

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Paul Jerard & 2 others (Applicants)  
**AND** Bellavista Trust (Respondent)  
**REPRESENTATIVES** Paul Jerard, Advocate for the Applicants  
Robin Hedges, Advocate for the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 27 May 2005  
**DATE OF DETERMINATION** 4 August 2005

**DETERMINATION OF THE AUTHORITY**

**The Applicant Parties**

- [1] This matter was filed with the Authority by Mr Paul Jerard on his own behalf and also on behalf of: Mrs Winefreda Jerard, Mr Romeo Espanola and Ms Mei Hung. The latter person has now withdrawn from the proceedings. Mr Espanola did not attend the investigation meeting and it appears to be generally accepted that he no longer has any apparent interest in the proceedings. That leaves the Authority in the position that only the claims of Mr and Mrs Jerard remain under investigation.

**The Identity of the Respondent**

- [2] The *Statement of Problem* filed with the Authority cites R J Hedges, trading as Bela-Vista Berries, as the Respondent party. It has now been established that the correct legal entity of the employer is the Bellavista Trust, trading as Bellavista Berries. This determination and the records of the Authority now reflect that the Bellavista Trust is the Respondent party to this matter.

**The Employment Relationship Problem**

- [3] The overall claims, and the evidence pertaining to this matter are somewhat unclear, but it appears that the substantial claim of Mr and Mrs Jerard is that that they were unjustifiably dismissed and that the dismissal occurred on or about 4 November 2004. On the other hand, Mr Robin Hedges, one of the joint owner/operators of the business, says that Mr and Mrs Jerard simply left their employment without any notice.

## Background

- [4] Bellavista Berries is a strawberry farm. The strawberry picking season is from November until approximately the end of January each season, depending on climatic conditions.
- [5] Mrs Jerard worked as a strawberry picker at Bellavista Berries during the 2003/2004 season. The understanding of the Authority is that she met up with Mr Robin Hedges in a Warehouse store some time in October and it was suggested that she might like to work at Bellavista Berries for the 2004/2005 season. It seems that Mr and Mrs Jerard subsequently went to the berry farm and spoke to Mr John Hedges, the father of Mr Robin Hedges.
- [6] Mrs Jerard says that she was offered the role of supervising the strawberry packing shed and she was also asked to organise the employment of some other strawberry pickers. While there is nothing in writing, it appears that it was agreed that Mrs Jerard would be paid \$12.00 per hour for carrying out some duties and \$15.00 per hour for other duties. She also says that she was to be paid petrol money to compensate her for her travel to the berry farm. Mrs Jerard subsequently resigned from her job at an avocado and kiwifruit farm and came to work at Bellavista Berries.  
Mrs Jerard says that it was also later agreed that all the pickers would be paid 90 cents per kilo of strawberries picked instead of an hourly rate.
- [7] Mr Jerard is carpenter and he says that he was offered work on a house that was going to be relocated to the berry farm. The rate of pay was to be \$15.00 per hour. However, it seems that because of bad weather, the progress on the house was delayed. The evidence of Mr Peter McCauley, who was involved with the house relocation project, is that because of Mr Jerard's age, he found the physical work on the foundations for the house somewhat difficult. Mr Jerard also did a little building work on the strawberry packing shed.  
It appears that Mr Jerard then became involved with work related to the strawberries and he was paid \$12.00 per hour for that work.
- [8] From what I can understand from the overall evidence, confusing as it is, and the rather limited wage and time records, for the week ending 20 October, Mrs Jerard worked 16 hours @ \$12.00 per hour and for the week ending 27 October 2004, she worked 16 hours @ \$15.00 per hour.  
For the week ending 3 November Mr Jerard worked 60.5 hours @ \$12.00 per hour and 11.25 hours @ \$15.00 per hour, and for the week ended 10 November 2004, Mr Jerard worked 7.75 hours @ \$12.00 per hour and 2 hours @ \$15.00 per hour.  
During the week ending 3 November, Mr and Mrs Jerard also picked strawberries and were paid 80 cents per kilo for a total of 415.70 kilos.
- [9] However, the detail of the payments received by Mr and Mrs Jerard becomes confused, as when they received their payment for the week ending 3 November 2004, the "Wage Receipt No 5" shows that the total earnings have been amalgamated as has the PAYE deduction. The outcome being that a net sum of \$901.95 was received by the couple. The evidence of Mr Robin Hedges about this is that Mr and Mrs Jerard requested payment in this manner. [Just how the Inland Revenue Department would view this arrangement is not for the Authority to speculate about but that is something that the employer may be wise to contemplate.]
- [10] It appears that Mr and Mrs Jerard were driving home on 4 November 2004 after receiving the above wage receipt. That is when Mrs Jerard discovered that the rate paid per kilo for picking strawberries was 80 cents and not the 90 cents per kilo that she believed had been agreed to. Mrs Jerard was upset about the reduced rate that had been paid.

