

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Barry James McIntosh (Applicant)
AND Southern Lakes Holdings Limited (Respondent)
REPRESENTATIVES Justine Baird, Counsel for Applicant
Jack Enright, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 7 October 2005
DATE OF DETERMINATION 4 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Southern Lakes Holdings Limited owns and operates a farm in Central Otago called Dunstan Burn Station. Jack Enright is the director and a shareholder in the company and is actively involved in the management of Dunstan Burn Station. The company employed Barry McIntosh full time from about January 2004 until the termination of his employment on or about 22 March 2005.

[2] Mr McIntosh says that he was unjustifiably dismissed by Mr Enright on 22 March 2005, that Mr Enright confirmed on 24 March 2005 the fact of dismissal and that a letter (wrongly dated 16 March 2005) also confirmed the termination of the employment. Mr Enright says that he did not fire Mr McIntosh who left the employment of his own accord.

[3] The starting point is events concerning another employee (Reagan). Mr McIntosh says that he spoke up for Reagan who Mr Enright had just dismissed and was then dismissed himself. To resolve Mr McIntosh's grievance I should briefly explain what happened to Reagan, then consider the apparently conflicting evidence available in respect of Mr McIntosh's claimed dismissal and subsequent events.

[4] I also need to resolve Mr McIntosh's claim for arrears of wages and arrears of holiday pay.

Reagan's employment terminated

[5] As with Mr McIntosh, Reagan had staff accommodation on the station. Reagan apparently had his girlfriend to stay in the accommodation at some point over the long weekend that includes Otago Anniversary Day (21 March 2005). Whatever it was that happened between Mr Enright and Reagan, everyone agrees that it occurred at about 7.30 am on Tuesday, 22 March 2005. It is also common ground that Mr Enright took Reagan outside the workshop with the door closed while Mr McIntosh, Carl and Vaughan (two other employees) remained inside the workshop.

[6] Mr McIntosh says that he heard Mr Enright dismiss Reagan. Mr Enright is adamant that Mr McIntosh would not have been able to hear through the workshop walls or door. It is not necessary to resolve the point. Mr Enright came back into the workshop without Reagan and according to Carl said that they were now a staff member short, indicating that Reagan's employment had terminated. Whether right or wrong, Mr McIntosh thought that Mr Enright had dismissed Reagan for having his girlfriend stay with him and decided to take up that cause in Reagan's absence.

Mr McIntosh's employment terminated

[7] Mr Enright's evidence is that Mr McIntosh had given him a hard time about some issues previously but he had not taken that up with Mr McIntosh. On this occasion, when Mr McIntosh started questioning him about Reagan, Mr Enright told him that it was nothing to do with him. Mr Enright also says that *during the course of this conversation McIntyre was asked if he wished to terminate with this company and he did not reply to this*. Carl's evidence on the point is that *Jack [Enright] said – if you're not happy and want to leave, its up to you*. Mr McIntosh's evidence is that Mr Enright said that if he did not like it (referring to Reagan's situation) he was sacked as well and to get off the property.

[8] There is no dispute that Mr McIntosh then left the workshop and drove the short distance back to his accommodation arriving there by about 7.45 am. It is also common ground that Mr McIntosh did not report for work the next day (Wednesday). Either on the Wednesday or the Thursday, Carl went to see Mr McIntosh. There is no significant dispute over what was said. Mr McIntosh said he had been fired, but Carl said he had not heard Mr Enright dismiss him. They also discussed what had happened to another former employee (Graeme) who apparently turned up for work even though he had been told by Mr Enright to get off the property. Graeme's employment had continued as a result. Given this information, Mr McIntosh decided to go and see Mr Enright to clarify the situation and sort things out.

[9] In evidence Mr Enright is adamant that he did not talk to Mr McIntosh until about two and a quarter to two and a half months after the termination. That must be about June at the earliest although, in some of his evidence, Mr Enright suggested this took place in July. Mr Enright must be wrong about the timing. There is a letter dated 27 April 2005 from Mr Enright to Mr McIntosh. There is no reason to doubt the accuracy of the date on that letter and it refers to an earlier letter from Mr Enright. The earlier letter is dated 16 March 2005 but that must be a mistake because it refers to events which it is agreed occurred on 22 March 2005. It reads *On a visit to my residence recently you stated that you would leave the accommodation on this Station when it suited you*. The visit referred to must have occurred after 22 March and before 27 April 2005. Mr McIntosh's evidence is that he and his partner (Jan Campbell) went to see Mr Enright on the evening of 24 March 2005 as a result of the earlier discussion with Carl. I accept the evidence of Mr McIntosh and Ms Campbell about the date and timing of this visit.

[10] I accept Ms Campbell's evidence about what was said about this visit. Mr McIntosh asked Mr Enright what was the story. Mr Enright said *I told you, you're gone*. Mr McIntosh asked why and Mr Enright said he did not want to discuss the matter. Mr McIntosh asked for his final pay and Mr Enright said it was in the lawyer's hands. He also said that he had advertised Mr McIntosh's position. Ms Campbell then criticised Mr Enright for treating them that way. The exchange ended by Mr Enright saying again that he did not want to discuss it.

