

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA126/07
5049408

BETWEEN PERRY MAY
 Applicant

AND MAJAC TRUST
 Respondent

Member of Authority: James Crichton

Representatives: Brent Climo, Advocate for Applicant
 Graeme Malone, Counsel for Respondent

Investigation Meeting: 9 July 2007 at Nelson

Determination: 28 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed in Authority on 21 March 2007 the applicant (Mr May) alleged that he had been unjustifiably dismissed on 22 February 2006 when representatives of his employer, the respondent (Majac Trust) visited his accommodation on the farm property where he worked and summarily dismissed him.

[2] Majac Trust resists that proposition and contends instead that Mr May resigned his employment in a telephone discussion on 20 February 2006 with another representative of Majac Trust, Mr Michael Talley.

[3] Mr May gave evidence that he had always worked on farms during his working life and that he received an offer dated 9 September 2005 which set out the terms and conditions of his employment together with a suggested start date of 1 October 2005.

[4] There was some dispute about whether Mr May was employed as a Stock Manager or simply a Farm Hand. Nothing turns on this distinction. A perusal of the

letter of offer that I have just referred to suggests that Mr May's duties were that of a Farm Hand assisting in stock management matters as and when required.

[5] The evidence before the Authority is concerned almost exclusively with the events around the termination of the employment relationship between the parties. There was a telephone discussion between Mr May and Mr Michael Talley of Majac Trust in which Mr May says there was a discussion about operational matters to do with the farm and Mr Michael Talley says there was a resignation from Mr May.

[6] Then there is evidence about a meeting between Mr Milan Talley and Mr George Shead of Majac Trust and Mr May on 22 February at which Mr May says he was dismissed by Mr Milan Talley and Mr Milan Talley says he and Mr Shead were at the farm simply to arrange the handover of operational matters consequent upon Mr May's resignation to Mr Michael Talley on the telephone two days before.

Issues

[7] It will be convenient if the Authority considers first the evidence available in relation to the telephone discussion between Mr Michael Talley and Mr May on 20 February 2006, second the evidence of 22 February meeting between Milan Talley, George Shead and Mr May on the farm property, and thirdly, evidence of the subsequent behaviour of the principal protagonists after those events.

The telephone call

[8] Mr Michael Talley gave evidence that on 20 February 2006 he received a call from Mr May during which Mr May resigned his employment. Mr Michael Talley's evidence was that Mr May had rung him for the specific purpose of trying to exclude Mr Shead from the farm property that Mr May was working on. Mr Michael Talley's evidence was that Mr May had said words to the effect that he was not going to take instructions from Mr Shead and he did not want Mr Shead on the farm he worked on again. Mr Michael Talley said that he was not going to agree to those demands as Mr Shead had worked for him for *quite a long number of years and was the Farm Manager responsible for all of Majac's farms*. Mr Michael Talley then recalls that Mr May said words to the effect *well then I quit* and the call was terminated by Mr May.

[9] It seems that Mr Michael Talley had not long been out of hospital after a serious operation when the call on 20 February took place. I am satisfied on the balance of probabilities that Mr May initiated the call and not Mr Michael Talley. I agree with the submission of counsel for Majac Trust on this point when he observes that it seems unlikely that a man not long out of hospital after a serious operation would initiate the call. None of the evidence from either of the principal protagonists in the call suggests that Mr Michael Talley had any particularly pressing matters to raise with Mr May.

[10] Mr May, in giving oral evidence about the conversation (he makes no reference to the call at all in his written brief of evidence) acknowledged that the call traversed operational matters concerning the farm and said there was a difference between him and Mr Michael Talley about rams. Mr May said that Mr Michael Talley *wouldn't agree with anything I had to say* but claims there was an agreement for the two men to meet.

[11] Mr May also denied that he had any beef with Mr George Shead and said that he had no reason to seek to exclude Mr Shead from the farm. Nor would he admit to having said anything to Mr Michael Talley that might have encouraged the latter to believe that he had tendered his resignation.

