

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 93
3161463

BETWEEN ALEX KNIGHT
 Applicant

AND TERESA GREENE
 Respondent

Member of Authority: Peter Fuiava

Representatives: Robert Morgan, advocate for the Applicant
 No appearance by the Respondent

Investigation Meeting: 29 November 2022

Submissions and
information received: 1 December 2022 from the Applicant

Determination: 28 February 2023

DETERMINATION OF THE AUTHORITY

- A. Alex Knight’s resignation was the result of a breach of duty by his employer Teresa Greene. Mr Knight was constructively and unjustifiably dismissed.**
- B. Ms Greene is ordered to pay Mr Knight \$25,035.41 plus interest no later than 5 pm Friday 31 March 2023.¹**

Employment Relationship Problem

[1] This is a claim brought by Alex Knight for constructive unjustified dismissal against his former employer Teresa Greene for whom he worked as a dairy farmhand for 19 days from 21 September to 9 October 2021. At the time Alex was 17 years of age.

¹ The individual components are set out at [35].

[2] While Ms Greene participated in a case management conference with the Authority on 16 September 2022, she did not attend the investigation meeting held in Rotorua on 29 November and she has not lodged with the Authority a Statement in Reply. As a result, Alex's claim has gone unchallenged.

The Authority's investigation

[3] I have held two case management conferences (CMC) for this matter. The first was held on 22 July 2022 which Alex's representative Mr Morgan attended. However, the CMC needed to be resumed after Ms Greene notified the Authority that she was not able to attend the teleconference as the result of recovering from surgery. A second CMC was subsequently held and was attended by both parties. By agreement, I made directions for the lodging of witness statements and set the matter down for an investigation meeting.

[4] For my investigation written witness statements were lodged from Alex and his mother Dianne Knight-Devlin both of whom answered questions under oath or affirmation. On 1 December 2022 Mr Morgan lodged his written closing submissions with the Authority.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- (i) Whether Alex was unjustifiably dismissed by Ms Greene on 9 October 2021?
- (ii) In the alternative, was Alex constructively dismissed because he felt it was unsafe for him to return to work?
- (iii) What is a reasonable notice period given that Alex was not provided with an employment agreement?
- (iv) Did Alex receive his full wages including holiday pay from his employer?

- (v) If the dismissal is found not to be justified what remedies should be awarded considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act.
- (vi) If any remedies are awarded, should they be reduced (under s 124) for blameworthy conduct by Alex that contributed to his own grievance?
- (vii) Should either party contribute to the costs of representation of the other party?

Relevant facts

[7] Alex's witness statement to the Authority (signed 29 November 2022) states that he had worked for another dairy farm business as a farmhand for three months before he accepted an offer of employment from Ms Greene which included accommodation in a farmer's cottage. Alex stated in evidence that he was not fresh out of school and that Ms Greene had apparently known him and his mother since he was three years of age.

[8] As a farmhand for Ms Greene, Alex worked six days on and two days off and he primarily assisted with the milking of dairy cows twice a day. The number of cows Ms Greene had was approximately 850. However, there was no employment agreement provided and while Alex requested a contract from Ms Greene, one was not provided. On 15 September 2021, he moved into the farmer's cottage and commenced his employment on 21 September. Working alongside Alex was Ms Greene's husband William, their son, and two other workers.

[9] Nothing eventful occurred during Alex's first week of employment. He turned up to work, milked the cows, went home to eat, worked around the farm, and attended to the evening milking. However, when he returned to work for the second week, he noticed a change in Mr Greene's behaviour towards him. According to Alex, it was like a "switch had been flipped" in that Mr Greene would rage at him to the point that he would become terrified of him.

[10] It was Alex's evidence that Mr Greene swore at him and that he was physically intimidating and threatening. It was alleged that he smelt of alcohol and that he had said to Ms Greene that he would knock Alex's "fuckin head off." By the end of the

second week, Alex was afraid and was concerned for his safety fearing that Mr Greene would come by the cottage and hurt him. Alex called his mother Dianne for advice but not appreciating her son's predicament, she advised him to simply keep his head down and continue working. It appears that Ms Greene had spoken to Dianne beforehand to reassure her that William had just been having a bad week.

[11] However, when Alex returned to work on 7 October 2021, matters did not improve. His witness statement records that he was worried for his personal safety and welfare because Mr Greene had said to him that he would "punch his lights out" and that he would "fuckin deal" to him. After the morning milking on 9 October, Alex called his mother again to report what had taken place. The decision was then made for Alex to resign for his own safety.

[12] Ms Greene tried to dissuade Alex from leaving adding that she would show him how to do things the way her husband liked them to be done but matters had come to a head by then and according to Alex he had been working as instructed.

Whether Alex was unjustifiably and constructively dismissed by Ms Greene on 9 October 2021?

[13] Constructive dismissal is the resignation of an employee which is caused by an employer. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* identified the following three situations constituting constructive dismissal while making clear that this was not an exhaustive list:²

- (a) an employer gives an employee a choice of resigning or being dismissed.
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) a breach of duty by an employer leads an employee to resign.

[14] Alex has the onus of establishing that his resignation was due to his employer's actions. Once this is established, the employer's actions are then considered through the lens of the test of justification set out in s 103A of the Act. The test is whether the

² *Auckland, etc, Shop Employee, etc, IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[15] The present case falls into the third category—a breach of duty by an employer causes an employee to resign. Despite being given the opportunity to participate in these proceedings, Ms Greene has not lodged a Statement in Reply or a witness statement denying matters and as such, the claim has not been rebutted in any way.

[16] Based on the information and evidence before me, Alex has shown that he was verbally abused and physically threatened by Mr Greene. This concern was brought to Ms Greene's attention to address but as his employer she failed to do so. Ms Greene has failed in her duty to provide Alex with a safe workplace environment and it is reasonably foreseeable that if his concerns around his personal safety were not addressed that Alex would not be prepared to work under such conditions.

[17] I find that the claim of constructive and unjustified dismissal is made out on the facts.

What is a reasonable notice period given that Alex was not provided with an employment agreement?

[18] It is noted that Alex was not provided with a written employment agreement which would have set out a notice period provision for him. Given the industry in which Alex worked, it is reasonable to expect a provision providing for one weeks' notice for either party would have applied. Alex was deprived of an additional week's pay due to Mr Greene's behaviour. As a jurisdiction founded in equity and good conscience, it is appropriate that Teresa Greene be ordered to pay Alex Knight additional wages of \$850 gross by the due date of this determination.

Did Alex receive his full wages including holiday pay from his employer?

[19] As an employee Alex was entitled to holiday pay upon termination of his employment calculated at eight per cent of his gross earnings.³ I was provided with screenshots of three direct credit payments into Alex's bank account of \$850 on 30 September 2021, \$850 on 5 October 2021, and \$660.57 on 12 October 2021.

³ Holidays Act 2003, s 23.

[20] Alex's net total earnings equate to \$2,360.57. While I do not have the benefit of a wages and time record for him and while it also remains unclear how much it cost to rent the farmer's cottage, proceeding on what is known, eight percent of Alex's net earnings amounts to \$188.85. While it is acknowledged that Alex's actual holiday pay earnings would have been higher, based on what is known, Ms Greene is ordered to pay this amount in unpaid holiday pay by the due date set out in this determination.

Interest

[21] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement and such an award is appropriate where a person has been deprived of the use of money. Ms Greene is ordered to pay interest on one weeks' wages (the notice period not given for Alex) and unpaid holiday pay which cumulatively equates to \$1,038.85 (\$850 + 188.85). Interest is to be calculated using the civil debt interest calculator and the interest period is to run from 9 October 2021 until the date payment is made in full:⁴

What other remedies should be awarded?

[22] Mr Morgan seeks compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. He suggests as a starting point the amount of \$8,000. Compensation is for the effects on the employee of the grievance and is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct.

[23] Assessing how much an employee is to be compensated under s 123(1)(c)(i) of the Act is a fact-driven exercise and is to be undertaken on a principled basis. It was Alex's evidence that for a long time afterwards he lived in fear that Mr Greene would track him down and beat him up. He felt scared to drive into town in case he would be seen and harmed by him. Alex stated that he had this in his mind several months after leaving his employment and that he had lost faith in working for other employers because of what had happened to him.

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator.