[11] In evidence, Mr Enright said that he did not recall much of this discussion. He accepted having said that he did not want to discuss the matter but indicated that he meant that he did not want to discuss it with Ms Campbell. However, I accept the evidence of Mr McIntosh and

Ms Campbell that Mr Enright declined to discuss the matter of the termination of Mr McIntosh's employment with him.

[12] Even if I accepted Mr Enright's evidence that he did not intend to dismiss Mr McIntosh on 22 March, his actions on 24 March of refusing to discuss the matter, confirming to Mr McIntosh that he had told him he was gone and telling him that his position was to be advertised all amount to a dismissal.

Justification

[13] Mr Enright did not directly argue that there was any justification for a dismissal given his view that he never dismissed Mr McIntosh. However, he was critical of Mr McIntosh for giving him a hard time about Reagan and on earlier occasions. No fair and reasonable employer would have summarily dismissed Mr McIntosh in the circumstances that existed at the time. Accordingly I find that Mr McIntosh has a personal grievance.

Remedies

[14] There is a claim for lost remuneration. Mr McIntosh gave evidence that he commenced new employment on 7 July 2005. However his claim and evidence is to cover his lost remuneration for the three months immediately following the termination of the employment. His annual salary was \$42,500. That results in a loss of \$10,625 (gross) for the three months. From that must be deducted the earnings received by Mr McIntosh from some fencing and some other casual work. There is information about the net amount received by Mr McIntosh from this work (\$1,340.24) but the amount to be deducted from the gross loss for the three months calculated above is the gross that was payable to Mr McIntosh for this work. He should obtain details of that gross pay and advise Mr Enright of that sum without delay. Leave is reserved for either party to come back to the Authority if there is any difficulty with this calculation.

[15] Mr McIntosh gave evidence about the difficulty of having to explain to prospective employers about why this employment had ended. He said that he felt at his lowest ever and that there were difficulties in his relationship with his partner as a result. He had money worries and he experienced rejection when applying for alternative positions. Ms Campbell confirmed this evidence and said it was really horrible most of the time until Mr McIntosh obtained his new employment. Ms Campbell also spoke of the stress and sadness endured by Mr McIntosh. There is no reason to doubt any of this evidence. To remedy the effects of the dismissal, I order Southern Lakes Holdings Limited to pay to Mr McIntosh compensation of \$8,000.

[16] Mr Enright did not argue that Mr McIntosh contributed in a blameworthy way to the circumstances giving rise to the dismissal. In any event, I find that Mr McIntosh did not. In the circumstances of the employment, it was hardly surprising that one employee might stick up for another who he rightly or wrongly thought had suffered some injustice. All Mr Enright needed to do was to decline to engage in any debate with Mr McIntosh about the point. Mr Enright bears full responsibility for the dismissal which occurred on 24 March 2005.

Arrears of wages and holiday pay

[17] The salary was paid twice monthly in arrears on the 16th of the month and the 1st of the following month. Accordingly, Mr McIntosh was fully paid for February 2005 but was only partly paid for March. His employment lasted 21 of the 31 days in March so he should have been paid \$2,399.19 for the time worked. However he was only paid \$1,778.82 leaving a difference of \$620.37 which Southern Lakes Holdings Limited is to pay to Mr McIntosh.

[18] Mr McIntosh's exact start date is unclear. Mr Enright was asked to provide time and wage records but did not provide those to Mr McIntosh and has only provided partial information to the Authority. However I do have Mr McIntosh's bank statement which shows he deposited \$1,032.80 into his account on 19 January 2004 which he says was a wages cheque. Automatic payments were received by him thereafter. Because the first cheque payment is a little bit less than the regular net half monthly payment I infer that Mr McIntosh started work early in January 2004.

[19] Mr McIntosh told me that he took no annual leave during his employment. In the absence of any contrary indication based on proper records, I accept this evidence. Mr McIntosh therefore became entitled to three weeks annual leave in early January 2005 and payment at his then rate of salary for those three weeks upon the termination of his employment. That is a total of \$2,451.92 which I order Southern Lakes Holdings Limited to pay to Mr McIntosh. Mr McIntosh is also entitled to proportionate holiday pay at 6 per cent of his gross earnings after early January 2005. Six regular salary payments were made and the arrears of wages determined above also needs to be included, a total of \$11,243.73. Holiday pay on that sum amounts to \$674.62 which I order Southern Lakes Holdings Limited to pay to Mr McIntosh.

Summary

[20] Mr McIntosh was unjustifiably dismissed so he has a personal grievance against Southern Lakes Holdings Limited.

[21] To remedy the grievance I order Southern Lakes Holdings Limited to pay compensation for lost wages for three months commencing on 22 March 2005. Leave is reserved if there is any difficulty with calculating the precise figure.

[22] I also order Southern Lakes Holdings Limited to pay compensation to Mr McIntosh of \$8,000.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[23] Southern Lakes Holdings Limited is ordered to pay to Mr McIntosh \$620.37 as arrears of wages. Southern Lakes Holdings Limited is also ordered to pay to Mr McIntosh \$3,126.54 for holiday pay due at the termination of the employment.

[24] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority