

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 215
5325133

BETWEEN ROBERT MATHIESON
Applicant

AND THE BEECROFT GARDEN
TRUST
First Respondent

HIERONYMOUS BAX
Second Respondent

KLARA FURJAN
Third Respondent

Member of Authority: R A Monaghan

Representatives: J Beck, counsel for applicant
W Van Harselaar, counsel for respondents

Investigation meeting: 17 and 18 May 2012 at Dunedin

Additional information provided: 29 May 2012, 14 and 17 September 2012

Submissions received: 21 September 2012 from applicant
28 September 2012 from respondent

Determination: 9 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Mathieson says he has a personal grievance in that his employment was affected to his disadvantage by unjustified actions of his former employer, the Beecroft Garden Trust (the trust). He says further that that the trust dismissed him unjustifiably in June 2011, in association with by-then longstanding efforts to have him leave a property it owned and where he resided. He also says the trust owes him unpaid wages and holiday pay for work he carried out on the property.

[2] In addition Mr Mathieson seeks penalties against Hieronymous (Ron) Bax and Klara Furjan - who were trustees at the relevant times - for aiding and abetting breaches of the employment agreement. A similar claim against a third trustee was withdrawn at the investigation meeting.

[3] The breaches in question were specified in a supplement to the statement in reply as:

- arising from the unjustified dismissal;
- failures to pay wages and other monies owed during the employment relationship; and
- breach of good faith.

[4] Mr Mathieson seeks further orders that any penalties awarded be paid directly to him.

Issues

[5] The issues are:

- (i) was there an agreement under which Mr Mathieson would carry out remedial work on the trust's property at a rate of \$25 per hour;
- (ii) is Mr Mathieson owed unpaid wages and holiday pay, and if so how much;
- (iii) was Mr Mathieson's employment affected to his disadvantage by an unjustified action of his employer;
- (iv) did the employment relationship terminate in either of October 2010 or February 2011;
- (v) if not, was Mr Mathieson dismissed unjustifiably in June 2011; and
- (vi) is either or are both of Mr Bax and Ms Furjan liable to the payment of a penalty,
 - in that they aided and abetted the specified breaches; and
 - if so, were their actions such that a penalty is warranted.

Was there an agreement to carry out remedial work at a rate of \$25 per hour

1. Background

[6] The trust is registered as a charitable trust. It owns a one-acre property at the Taieri Mouth known as Beecroft Garden. A house on the property was intended to be used partly as an on-site office with the rest being for the residential use of a volunteer caretaker.

[7] The purpose of the trust - and in the light of that purpose the intended use of the property - was to provide inspiration and access to information to facilitate growth towards global self sufficiency, as well as to show the integration of landscape, sourcing food, and meeting energy and shelter needs in a sustainable way. This included growing produce and raising other plants on organic principles, keeping chickens and selling their eggs, and making Beecroft Garden available to the public to view as a showpiece for the operation of those principles. At the time of Mr Mathieson's engagement it was hoped that an apiary, previously operating on the property, could be reintroduced.

[8] Mr Mathieson has a background in carpentry, landscaping (including applying the principles of permaculture) and working as a stonemason. He had recently returned from Australia, and was living with and assisting his parents, when he became acquainted with a person who was formerly a trustee of the trust and had also lived on the property. In or about August 2009 the person advised Mr Mathieson that the caretaker was leaving and the trust was looking for a replacement. She asked Mr Mathieson if he was interested in the position and offered to introduce him to the founding trustee, Bill McConnachie.

[9] Mr Mathieson visited the property and met Mr McConnachie. Mr McConnachie advised Mr Mathieson that he could live rent-free on the property provided he promoted organic principles. Mr Mathieson noted that the buildings on the property were in disrepair and that the grounds were overgrown, and commented that considerable remedial work would be required. When he asked about remuneration Mr McConnachie told him he would receive an income from the sale of eggs or produce grown on the property and from payments by the trust. Mr

McConnachie also advised it would be necessary to speak to the other trustees before any arrangement was finalised.

[10] Mr Mathieson moved into the house at Beecroft Garden on 19 September 2009. He says there was a voluntary arrangement between the parties under which, in return for carrying out caretaking duties, he would live rent free on the property and receive the proceeds of the sale of any produce. He says there was a separate employment agreement under which, because the property was in such a run down state, he would carry out additional remedial work which would be paid for at the rate of \$25 per hour. The agreement was reached orally at a meeting with the trustees at the property on 20 September 2009 and later confirmed in writing.

[11] The trust acknowledges that the need for remedial work, and appropriate payment, was discussed and a limited arrangement was made, but denies there was an agreement of the kind Mr Mathieson asserts.

2. Was an oral employment agreement entered into on 20 September

[12] Discussions on 20 September confirmed that from the trust's point of view the position being made available was voluntary, and there would be no remuneration although Mr Mathieson could sell produce and keep the proceeds. Mr Mathieson could live on the property rent free, but would be asked to make a contribution to rates and insurance (a requirement later waived). He would be expected to keep the property tidy, teach the principles of organic gardening and permaculture, and host WOOFERS¹ who would stay in an outhouse on the property. That is not in dispute.

[13] I construe the oral evidence about the remainder of the discussions on 20 September as a conversation about what work needed to be done on the property, and how some of the problems on the property could be addressed. Such discussion flowed inevitably from the fact Mr Mathieson would be living there, and the run-down state of the property could not be ignored. In that context I accept there was a discussion about an appropriate rate of pay for Mr Mathieson if he undertook

¹ This is a reference to a scheme operating internationally, under which volunteers live and work for nothing on organic farms in order to gain awareness of ecological farming practices

additional work, which for convenience I continue to describe as remedial work, and that the amount of \$25 was agreed in principle.

[14] Beyond that, the evidence did not persuade me that on 20 September an oral agreement was reached to the effect that Mr Mathieson would carry out additional remedial work to be paid for at the rate of \$25 per hour, and without limit on the work to be done or the number of hours to be worked.

3. Was there a written agreement

[15] By letter dated 25 September 2009 the trustees said they confirmed Mr Mathieson's position as resident caretaker for a trial period of three months, after which it was hoped to make Mr Mathieson the manager. That provision reflected Mr Mathieson's expressed wish for a secure position as 'manager' – although precisely what such a position was to encompass was not clear and neither party has suggested Mr Mathieson was ever appointed as 'manager'.

[16] As caretaker Mr Mathieson was to report to Mr McConnachie on a weekly basis to discuss ideas, progress and funding, and 'request permission to tackle new projects'. Notes were to be kept for record-keeping purposes. Mr Mathieson was also to:

Apply your many skills and talents to develop Beecroft toward the goal of Bill's vision (as stated in the trust documents) & whenever possible assist Bill to visit the property.

[17] In return:

For this considerable and appreciated contribution you will have rent free accommodation, quiet country living, fabulous views, an acre of organic grounds and established orchards, just a short walk from a private beach.

[18] Notably, the letter is silent on the carrying out of remedial work in return for payment.

[19] Mr Mathieson said in evidence that, because there was a lack of clarity in the arrangement, he had a further discussion with the trustees in November 2009. He said he believed payment had been promised to him, and he wanted that in writing

together with a list of tasks to be carried out and the priorities to be accorded to them. There was reason for that view in that the parties had discussed the prospect of Mr Mathieson's carrying out extra work and the rate at which he would be paid, but even on Mr Mathieson's account there was no agreement on what work would be done or by association what hours would be worked.

[20] Ms Furjan said she acknowledged the need for work to be done to bring the dwelling to a habitable standard. However Mr Bax and Ms Furjan said the only tasks for which payment was agreed involved the installation of pink batts insulation and the replacement of the piles under the house. It was unclear whether that discussion occurred in September or November, although it does appear the work was done and paid for. Finally, it was common ground that the discussions about remedial work encompassed the restraints on the trust's ability to pay, and the need to identify in advance what work would be carried out in the interests of monitoring costs and ensuring the availability of funds for payment.

[21] Mr Mathieson acknowledged the conversation about ability to pay, but said in addition that the trustees indicated any accumulated amount owed would be met when the trust was able to. In addition Mr Mathieson did not accept that the only work agreed on for payment was the insulation and piling work. He said, and the trustees disputed, that other work including work on the front fence, the hot house, the 'top cottage', water tanks and guttering were raised as work to be done and were agreed on.

[22] The November discussion resulted in a handwritten document dated 16 November 2009 and signed by Messrs McConnachie and Mathieson and Ms Furjan. Mr Bax refused to sign because he considered the document to be too open-ended.

[23] Mr Mathieson said the document contains the terms of the employment agreement. The document recorded that he:

... has full managerial authority (with consultation and agreement by the trustees) to restore and improve the property at 231 Moturata Road Taieri Mouth. Including seeking donations and contributions to the trust.

Records are to be kept in respect of money spent, labour hours spent, agreed as \$25 per hour, for future remuneration to be repaid in money or trade as and when possible, as agreed by the trustees and Robert Mathieson.

[24] From that document it can be discerned that Mr Mathieson:

- had authority to restore and improve the property, but the authority was not ‘full’ in the sense that Mr Mathieson had sole discretion to act as he considered appropriate because consultation with and agreement by the trustees was also required;
- had authority to seek donations and contributions to the trust;
- was required to keep records of expenses incurred and the number of hours worked;
- could charge for time worked at \$25 per hour; and
- could expect that payment would be made in money or ‘trade’ (which I understand as a reference to some form of barter) when that was possible and as agreed by the parties.

[25] In a further letter to Mr Mathieson dated 23 November 2009, and co-signed by Mr McConnachie and Ms Furjan, a solicitor assisting the trust set out a version of the parties’ agreement as follows:

At our last visit on November the 16th you again expressed concerns about your security ...

When you moved to Beecroft we had the understanding that your work was voluntary, in exchange for free occupancy, produce [fruit, vegetables, eggs etc] excluding rates and insurance of \$30 per week. After considering the degraded condition of the property we agreed to waive the rates and insurance bills and even agreed to pay the power bill until the residence is functional again.

We thought we had made it clear that the trust could not afford to pay anybody (except for the compulsory electrical work which is currently being completed). Both Bill and Klara informed you that you would require a paying job, part time or otherwise, to provide you with an income.

On 16/11/09 you insisted we sign another agreement immediately to keep you on. This we did. After seeking independent advice we add the following clauses.

In relation to the \$25 per hour this has to be limited to 4 hours per day maximum or 20 hours per week. Capped at \$2000 or 80 hours work in total for the restoration of the main dwelling.

The general maintenance, gardening, mowing etc still needs to be attended to as part of the normal caretaking duties.

...

All purchases have to be cleared by the trustees first or signed for by Bill.

[26] The relevant provision purports to add a limit on the hours of work which could be charged and would be paid for. It appears to be saying that the trust would pay no more than \$2,000, or 80 hours, for remedial work on the main dwelling. The arrangement contained in the 16 November letter was sufficiently vague for the additional provision to amount to an attempt to add a detail, rather than an attempt to vary the terms of the arrangement.

[27] The trustees said in evidence that the limit was intended to relate to the pink batts and piling work - being the only work what had been authorised and agreed - and nothing else. If that was the intention the document does not convey it adequately. Its effect is to move from the more general position regarding work to be done and payment for it set out in the 16 November letter, to a more specific position that no more than \$2,000 would be paid.

[28] The trust says the letter was delivered on 5 December 2009, and produced a courier post track pack record to that effect. Mr Mathieson said he received the letter about a fortnight later, then went on holiday. He should have responded immediately to the statement about how much he could expect to be paid. The protracted and acrimonious dispute which followed could have been avoided if he had challenged the trust on how much it could or would pay for the remedial work, and made a choice about whether to continue to live on the property in his voluntary capacity in the light of the response.

[29] Whatever the date of receipt, there was a lengthy delay before Mr Mathieson replied. In a letter to the solicitor dated 11 February 2010 - which was not passed to the trustees so that unfortunately they were unaware of it - he said he there had been discussions about bringing the property back to a manageable state, and to that end work would be done in exchange for payment by the trust of rates, insurance and power. He did not agree that he ever accepted the restoration of the property to a habitable state was to be on a voluntary basis. He acknowledged awareness that the trust had limited funds, but said there was an agreement that he receive \$25 per hour to restore the dwellings to a habitable condition. Payment would be collected when

the trust was 'back on track or sold or whatever'. He noted, correctly, that there had been no mention of capping in the parties' discussions.

[30] That reply amounts to a rejection of the capping proposal, whether or not it related only to the pink batts and piling work. At the same time: it fails to acknowledge the requirement that he consult and seek authorisation for work to be done; and assumptions to the effect that Mr Mathieson could carry out such work as he considered necessary, and that there would be no limit on the accumulated payments owed because payment could be made from any surplus achieved or from the proceeds of any sale of the property, for example, were not justified by the conversations of September and November.

[31] Finally Mr Mathieson said in his letter he had been so busy doing voluntary gardening work to restore the grounds that he had not been able to seek outside employment. He asserted that until '*this*' – presumably whether payment would be capped – was resolved all 'construction' work would be on hold. Again, had he acted on that assertion and made a choice about whether to continue in his voluntary capacity, this dispute would have been avoided.

[32] I observe further that the assertion suggests no work beyond that encompassed by the caretaker's role had been or would be carried out, yet the terms of Mr Mathieson's wage claim amount to a claim that remedial work was carried out from the outset. Despite the assertion of 11 February 2010 it appears that during 2010 Mr Mathieson carried out remedial work for which he required to be paid, the trustees denied liability for payment and a dispute about payment escalated.

[33] It is at least clear from Mr Mathieson's conduct during 2010 that he did not agree to the capping provision in the letter of 23 November 2009.

4. Comments on the existence of an employment relationship

[34] Before continuing I comment on whether there was an employment relationship between the parties, and why this investigation has proceeded without that matter being raised other than to the extent Mr Mathieson says the arrangement regarding payment for remedial work constituted an employment agreement.

[35] I comment because I consider it arguable on these facts that there was no employment relationship between the parties at all. Rather there was a voluntary arrangement in the terms the parties have acknowledged, supplemented by an agreement in principle that certain work would be paid for at the rate of \$25 per hour. I consider it arguable that the resolution of the associated dispute is within the jurisdiction of the Disputes Tribunal.

[36] However the matter has come before the Employment Relations Authority after first having been aired at length in the Tenancy Tribunal. That occurred because the escalation of the dispute about payment was addressed not by a direct attempt to resolve the dispute, but by bypassing the dispute and embarking on an attempt to terminate Mr Mathieson's tenancy. Unfortunately there was already confusion about the parties' legal relationship, which was exacerbated during the attempts to navigate tenancy law. I believe the evidence I heard was affected by the positions the parties had taken in the course of the Tenancy Tribunal hearings.

[37] A cross-over between the employment and tenancy issues occurred because in the course of the tenancy hearings the existence or not of a service tenancy was an issue. In late 2010 the trust made various attempts to give Mr Mathieson notice to vacate the property under the Residential Tenancies Act 1986. Mr Mathieson did not leave, and the trust sought an order for vacant possession from the Tribunal in or about early 2011. When the matter was heard, questions arose of whether there was a service tenancy and if so whether valid notice of the termination of that tenancy had been given.

[38] A service tenancy is defined at s 2 of the Residential Tenancies Act as a tenancy granted as a term of or as an incident of a contract of service or a contract for services. The Tribunal found there was a service tenancy on the ground that there was an associated contract of service (that is, an employment relationship), both because it found the 25 September letter suggested there was an employment relationship and because the trustees '*confirmed they considered he was an employee under a service tenancy, employed on a three month trial as a caretaker/manager.*'²

² 11/0029/DN, 3 May 2011 at [8]

[39] The trustees' 'confirmation' appears to explain the approach in the present matter although I note the Tribunal later recorded that the trust had been '*originally unclear as to whether Mr Mathieson was an employee.*'³ For reasons not apparent from the record the trust believed there were inaccuracies and untrue statements in the order, and made an application for a rehearing which was declined.⁴ Accordingly the 'confirmation' stands. There would in any event be a difficulty for the trust if it said there was a service tenancy associated with a contract of service for the purposes of the Residential Tenancies Act but no employment relationship for the purposes of the Employment Relations Act 2000.

[40] The matter of the termination of the service tenancy was eventually resolved when the Tribunal made an order granting possession of the property to the trust on the ground that notice of termination of a service tenancy had been given by a letter dated 1 July 2011 (which I take as a reference to a letter dated 30 June 2011 to be discussed later in this determination).⁵

5. Conclusion on the agreement to pay Mr Mathieson for work carried out

[41] I conclude that the relevant terms of the parties' agreement were contained in the document dated 16 November 2009.

[42] There was no agreement that payment be capped in the terms set out in the 23 November letter. Nor was there an agreement that, in effect, Mr Mathieson carry out such work as he considered necessary on a full-time paid basis.

Is Mr Mathieson owed unpaid wages and holiday pay

[43] Mr Mathieson seeks the sum of \$79,000 in unpaid wages, calculated as: 90 days' work in 2009 at an average of 12 hours per day; 300 days' work in 2010 for an average of 6 hours per day; and 70 days' worth of work in 2011 for an average of 4 hours per day.

³ at [12]

⁴ 11/00291/DN, 6 July 2011

⁵ 11/00511/DN and 11/864/DN, 5 April 2012

[44] For reasons to be discussed later in this determination, I find the employment relationship ended on 5 October 2010. I respectfully disagree with the Tenancy Tribunal's view of when the employment relationship ended. Accordingly the claim for wages in respect of work done in 2011 cannot succeed in any event. What remains is the claim for 90 days' work in 2009 and for work done to 5 October 2010.

[45] Regarding work done in 2009, I am not satisfied that any remedial work was done and not paid for. As I have noted, Mr Mathieson seemed to be saying as much in his 11 February letter. The evidence he advanced in support of the number of days and hours claimed despite this took the form of numerous dated photographs of the work done, on the basis of which Mr Mathieson assessed the days and hours required to do the work. There was no contemporaneous record detailing actual hours and days worked on qualifying work, and the attempt to construct a record following my request for better information was of limited assistance. Moreover there was no evidence that the work was undertaken in consultation or with authorisation, and the photographs raised the further question of whether the work was remedial, or within the scope of the caretaker's role, or had some other purpose.

[46] Similar comments apply to the work done to October 2010.

[47] Mr Mathieson has expended a great deal of time and effort on the work he has done, and he did so expecting to be paid. However he commenced the work knowing that consultation and authorisation were required, that the trust had limited financial resources and wished to control expenditure on the work, and that as at November 2009 it did not wish to spend more than \$2,000 on remedial work. There was no term in the parties' agreement requiring him to carry out such work, or requiring the trust in return to make payment in full for it. In the face of this not only did Mr Mathieson continue to do such work as he considered necessary and press for payment prior to October 2010, he continued to do the work later in 2010 and in 2011 without authority and in the knowledge that in addition to the dispute about his entitlement to payment the trust was seeking to have him removed from the property.

[48] One of the many unfortunate features of this dispute is that, I was advised, the property is now derelict.

[49] For the above reasons I dismiss the claim for payment.

Was Mr Mathieson's employment disadvantaged by an unjustifiable action

1. Mr Mathieson's account of the grievance

[50] In letters to Mr Bax and Ms Furjan dated 5 October 2010, Mr Mathieson said he had personal grievances in respect of their 'disrespect and maltreatment of me in relation to my employment, accommodation and human rights whilst engaged in my position as manager of Beecroft Gardens over the period of the last 90 days.' The letter comprises the only evidence of the raising of any grievance other than the unjustified dismissal grievance which was raised much later.

[51] I consider the letter provides insufficient information about the grievance in question to amount to the raising of a grievance under s 114(1) of the Employment Relations Act 2000,⁶ although the point was not taken and the parties attempted mediation on the matter shortly afterwards.

[52] When I asked Mr Mathieson to identify what incidents over 'the last 90-day period' (namely July-September 2010) were being referred to, his answer indicated that an incident on 28 September was the central concern.

[53] The incident arose in respect of a meeting which was to take place on the property that day. The meeting had been arranged because of the escalation in the dispute about the work done or to be done on the property, and payment for it. Mr Bax and Ms Furjan (to whom I will refer as the trustees as Mr McConnachie was by then deceased) arranged to meet Mr Mathieson to discuss these matters.

[54] The trustees were running late for the meeting and called to advise of this. Mr Mathieson's partner received their call in the house while Mr Mathieson was outside. Mr Mathieson said in evidence that when he was advised of the call he contacted Ms Furjan, who told him a proposed new trustee he had expected to meet would not be attending. Mr Mathieson took the view he had been lied to about the new trustee's

⁶ Assuming that the grievance was a 'disadvantage grievance' under s 103(1)(b), and with reference to the decision of the Employment Court in *Creedy v Commissioner of Police* [2006] ERNZ 517.

attendance, purported to cancel the meeting and sought to have the trustees prevented from entering the property. That reaction was unreasonable.

[55] Mr Mathieson was too late to prevent the trustees from entering the property, but matters were made worse in that, when the trustees arrived, they had a dispute with Mr Mathieson's partner about whether they were entitled to be in the particular part of the building they entered, or whether that part of the building was private and not accessible to them. The trustees recognised the area as one usually set aside as the on-site office and not regarded as private, while Mr Mathieson and his partner had converted it to part of their living accommodation. Mr Mathieson's partner became upset, and sought assistance from Mr Mathieson. Mr Mathieson became angry and required the trustees to leave.

