

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Ross & Sherilee Miller (Applicants)
AND Brian & Susan Bradley (Respondents)
REPRESENTATIVES Crichton Parker for Applicant
Grant Shand for Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING New Plymouth, 23 November 2004
**CLOSING COMMENTS IN
WRITING FROM THE
PARTIES'
REPRESENTATIVES** 7 & 22 December 2004 and 27 January 2005
DATE OF DETERMINATION 4 February 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Ross and Sherilee Miller, the applicants, have requested an investigation be conducted into the termination of their employment by the respondents on 4 December 2003.
2. Brian and Susan Bradley, the respondents, have refused to pay remedies being sought by the applicants for a personal grievance. They deny that wage arrears and a bonus (\$6,000) claimed by the Millers are owing. The Bradleys say the dismissals were justified because of redundancy. They say they were fair.
3. The parties attended mediation services provided by the Department of Labour but the problem remained unresolved. The Authority has been required to conduct an investigation and determine the facts.

The Facts

4. Sherilee Miller was employed by Brian and Susan Bradley as a part-time farm manager on their Ball Road, Patea farm on 1 June 2002. Ross Miller was employed by the Bradleys as a

full-time farm manager on the same farm. The Millers lived in a house provided at the Ball Road property. The Bradleys lived in another property down the road close by.

5. Mr. and Mrs Miller each had individual employment agreements with the respondent (the standard Federated Farmers document commonly used in the industry). The applicant's employment was indefinite and they had no intentions of leaving at least before the end of the dairying season June 2004.
6. The applicants' duties, functions and responsibilities were detailed in writing in their agreements. In Mrs Miller's circumstances her hours of work were specified as follows:

*“Spring/56 hours for 8 weeks
14/07/03 to 07/09/03
Lactation/mating – 31.5 hours for 10 weeks
08/09/03 to 16/11/03
Average hours = 42.38 per week.”*

7. Mrs Miller's employment agreement also made provision for her to be available to work reasonable additional hours:

“Herd testing, attend meetings with farm adviser and any other duties not exceeding a total of 146.25 hours....”

8. Mrs Miller's wages were \$384.61 a fortnight and Mr. Miller was paid \$1,658.46 a fortnight (from the wage records). Arrangements existed for the payment of a production bonus.
9. Mr. Bradley gave evidence that he was supportive and generous and hands on in his work. He gave examples that included the following. At the beginning of their employment, Mrs Miller had a baby and arrangements were made by Mr. Bradley for the farm managers on two of his other properties to share the task of *retrieving* cows and calves. Mrs Miller did not have to do this task. Mr. Bradley says he did the milking for a week after the birth of the child to help the Millers.
10. Mr. Bradley says he had to assist the Millers when they started work. He wanted to be sure they knew what they were doing and that the farm was farmed the way he wanted it. He says he also had all the cows milked from the property across the road until 27 July 2004. Mr. Bradley says that this is evidence of the need for him to be assured that the Millers understood what they were required to do in meeting his standards.

11. Mr. Bradley says that he also covered for Mrs Miller on Monday nights so that she could take her daughter to dancing classes. He says he did the milking himself or paid someone else to do it. Mr. Bradley says that he was a generous employer.
12. In May 2003 the parties had an issue about the payment of holidays. The Millers were paid an extra week by Mr. Bradley to put the matter behind them. Mr. Bradley raised this matter in support of his claim that Mrs Miller, in particular could be argumentative.
13. The Bradleys introduced timesheets from 1 June 2003. Mr. Bradley says the reason was because he wanted to get an understanding of how staff were managing their time and to have a record of hours worked.
14. There were issues that Mr. Bradley had about the management of the farm with the Millers. To resolve these issues the parties had a meeting on 15 August 2003. The issues were not initially resolved between the parties. Mr. Bradley brought in a farm advisor, Michael Joyce, to assist. Mr. Joyce met the Millers and Mr. Bradley separately and then decided to assist to resolve the issues at a meeting held on 21 August 2003.
15. The issues involved:
 - Mr. Bradley's instructions to the Millers.
 - The Millers taking responsibility for problems caused by them not following instructions.
 - Mr. Bradley's daily visits to the farm.
 - The Millers raised a lot of issues and complaints, including allegations that Mr. Bradley verbally abused them.
 - How to deal with complaints in a timely way.
16. There was a *Record of Principle* produced as a result of Mr. Joyce's involvement at the meeting on 21 August 2003. After this things apparently improved and there were no issues that came up during September 2003. However, an incident happened involving the Millers' dog getting run over, the payment of the vet's bill and a Dispute Tribunal hearing in regard to the payment that became an issue between the Millers and Mr. Bradley and his brother, Craig Bradley, in October 2003.
17. The Millers claim that in October they were abused by Mr. Bradley and there was a confrontation involving Brian Bradley, Ross Miller and Brian Hayman (the manager of the