- [11] It appears that Mrs Jerard was also upset because someone else was in charge of the packing shed when she had been assured she would be doing that. The outcome of all of this was that Mrs Jerard sent a text message to Mr Robin Hedges. Mrs Jerard says that the message she sent was: *“Not coming in tomorrow.”*  
Mr Hedges says that the message was: *“Don’t want to go to work.”*
- [12] When Mrs and Mrs Hedges arrived at their home there was message on the telephone answering machine from Mr John Hedges. Mrs Jerard says that she did not really understand the message. The evidence of Mr Jerard is that Mr John Hedges rang later and he spoke to him about the packing shed supervision issue, and the matter of only 80 cents per kilo being paid for picking strawberries rather than 90 cent per kilo.
- [13] Mr Jerard says that the response from Mr Jerard was that he said: *“I don’t want any shit from the field, you’re all sacked.”*
- [14] It appears that Mr Jerard went back to the strawberry farm later on the day of Friday 5 November to drop off some tools and then went back again on Monday 8 November 2004 to retrieve his tools but there does not appear to have been any discussion about the status of his employment or that of Mrs Jerard.

## **Analysis and Conclusions**

- [15] The first question that I have to decide is: Were Mr and Mrs Jerard dismissed?
- [16] Mr Robin Hedges says that there was not a dismissal. He says that the text message received from Mrs Jerard was effectively a resignation. Regardless of which version of the text message is correct, I do not find that any reasonable employer could have interpreted either message as being a resignation. Mr Hedges also says that given the nature of the strawberry picking industry, there are always people coming and going and he simply accepts that some people do not want to come back after only picking strawberries for a short time.
- [17] While I can accept that this is probably so for some people, in the case of Mrs Jerard, it is clear that she was not just another itinerant worker. She had worked at the strawberry farm the previous year and was obviously someone that was reliable, hence the offer of re-employment. Mrs Jerard also gave up other employment to come to Bellavista Berries and was told that she would have the responsibility for the supervision of the packing shed.
- [18] Furthermore, I accept the evidence of Mr Jerard as to the discussion that took place between him and Mr John Hedges. The outcome of that discussion was that it was clearly conveyed that not only Mr and Mrs Jerard were dismissed, but also Ms Hung and Mr Espanola, both of these people had gained their employment via Mrs Jerard and she appears to have had some responsibility for them.
- [19] Mr Robin Hedges says that he and his sister operate Bellavista Berries and that his father only assists there and has no authority in regard to employees. I doubt that this is so. Apart from the chance meeting at the Warehouse, it is clear that all of the arrangements pertaining to the employment of Mr and Mrs Jerard, and others, was handled by Mr John Hedges and it was reasonable for them to assume that he had the authority to dismiss them.
- [20] Mr Robin Hedges says that he considers that Mr and Mrs Jerard and the other two employees, abandoned their employment and that he suffered a financial loss over the four days that it took to employ replacement pickers. I do not accept that the Jerards abandoned their

employment. I find that Mrs Jerard was clearly upset about the rate of pay that she received when she believed that a higher rate had been agreed to. She was also upset about not being in the role of supervising the packing shed as she had been told she would be. I find that it is more probable than not that she reacted to both of those matters by texting a message indicating that she would not be coming to work the next day. Clearly that was an overreaction and she would have been better advised to have initiated a discussion about these matters with the Hedges. However, having said that, I also have to say that I have gained the impression that the Hedges are people of few words and not particularly disposed to investing much time in discussing and resolving employment relations issues.

- [21] While I find that Mrs Jerard overreacted to her situation, I also find that Mr John Hedges reacted in kind and faced with a problem, he simply chose to eliminate the problem by dismissing all concerned.
- [22] I also find it most peculiar that when Mr Robin Hedges found himself without any pickers, and the fact that there was fruit to be picked and retailers to be supplied, he did not make some attempt to ascertain from Mrs Jerard what had happened and why. It seems most probable that Mr Robin Hedges accepted his father's decision to dismiss the Jerards and others, and was not prepared to reverse it or initiate any dialogue whatsoever with the Jerards.
- [23] Given all of the above, I find that Mr and Mrs Jerard were dismissed by Mr John Hedges on 4 November 2004 and that the dismissal was unjustified.

## Remedies

- [24] Having found that Mr and Mrs Jerard were unjustifiably dismissed, I now turn to the remedies that may be available to them.

(a) Reimbursement of Wages

Section 123(b) of the Employment Relations Act 2000 ("the Act) provides that where the Authority determines that an employee has a personal grievance, it may provide for:

"the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance."

- [25] Further to that provision, section 128(2) of the Act provides that:

"If this section applies then, subject to subsection (3) and subsection 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration."

- [26] Subsection (3) provides that:

"Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate."

- [27] Both Mr and Mrs Jerard were unemployed for a period of more than 3 months and I have heard little evidence of their attempts to obtain further employment and mitigation of their losses, apart from registering with WINZ. Nonetheless, I have no doubts that had it not been for the unjustified dismissal, Mr and Mrs Jerard would have continued their employment for

the remainder of the strawberry season, that is, until the end of January 2005, that is, for a period of 13 weeks. Therefore, pursuant to section 128(2) of the Act, an award of a sum equal to the lost remuneration for that period is appropriate.

*Payment to Mrs Jerard*

[28] The assessment of an appropriate sum to be awarded raises some difficulty given that payment per kilo of strawberries picked was the method of payment at the time of the dismissal. Also, given the short period of employment, it is impossible to predict what the earnings might have been or the length of the working day, taking into account prevailing climatic conditions. I conclude that the most appropriate method of assessing an appropriate award of lost remuneration is to assess payment at \$12.00 per hour for a 40 hour working week, that is,  $\$490.00 \times 13 = \$6,240.00$ .

*Payment to Mr Jerard*

[29] While Mr Jerard was employed to use his skills as a carpenter on the house that was to be relocated to the Bellavista property, it is not clear when he would have commenced work on the house and for how long. On the other hand, it appears that he could have, at the least, remained picking strawberries, possibly in conjunction with working on the house in due course. Once again, I conclude that the most appropriate method of assessing an appropriate award of payment is to assess payment at \$12.00 per hour for a 40 hour working week, that is,  $\$490.00 \times 13 = \$6,240.00$ .

(b) Compensation

[30] Section 123(c) of the Employment Relations Act 2000, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the payment to the employee of compensation by the employee’s employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the employee; .....

[31] I heard little evidence from Mr and Mrs Jerard as to the affect of the dismissal upon them. Indeed, they appeared somewhat stoic about the events and have not sought an award of compensation. In the absence of any evidence as to why any compensation should be awarded, I decline to do so.

(c) Contribution

[32] Pursuant to the provisions of s.124 of the Act, the Authority is bound to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. Given the unequivocal action of Mr John Hedges in conveying that all the strawberry pickers were “sacked,” I find no contribution on the part of the Jerards that contributed towards the situation that give rise to their grievances and the remedies awarded remain intact.

## Determination

1. I find that Mr and Mrs Jerard were unjustifiably dismissed by Mr John Hedges on or about 4 November 2004.
2. Pursuant to sections 123(b) and 128(2) of the Act, Bellavista Trust is ordered to pay to Mrs Jerard the gross sum of **\$6,240.00**.
3. Pursuant to sections 123(b) and 128(2) of the Act, Bellavista Trust is ordered to pay to Mr Jerard the gross sum of **\$6,240.00**.
4. Costs Bellavista Trust is ordered to pay to Mr and Mrs Jerard the application fee of \$70.00 paid to the Authority.

NOTE: For the benefit of both parties and interested observers, I feel bound to reiterate that pursuant to section 157 of the Employment Relations Act 2000, the Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

It is also appropriate to convey that because the Authority is an investigative body, in cases such as this one, it does not have the relative luxury that other institutions, such as the Employment Court, has, of nearly always having experienced and competent advocates or lawyers, presenting, often in substantial detail, the relative merits of the respective positions of the parties, along with accompanying legal argument and precedent. Nor is it a court of record with the ability to revisit the recording of what the parties may have said regarding contentious or confusing evidence. Indeed, the Authority has to not only listen to and observe closely, what people that come to it are presenting, but also at the same time, record, often in some detail, for future reference, the evidence that goes to the heart of what has to be determined.

In essence, in cases such as this one and most others, the Authority has to largely conduct its own investigation, analyse the evidence gleaned from that investigation, with all its confusion and uncertainty, and then determine the matter on the basis of what is most probable in the circumstances.

It may be that one or both parties may feel that the Authority has overlooked or interpreted something that should have assumed more importance. That might be so, but the investigative role of the Authority has its limitations as to time, resources and support staff, and if the parties are not entirely forthcoming in regard to providing the relevant evidence in its entirety, then the Authority, having asked the appropriate questions, can only assess what is before it, make a measured determination accordingly, and hence fulfil the role for which it has been established under the under the Act, according to the substantive merits of the case and without regard to technicalities.

It may be that some may still feel that an adversarial system provided by an institution such as the Employment Court, provides more certainty and/or better outcomes, but the legislation has provided for separate and distinct institutions with separate and distinct roles. Therefore, it is not appropriate that they be compared or confused with each other, as the Act clearly, and correctly in my view, has

provided for different methods and processes for the resolution of employment relationship problems, and each institution brings its own respective skills and experiences to the matter before it accordingly.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**