[56] Even more unfortunately what the trustees perceived to be both a refusal to conduct the necessary meeting, and an attempt to turn them away from what was trust property, prompted a hostile reaction in return. Mr Bax purported to give notice to Mr Mathieson to vacate the property and pronounced the relationship over, and the trustees attempted to repossess items they believed belonged to the trust. This led to the police being called, and shortly afterwards Mr Mathieson obtained trespass notices forbidding the trustees from entering the property.

[57] These circumstances amounted arguably to a dismissal, but Mr Mathieson has not raised any personal grievance of that kind. While it is open to me to reframe the grievance, a combination of the shortcomings in the 5 October letter, Mr Mathieson's claim that the employment relationship continued until his dismissal in June 2011, and the effluxion of time with reference to the requirements in s 114 regarding the raising of a grievance means I have decided not to do so.

[58] As for whether the circumstances amounted to a disadvantage grievance, in that Mr Mathieson chose to remain on the property and to regard the employment relationship as continuing it is difficult to identify what disadvantage he suffered. Further, if there was a disadvantage resulting from an unjustified action of the employer's, Mr Mathieson's contribution to the circumstances would mean he received no remedy.

2. The grievance identified in submissions

[59] The disadvantage identified in submissions for Mr Mathieson concerned what was said to be the unilateral variation of the terms of his employment by the letter dated 23 November 2009. In particular, Mr Mathieson was said to have been disadvantaged by the limits placed on his hours of work. No such grievance was raised within 90 days of 23 November 2009 as required by s 114 of the Act, no such grievance was identified either in the statement of problem or when I questioned Mr Mathieson about what he meant by his letter dated 5 October 2010, and no application has been made to raise the grievance out of time.

[60] Moreover were such an application to be made it is unlikely to be granted because:

- of the findings I have made about the parties' agreement regarding payment for work done;
- of the length of time taken to raise such a grievance;
- while exceptional circumstances might exist in that the written employment agreement did not contain the necessary explanation concerning the resolution of employment relationship problems, including information about the raising of a grievance within 90 days⁷, Mr Mathieson has had more than sufficient opportunity to obtain advice on the matter and to address it sooner than has been the case; and
- in the circumstances a finding that it is just to grant leave to raise the grievance is unlikely.

Did the employment relationship terminate in October 2010 or in February 2011

[61] Mr Mathieson relied on 30 June 2011 as the date on which his employment terminated, and has not alleged that his employment was terminated on any other date let alone by an unjustified dismissal.

[62] The trust, however, said that the employment relationship terminated either in October 2010 or February 2011.

⁷ Ref s 115(c) Employment Relations Act

1. Did the employment relationship end in October 2010

[63] As a result of the 28 September incident, by letter dated 5 October 2010 Mr Mathieson was advised that the trustees had resolved to sell the property and that he would be given 6 weeks to vacate it. The letter also advised that Mr Mathieson's role as voluntary caretaker/manager would cease on the date the property was vacated. Arguably, that advice also amounted to a notice of dismissal.

[64] Mr Mathieson did not accept he had been given proper notice to vacate the premises or to terminate his employment. He took the view that, as he did not vacate the premises, his employment did not end either. This is inconsistent with the view he has also advanced to the effect that he was engaged under a voluntary arrangement which included accommodation, and a separate employment agreement in respect of payment for remedial work, but nothing turns on the point.

[65] I do not in any event accept the analysis Mr Mathieson advanced in support of the view that his employment continued. The relevant question here is not whether proper notice of the termination of his tenancy was given - or even necessarily whether express notice of termination of employment was given - but whether in all the circumstances (which could include the giving of notice and actions taken in respect of the tenancy) the employment relationship can be said to have ended.

[66] I conclude that, not only had notice of the termination of employment been given in the 5 October letter, it was clear from the parties' recent history together with the incident of 28 September and its aftermath that nothing of the essential element of mutual trust and confidence remained between them. In all of the circumstances, even in the absence of what I consider express notice of termination of employment contained in the letter, I find that trust and confidence had been lost to the extent that the employment relationship was at an end.

2. Did the relationship end on 15 February 2011

[67] By February 2011 the trustees had taken the view that the parties' relationship was over and that Mr Mathieson remained unlawfully at Beecroft Garden. Although they had applied for orders from the Tenancy Tribunal when Mr Mathieson did not

vacate the property at the end of November, the application had not yet been heard. The relationship had also deteriorated to the point that Ms Furjan obtained a trespass order dated 14 February 2011 against Mr Mathieson. In addition she placed a public notice in a local newspaper, advising that the person residing on the property was there without authority and had no authority to act on behalf of the trust.