[12] Mr Milan Talley was with his father when he took the call from Mr May. Mr Milan Talley's evidence was that he could *tell by Dad's reaction that it wasn't a pleasant conversation. I saw he was affected by it. He told me that Perry (Mr May) had quit and hung up. Dad wasn't doing much of the talking and the call ended abruptly.*

[13] I am satisfied on the balance of probabilities that this call on 20 February was initiated by Mr May, that it may well have been for what one might loosely describe as "operational" purposes but that in the course of that call Mr May became angry or agitated about not getting his own way in relation to some of the matters that were being discussed with Mr Michael Talley and that he quit as a consequence.

[14] It seems to me inconceivable that Mr Michael Talley, having just risen from his sick bed, would trouble to ring one of his 5000 employees in relation to the operation of a remote farm. I think the evidence is persuasive that Mr May initiated the call.

[15] I accept Mr Milan Talley's evidence that the nature of the discussion was a bit one sided with Mr Michael Talley not doing much of the talking. That suggests a heated or somewhat excitable persona on the other end of the phone and given Mr May's evidence that he did in fact participate in the call, I am satisfied that it was Mr May who was excited by the call. I accept that Mr May may not have set out to resign his position and it seems unlikely that he would have rung Mr Michael Talley with the dominant purpose of resignation. However, I am satisfied on the balance of probabilities that that is what he did after the exchange with Mr Michael Talley. I suspect that Mr May found that he was not going to get his own way in relation to the operation of the farm and that he got fed up and quit.

[16] The question is whether Majac Trust, having received a resignation in those circumstances did enough to allow for some reflection of both parties and perhaps allow Mr May to reconsider his position.

The 22 February meeting

[17] As I have already noted, on 22 February Mr Milan Talley and Mr George Shead attended the farm property and met with Mr May. Mr Milan Talley's evidence was that he was doing that at his father's request (his father still being unwell) because his father had received Mr May's resignation over the telephone on 20 February. It is clear from the evidence that Mr Shead did not know the purpose of the visit to the farm until he and Mr Milan Talley were travelling to the farm in the vehicle together, when Mr Milan Talley told Mr Shead what was happening.

[18] Mr May contends that Mr Milan Talley dismissed him on 22 February at the meeting at the farm and Mrs May gave evidence supportive of that view.

[19] Mr Milan Talley was unshaken in his testimony that he was simply there at the farm with Mr Shead to deal with the consequences of Mr May's earlier resignation. Both Mr Milan Talley and Mr Shead gave evidence that they thought Mr May realised he had gone too far in the discussion with Mr Michael Talley two days before. For instance, Mr Milan Talley told me in answer to one of my questions, that Mr May *was talking to us as if he was very aware of the disagreement with my father but he was back peddling on it a bit.*

[20] Mr Shead, who said that he said nothing during the meeting, recalls Mr May saying something to the effect *I knew it was coming when Milan started talking about*

the telephone call with Michael. Mr Shead continued that he *thought Perry felt he may have overstepped the mark a little* in his discussion on the telephone with Mr Michael Talley.

[21] I am satisfied on the evidence that I heard that Mr Milan Talley did not dismiss Mr May at the meeting on 22 February. What he did, I believe, was to respond to his father's request that he go up to the farm and deal with the consequences of the resignation already received. I think the evidence strongly suggests that Mr May realised he had, to use Mr Shead's words, *overstepped the mark a little* in his conversation with Mr Michael Talley and the discussion with Mr Milan Talley was simply an inevitable consequence of his earlier behaviour.

[22] The real question though is whether the process could have been aborted at that late stage, whether Mr May might have been able to, as it were, withdraw his intention to quit and whether also Majac Trust had done all they reasonably ought to have done in giving Mr May an opportunity to reconsider his position.

[23] I am satisfied on the evidence I heard that Mr May accepted that he ought to leave at the meeting on 22 February. It was not a situation where Mr May resisted the inevitable consequences of his behaviour and Mr Milan Talley records Mr May saying words to the effect *its probably best I go then* to which Mr Milan Talley recalls replying that he thought it would be best for both.

[24] But Mr Milan Talley also made the telling observation that it was perfectly possible for Mr May to contact his father, Mr Michael Talley, and withdraw his resignation and that he could have done that at any time. Even on Mr May's own evidence, there was a clear acknowledgement that there was no reason for Mr Michael Talley to dismiss him and the evidence before the Authority was very clear that recruiting farm labour, particularly to remote locations (which this was) is very difficult indeed. When Mr May was asked why he did not ring Mr Michael Talley again to discuss matters, he said that he did not do that because Mr Michael Talley had been ill. That seems a rather lame answer given that he had been perfectly happy to discuss matters with Mr Michael Talley two days before.

[25] In all the circumstances, I am not persuaded that Majac Trust behaved improperly in accepting Mr May's resignation, which I am satisfied he gave at the telephone discussion with Mr Michael Talley on 20 February. Majac Trust went to

the farm two days later and I am satisfied on the evidence I heard that Mr May knew that he had overstepped the mark in the telephone discussion two days previously. I do not accept that Mr May was dismissed by Majac Trust; I accept there was no basis for dismissal and no possible reason for Majac Trust to dismiss Mr May.

[26] Indeed the only reason for the employment relationship coming to an end when it did was because Mr May sought to bring it to an end himself and I am satisfied that he did that of his own volition without any encouragement or assistance from Majac Trust who had nothing whatever to gain by the loss of Mr May's services.

Conduct subsequently

[27] Mr Shead is alleged to have confirmed after the termination of employment that Mr May had been dismissed and that he, Mr Shead, was *embarrassed about that*. The first point to note about this allegation is that Mr Shead denies it and I thought Mr Shead a truthful and straightforward witness. What Mr Shead did say, he said, was that he was surprised that Mr May had left his employment so soon after starting and that may well have been interpreted by some as effectively being a reference to a dismissal, when it was not.

[28] On the balance of probabilities I prefer Mr Shead's evidence to the evidence of others on this point but, that aside, the probative value of the evidence of witnesses' behaviour relative to a meeting on 22 February where I find as a fact that the termination happened two days before, is really neither here nor there.

[29] I put in the same category the evidence of Mrs May who overheard the conversation on 22 February, although she was not in the room and not participating in the conversation. She may well have been distracted by what she was doing around the house, but she was very clear in her evidence that she heard Mr Milan Talley say that Perry had to go and that *we* (presumably the family) had to go. That of course is absolutely consistent with Mr Milan Talley's own evidence that he was talking about the consequences of Mr May's earlier resignation. However, what Mrs May says next is not consistent with Mr Milan Talley's evidence because she goes on to say that *Milan Talley terminated the employment himself – I am absolutely certain of that*.

[30] Again, Mrs May's understanding of that discussion on 22 February has limited effect because I have already found that Mr May terminated the employment himself two days earlier. Furthermore, I think Mr May might well have been embarrassed by

his outburst on 20 February and on the face of the evidence before the Authority, it seems that he did not tell his wife about that earlier discussion. If that implication is correct, it is consistent with the fact that Mr May does not refer to the 20 February telephone discussion at all in his written brief of evidence.

[31] All of that also would confirm why it was that Mr May always referred to the termination of his employment as a dismissal rather than as a consequence of a resignation. It may be, as counsel for Majac Trust suggests, that that is simply to enable Mr May to obtain unemployment benefit, but equally it may be that Mr May chose to, as it were, package the termination as a dismissal rather than a resignation because he perceived that he had *overstepped the mark* in his conversation with Mr Michael Talley.

Determination

[32] I am not persuaded that Mr May has established a personal grievance on the grounds of an unjustifiable constructive dismissal and accordingly the Authority cannot help Mr May further.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority

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