mr Crowe to prevent him getting up. The situation cooled down and Mr & Mrs Ivory went back inside. Mr Millard had to deflect Mrs Ivory and Mr Ivory senior from inflaming things and Mr Guiney arrived soon after.

[9] To summarise, Mr Crowe had been drinking, got angry about the accommodation sharing, made arrangements to remove Mr & Mrs Ivory from the accommodation at short notice, announced those arrangements to Mr & Mrs Ivory, threw a punch at Mr Ivory and gave him a bleeding lip and pushed Mrs Ivory who fell over. There was then a scuffle between the two men before Mr Millard intervened and kept the peace. One of the owners arrived soon after and arranged different accommodation sharing to separate the combatants.

The dismissal

[10] On 20 November 2008 Mr Crowe was called to a meeting that day with Mr & Mrs Guiney and Ron Smith (another company owner). Mr Crowe gave his account of what happened. He admitted punching Mr Ivory, explained the surrounding circumstances and refused to accept he was at fault. The owners also interviewed Mr & Mrs Ivory and Mr Millard. Having done that they decided to dismiss Mr Crowe. Mr Smith phoned Mr Crowe at about 5.00pm and conveyed the decision. On 23 November 2008 Mr Crowe found in his car a letter dated 21 November that Mr Guiney had put there. It sets out the reasons for the dismissal.

[11] On 21 November 2008 Mr Crowe visited a solicitor who sent an email that day to Mr Smith asking for the dismissal to be reconsidered. That did not cause any change in the company's position. Subsequently Mr Crowe left the property but is apparently staying nearby with a friend.

Arguable case?

[12] There are several points relied on. First, Mr Crowe complains about the lack of advance notice of the agenda for the 20 November 2008 meeting. He says that he was not given an opportunity to prepare for, be represented at or to respond during the meeting. He also says that he was not listened to. This is all arguable because it will depend on the outcome of some disputes in evidence about the arrangements for and what happened at the meeting. However the position for the company at present is not weak. There is evidence that advice as to process was sought from reliable sources. The notes made at the meetings support the conclusion that Mr Crowe was cautioned about what was at stake. That the company made its decision on the basis of the uncontested fact that Mr Crowe was the only one to throw a punch indicates that he was listened to. What the company did not do is accept his explanation that he was not culpable. Not accepting is quite different to not listening to an explanation.

[13] Secondly, Mr Crowe says that in substance he was held to be guilty of an assault. However he says that he was simply defending himself. He also says that the owners were at fault for not providing adequate accommodation and misleading him about when they would all get their own living arrangements. The last point is meritless. Assuming the truth of the claim about the owners' fault, it provides no justification for violence or an assault. I accept that Mr Crowe may eventually

establish that he was defending himself. However the context is that Mr Crowe provoked Mr Ivory and there is little to support the notion that Mr Crowe needed to defend himself by punching and pushing Mr & Mrs Ivory. So while Mr Crowe has an arguable case I cannot say that the employer's position is weak or that Mr Crowe's position is strongly arguable.

[14] Mr Crowe says that even if he was at fault the situation occurred outside work hours and away from the work environment. I see no merit in this argument. Cases such as *Smith v Christchurch Press Company Ltd* [2000] 1 ERNZ 624 establish that it is not necessary for the misconduct to actually occur at work in work time. Here, the altercation was between the manager and one (or more) of his employees just outside the farm accommodation provided to them as part of their employment. There is more than a sufficient employment nexus.

[15] Mr Crowe points out that his employment agreement does not provide the employer with any right to terminate the agreement prior to its expiry date which is 31 May 2009. There are several weaknesses with this argument. It is probable that there would be implied into the agreement the right for the employer to terminate on reasonable notice or summarily for serious misconduct; just as there would be implied a right for the employee to resign on reasonable notice. If not and if the dismissal is therefore a breach of contract, the appropriate remedy would be damages not reinstatement.

[16] There is a point made that the employment agreement does not define or give examples of misconduct. However I am not aware of any decision to the effect that a manager who punches an employee cannot be summarily dismissed for doing so unless that behaviour is categorised in the employment agreement as serious misconduct. It all depends on the circumstances and there are numerous cases where such conduct has been found to be sufficient to justify dismissal.

[17] In summary I find that Mr Crowe has an arguable case about the quality of the employer's investigation and the correctness of its conclusion about the need for him to defend himself. This does not appear at present to be a strongly arguable case.

Balance of convenience

[18] Mr Crowe says that he has nowhere else to live, no other source of income and may lose personal belongings. He is also concerned that the practicability of

reinstatement in due course may be compromised if the company proceeds to appoint his replacement in the meantime.

[19] Mr Crowe's application to the Authority was lodged on 5 December 2008. By that time he had been served with a trespass notice by Police at the company's behest so he left the accommodation. Mr Crowe is currently living near the property with a friend. I have not been told any reason why this could not continue or why some other accommodation arrangement could not be made.

[20] A replacement farm manager was offered employment on 1 December 2008 and started work on 8 December 2008. If in due course there is an order for the permanent reinstatement of Mr Crowe that is a problem that the company will have to deal with. It will be little more of a problem later as it would be now should Mr Crowe be reinstated in the interim. The other factor relevant to this is that Mr Crowe could have made his application to the Authority a week or so earlier. He must bear the consequences of letting that time slip by.

[21] There is not sufficient detail of Mr Crowe's financial circumstances to place much weight on his evidence that he has no other source of income.

[22] There is no reason to think that Mr Crowe's property left behind (if any) would not be returned to him or safely held by the company regardless of the outcome of this claim for interim reinstatement. No details of this property have been given so there is no reason to think that there is anything irreplaceable.

[23] A principal concern for the company if Mr Crowe was reinstated in the interim is the position of Mr & Mrs Ivory. They would have to report to a manager who punched one of them and pushed the other. They both say they have lost trust in Mr Crowe as their manager and Mrs Ivory expresses some concern for her safety.

[24] I find that the balance of convenience favours the company.

Overall justice

[25] If Mr Millard's account of events immediately prior to the altercation proves correct Mr Crowe will have contributed significantly to the situation giving rise to any grievance that he can establish. If Mr Crowe does not prove that he was defending himself when he punched Mr Ivory and pushed Mrs Ivory, his contribution to any

grievance that can be established will be high. These factors may well count against permanent reinstatement.

[26] I have already found that Mr Crowe does not have a strongly arguable personal grievance claim based on the material provided to the Authority. Part of that reflects an employer that did not act in the heat of the moment but took time to find out from those involved what had happened. The picture placed before the Authority by Mr Crowe is almost the same as he placed before his employer. It is too soon to say that the employer's actions and how it acted were what a fair and reasonable employer would have done; but it is not apparent even to an arguable standard that this employer got it badly wrong. I therefore reject the contention that Mr Crowe would still be employed but for poor process.

[27] I conclude that there is nothing compelling about Mr Crowe's claim for interim reinstatement.

Summary

[28] The application for interim reinstatement is denied.

[29] Costs are reserved.

[30] The parties should participate in mediation with a view to resolving this problem. Following that, Mr Crowe through counsel should advise the Authority whether there is a need for an investigation meeting.

Philip Cheyne
Member of the Employment Relations Authority