**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 163/10
5291183

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| | BETWEEN | WAYNE PATRICK MAYNARD<br>Applicant |
| | AND | SMILEY FARMS LIMITED<br>Respondent |

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| Member of Authority: | R A Monaghan |
| Representatives: | W Maynard in person for applicant<br>Margaret Penny, advocate for respondent |
| Investigation Meeting: | 23 March 2010 |
| Determination: | 9 April 2010 |

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**DETERMINATION OF THE AUTHORITY (No 2)**

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**Employment relationship problem**

[1] This determination addresses Wayne Maynard's personal grievance on the ground that his former employer, Smiley Farms Limited (SFL), constructively dismissed him.

[2] SFL denies there was a dismissal.

**Background**

[3] SFL originally employed Mr Maynard jointly with his wife Kristy Maynard as farm manager and farm assistant respectively, commencing on 1 June 2008.

[4] Mrs Maynard ended her part in the employment relationship on 21 August 2009 following a dispute with Irene Kelly, who together with her husband Colin Kelly is a director and shareholder of SFL. Mrs Maynard's last day of employment was 18

September 2009. Shortly afterwards a new dispute arose over whether the holiday pay Mrs Maynard received on the termination of her employment was correctly calculated. The matter was referred to a Labour Inspector at the time, and has since been the subject of a consent order of the Authority.[1]

[5] Meanwhile, although SFL could have regarded the employment relationship with Mr Maynard as being at an end on the ground that he and his wife were employed jointly, both SFL and Mr Maynard wished Mr Maynard to continue in employment. Subsequently, however, several matters caused difficulties between Mr Maynard and SFL, so that by email message dated 31 October 2009 he resigned in the following terms:

> "… For the last 2 months it has been very hard working here since all the stuff going on with you guys and Kristy and a few other things that have been said and done so I have decided to give four weeks notice from tomorrow. It is probably not what you want to hear but I feel it is the right choice for myself and my family."

[6] During the investigation meeting Mr Maynard identified the particular matters on which he based his decision as:

a. tension in his relationship with Mr and Mrs Kelly, with particular reference to the way Mrs Kelly spoke to him;
b. changes made to his employment agreement because of ongoing disputes between SFL and his wife;
c. changes made to his employment agreement without his consent; and
d. arrangements for the use of a 4- wheeled motorbike on the farm being ended.

[7] Tension did develop in Mr Maynard's relationship with Mr and Mrs Kelly. To a significant extent the tension was because of SFL's disputes with Mrs Maynard. It is most unfortunate that this occurred, since the relationship between Mr Maynard and the Kellys was otherwise good and Mr Maynard was acknowledged to be a good employee. Unfortunately, too, in the circumstances it was probably inevitable that Mr Maynard would become embroiled in difficulties which were not of his making.

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[1] **Maynard v Smiley Farms Limited,** 25 March 2010, AA 140/10.

[8] Having considered the material filed as evidence of the parties' interactions after Mrs Maynard's employment terminated, I find it again unfortunate – though human – that Mrs Kelly in particular was unable to separate Mr Maynard's role as an employee from his role as Mrs Maynard's husband. Their dispute with Mrs Maynard affected the way Mr and Mrs Kelly communicated with Mr Maynard. However I do not accept that such difficulties in communication as occurred amounted to breaches of duty on the part of Mr or Mrs Kelly. For the most part, aside from certain interpersonal tensions and disputes of the kind discussed in this determination, work proceeded relatively normally.

[9] Further, I do not accept that these difficulties were the reason why changes were made to Mr Maynard's employment agreement. Because Mr and Mrs Maynard were originally employed jointly, many of their entitlements were also jointly held and amounted to more than a sole employee would have received. The agreement with Mr Maynard alone was a new and separate agreement which SFL was entitled to negotiate in its entirety, extending in principle to the ability to offer reduced entitlements. Not only that, it was necessary in any event to apportion entitlements once available to a team of two people on the basis that only one person was now being employed.

[10] Most of the changes which Mr Maynard said were of concern were matters raised as part of the ordinary course of the negotiations. They did not amount to unilateral alterations to his employment agreement or to unfounded reductions in his terms and conditions of employment. They were not imposed on him because of Mr and Mrs Kelly's dispute with his wife.