[24] It was submitted by Mr Morgan that Alex's post-employment stress is similar to being in some form of post-traumatic stress disorder (PTSD). The New Zealand Mental Health Foundation defines PTSD as a psychological reaction to experiencing or witnessing a significantly traumatic or shocking event or series of events.⁵ When asked, Alex stated that he had not seen a doctor or a counsellor regarding his stress and anxiety. In the absence of medical or clinical evidence to support a finding of PTSD, this matter cannot be taken any further.

[25] However, even so, Alex's mother Dianne stated in her witness statement that he was a good and diligent worker before the abuse and that it took her a long time to get him "back on his feet." Dianne stated that Alex did eventually find employment in December 2021 and that his new employer did a lot to restore his lost confidence. While he no longer works for that employer because of an allergic reaction to something on the farm, Alex is presently working on another dairy farm which he is enjoying.

[26] In quantifying compensation, I take into account Alex's vulnerability on account of his young age at the time and while he did not work for Ms Greene for long, the threat to his person by Mr Greene was serious and repeated. It caused Alex to lose confidence in himself and in other employers and had it not been for the emotional support and encouragement from his immediate family and friends, his re-entry into the workforce would have taken that much longer. On the spectrum of harm suffered and compensation awarded, I consider an award of \$16,000 for humiliation, loss of dignity and injury to feelings to be warranted in the circumstances.

Lost wages

[27] The Act provides for the reimbursement to an employee a sum equal to the whole or any part of wages lost as a result of their grievance.⁶ The Act further states that (unless exceptions apply) this sum be the lesser of the actual amount lost or three months' ordinary time remuneration.⁷

[28] During the investigation meeting, it was discovered that Alex had been out of work for twice as long as originally thought. He had initially claimed lost income for one month but upon questioning it was discovered he had been off work from 9 October

⁵ www.mentalhealth.org.nz/conditions/condition/post-traumatic-stress-disorder.

⁶ Employment Relations Act 2000, s 123(1)(b).

⁷ Section 128(2).

to mid-December 2021. It is accepted that Alex was unable to find work much sooner than he did because of the impact of Mr Greene's verbal abuse and physical threats towards him. I therefore fix Alex's claim for lost wages at eight weeks ordinary time remuneration which equates to gross wages of \$6,800 (\$850 per week x 8).

Contribution

[29] Having awarded lost wages and compensation, the Authority is required under s 124 of the Act to consider the extent to which Alex's own actions may have contributed towards his personal grievance. The Authority finds that there are none. A reduction in remedies is not warranted.

Expenses

[30] Teresa Greene is to reimburse Alex Knight \$71.56 being the filing fee he incurred in order to lodge his Statement of Problem with the Authority.

Costs

[31] On Alex's behalf, Mr Morgan seeks costs for a half-day hearing. The daily tariff for the first day of an investigation meeting is \$4,500. Mr Morgan therefore seeks costs in the amount of \$2,250. Clause 15 Schedule 2 of the Act enables the Authority to order any party to a matter to pay to any other party such costs and expenses it considers reasonable.

[32] The investigation meeting was scheduled for a 10 am start in the Rotorua District Court but due to industrial court action at the time, the meeting was adjourned at 10.15 am and did not resume again until 10.45 am. Because of factors outside either parties' control, the investigation meeting took longer than it needed to eventually finishing at approximately 12.15 pm.

[33] Costs generally follow the event and there is no reason for that not to be the case here. I consider it appropriate to make a costs award against Ms Greene of \$1,125 as a contribution towards Alex's legal costs. The award reflects the actual amount of meeting time to investigate and hear the evidence.

Compliance order

[34] In addition to seeking costs, Mr Morgan also sought a compliance order against Ms Greene. However, as she has another four weeks to comply with the orders set out below, the request for a compliance order is premature and is declined.

Summary of Orders

[35] The Authority makes the following orders. Teresa Greene is ordered to pay the following amounts to Alex Knight no later than 5 pm Friday 31 March 2023:

- (i) \$16,000 in compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings;
- (ii) \$850 (gross) for loss of one week's lost wages as a result of there being no notice period provided;
- (iii) \$188.85 (gross) in unpaid holiday pay;
- (iv) interest on \$1,038.85 (\$850 + 188.50) from 9 October 2021 to date of payment using the civil debt interest calculator;
- (v) \$6,800 in lost remuneration under s 128 of the Act;
- (vi) reimbursement of the filing fee of \$71.56; and
- (vii) costs of \$1,125.

Peter Fuiava
Member of the Employment Relations Authority