[68] In response, by letter dated 15 February 2011 Mr Mathieson advised that he had no intention of vacating the property, believed he had been constructively dismissed, and would pursue a claim for unjustified dismissal.

[69] The submission that Mr Mathieson did not understand the meaning of what he had written does not assist him in his denial that the terms of the letter meant that from his point of view the employment relationship was ended. The letter was very clear, and written in circumstances where the escalating dispute between the parties would make such a stance understandable. I do not accept that it is open to Mr Mathieson to resile from the statement in the letter by saying the intention was to highlight to the trustees that if they continued as they were he would take their actions into consideration when pursuing a personal grievance. The letter does not say that at all, and such meaning cannot reasonably be inferred.

[70] If a relationship had continued to that date I would therefore find that there was more than enough in the state of the relationship for Mr Mathieson to take the view that he had been constructively dismissed and to say so. I would construe the letter as a statement from him that the relationship had ended and would find that it had terminated accordingly.

[71] Again, however, no personal grievance has been raised in respect of the matter.

Was Mr Mathieson dismissed unjustifiably in June 2011

[72] Soon after the Tenancy Tribunal had made the first of its orders, and by letter dated 2 June 2011, the trust's present solicitors said Mr Mathieson's employment had ended before February and resumed attempts to secure the vacating of the property and a 'mutual parting of the ways'.

[73] A further notice to vacate the property was issued by letter dated 30 June 2011. The letter also said:

For the avoidance of any ambiguity in respect to tenancy matters the Trust confirms that your volunteer/and or employment role has been terminated. In the event that you dispute that your role has been terminated (or question your position of constructive dismissal) then the Trust further confirms in this letter that your volunteer and/or employment role is terminated.

[74] In the circumstances as I have found them to be, this was not a letter of dismissal but rather it was a letter confirming that any termination of employment had occurred several months earlier. Moreover it was written to address the ongoing attempts to remove Mr Mathieson from the property, and to address the confusion about Mr Mathieson's employment status which infused the tenancy dispute.

[75] Accordingly the letter does not affect my conclusions regarding the date of termination of employment. Further, it was abundantly clear by June 2011 that no employment relationship remained between the parties. No dismissal occurred at that time.

[76] Accordingly Mr Mathieson's personal grievance in this respect must fail.

Penalties

[77] The submissions in support of the claims for penalties against Mr Bax and Ms Furjan contained a list of 11 actions said to have breached good faith. The remaining breaches originally specified were not pursued.

[78] Section 4A of the Employment Relations Act refers to the duty of good faith set out in s 4, and provides for penalties for failure to comply with the duty if the failure was:

- deliberate, serious and sustained; or
- was intended to undermine bargaining, an employment agreement, or an employment relationship.

[79] It is open to the Authority to order the payment of penalties against individuals who have aided, incited or abetted a breach of s 4 where s 4A also applies. If it does so, it must be on the ground that the action complained of was wilful.⁸

[80] I do not accept there is any basis in fact or in the evidence for the first allegation that Ms Furjan signed the 23 November 2009 letter - said to have varied the terms of Mr Mathieson's employment from a permanent to a fixed term arrangement and reducing his hours of work - knowing the 'original employment agreement was still in force'. Most of the additional allegations similarly accused Mr Bax and Ms Furjan of taking certain actions whose validity Mr Mathieson disputes, in the knowledge that the terms of Mr Mathieson's employment were as he asserted them to be and in turn with knowledge of wrongdoing. I do not accept those allegations.

[81] One allegation was not of this kind. It was an allegation that acquaintances of the trustees were sent to the property to pose as refugees from the Christchurch earthquake and to harass Mr Mathieson. Although certain individuals were offered accommodation at Beecroft Garden because they were affected by the Christchurch earthquake, there was no reasonable foundation for the allegation in respect of their appearance on the property or their motives and I do not accept it.

[82] For these reasons I dismiss the claims for penalties.

Costs

[83] Costs are reserved, although I record that Mr Mathieson is in receipt of a grant of legal aid. If an order regarding costs is sought from the Authority the party seeking the order shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

⁸ *Credit Consultants Debt Services NX Ltd v Wilson* [2007] ERNZ 205