[11] There were, nevertheless, some specific matters which require further comment.

[12] The first concerned accommodation arrangements. Accommodation was provided to Mr and Mrs Maynard as a couple under the joint employment agreement, and it was reasonable for SFL to seek an appropriate amendment to Mr Maynard's employment agreement when those circumstances changed. A separate issue arose between SFL and Mrs Maynard over whether and how much rent she should pay in

the light of the termination of her employment. That matter was outside the employment relationship between SFL and Mr Maynard.

[13] Another arose out of an emailed message to Mr Maynard dated 8 October 2009 in which he was advised that his nett pay was to be reduced by, in effect, some $12 per week.

[14] This was not an attempt to reduce his salary unilaterally. The adjustment was made because of an adjustment to the way in which his hours of work and annual salary were combined to calculate a notional hourly rate of pay. Indeed there was an underlying issue related to an hours of work provision in the employment agreement which was also at the heart of Mrs Maynard's dispute about the calculation of her holiday pay.

[15] The relevant clause was defective. It gave rise to several recalculations of the hourly rate of pay, and holiday pay, owed both to Mr and Mrs Maynard. The principal defect was that on its face the clause comprised two apparently unrelated components, yielding a different result depending on the component followed. The components had a purpose, but the clause failed to record at all the purpose or the link between them.

[16] Regarding the 4-wheeled motorbike, the joint employment agreement provided for motorbike allowances on the basis that Mr Maynard provided his own 2-wheeler while Mrs Maynard provided her own 4-wheeler for use on the farm. The allowances were vehicle specific. After her employment terminated Mrs Maynard used the 4-wheeler for her own purposes on occasion.

[17] The parties discussed the motorbikes during a meeting held on 13 October 2009 to discuss the new employment agreement. At the time Mr Maynard was using both motorbikes. Mr and Mrs Kelly considered agreeing to the continuation of this, but with the allowance for each motorbike reduced as Mr Maynard could not use both at once. At the time, the matter was not finalised.

[18] In an email message dated 21 October Mr and Mrs Kelly referred to the fact that they had seen Mrs Maynard using the 4-wheeler in the course of her new

employment, and said they did not wish to be responsible for it. In particular, they had been meeting maintenance costs and did not wish this to continue if the motorbike was being used elsewhere. In a further message dated 23 October - which formed part of a longer message discussing terms of the new employment agreement still being negotiated - SFL informed Mr Maynard that it no longer required the vehicle on the farm. It would continue the arrangement for the use of the 2-wheeler. Mrs Kelly said she thought her action would reduce the arguments.

[19] Mr Maynard believed a 4-wheeler was needed on the farm. There was disagreement in the evidence about whether a 2-wheeler sufficed, and in any event it was said that another 4-wheeler could have been made available. The matter should have been capable of resolution at the time, but that proved not to be possible. I do not accept that anything in this matter amounted to a breach of SFL's obligations to Mr Maynard.

[20] Continuing difficulties of this kind led to Mr Maynard's decision to resign.

**Whether there was a constructive dismissal**

[21] A termination of employment which on its face is effected at the initiative of an employee can amount to a constructive dismissal if it falls within one or more of the following categories:

> (a) the employee is told to resign or be dismissed; or
> (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
> (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.[2]

[22] SFL did not act with the intention of coercing Mr Maynard to resign. Mr and Mrs Kelly wanted him to stay.

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[2] See: **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372 and **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR 415, [1994] 1 ERNZ 168.

[23] On the facts as I have set them out, I find no breach of duty in terms of (c) above. There were certainly difficulties and disagreements, and they caused Mr Maynard to resign, but the circumstances did not meet the test contained in (c).

[24] For these reasons I find that Mr Maynard was not dismissed.

**Costs**

[25] Costs are reserved.

[26] If either party seeks an order for costs from the Authority there shall be 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement setting out what is sought and why. The other party shall have a further 14 days in which to file a written reply in the Authority and copy to the other party.

R A Monaghan
Member of the Employment Relations Authority