farm over the road). Mr. Hayman says while they were out on the farm Mr. Bradley asked him to leave him and Mr. Miller alone to talk and he overheard an argument between Messrs Bradley and Miller that involved Mr. Bradley abusing Mr. Miller. Mr. Bradley denied being abusive toward Mr. Miller. He also denied saying to Mr. Miller that he would fix the insurance arrangements but that he could make enquires to see if his public liability insurance would cover the accident involving the dog.

18. Mr. Bradley says that in September 2003, he and Mrs Bradley evaluated the farm management. They say they decided that they wanted to run the farm themselves in a way that included their children having the benefit of a farm experience. Mr. Bradley accepted in his evidence that his decision to make the Millers redundant happened in October 2003. In his written evidence he says this was the only option available.
19. There was a meeting on 6 November 2003 when the Bradleys say they discussed their decision with the Millers. At this meeting the Bradleys produced a prepared summary which read as follows:

“As per our discussion on the redundancy of both your positions

The positions Farm Managers at our Ball Road property are no longer available.

The reason for the positions becoming redundant is that we, Brian and Susan are going to manage the Ball Road property.

In accordance with our Employment Contract four weeks notice will be given from this date.

We appreciate that you will need time to think about things so we would like to schedule a formal meeting for early next week to discuss terms of the redundancy and entitlements.” (Summary 6 November 2003 produced).

20. In their evidence the Bradleys told the Authority that they were prepared to listen to any suggestions from the Millers about notice, the opportunity to assist the Millers obtain a new job and to provide the Millers with a reference. They say the Millers would not listen.
21. The Millers became very upset upon hearing that their jobs were being made redundant. They requested that Mr. Bradley provide their entitlements in writing.
22. On 7 November 2003 Mr. Bradley says that he delivered to the Millers an envelope outlining the entitlements and provided a reference. He says he left the envelope for the Millers to get back to him about their entitlements. The Millers apparently did not want any help and the 4 weeks notice remained effective from the date that it was issued.

23. The Millers contested the amounts that the Bradleys had calculated. As a result a Department of Labour, Labour Inspector was asked to scrutinise the sums. Following the Department of Labour's scrutiny the sum of \$1,893.92 was paid by the Bradleys to Sherilee Miller and a sum of \$984.92 was paid by the Bradleys to Ross Miller, being arrears collected by the Department on the applicants' behalf. During the Authority's investigation meeting a letter was produced that was sent by the Labour Inspector to Brian and Susan Bradley on 11 May 2004 that read as follows:

"I am writing in response to your request concerning this claim.

As I advised in our telephone conversation the payment that Ross and Sherilee received was for annual holidays only, and was accepted as such.

In the event that Ross and Sherilee make a claim for wages and bonus payments which they determine are due, they are able to pursue this course of action either through the Employment Authority (as mediation has already been attempted); or through the Small Claims Tribunal.

24. Another meeting was arranged by the Bradleys with the Millers for 11 November 2003 that was not successful. The Bradleys then arranged for assistance from the Department of Labour to sort the problem out involving mediation assistance.

The Law

25. This employment relationship problem predates the 2004 amendment to the Employment Relations Act impacting on the application of *Coutts Cars Ltd v Baguley* [2001] ERNZ 660; [2002] 2 NZLR 533 (CA). The dismissals occurred on 4 December 2003.
26. The relevant law in this matter involves the employer having to show a genuine belief for the judgement that the employees' positions were redundant (applying *GN Hale & Sons Ltd v Wellington IUW* [1991] 1 NZLR 151) and the positions being surplus to the employer's requirements – *NZ Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565. In *Hale* the decision related to a commercial judgement. At issue in this matter is the reason for the decision – to take over the management of the farm, the bonus for the children of having a farm lifestyle experience or the cost of the running of the farm or other ulterior motives that related to the Millers' performance and behaviour.
27. Another issue related to consultation. Consultation in redundancy is not mandatory. According to the Courts consultation "*is desirable, if not essential in most cases*" (*Coutts Cars Ltd v Baguley* [2001] ERNZ 660; [2002] 2 NZLR 533 (CA)) having regard to good faith and the provision of information but it is not an absolute requirement (applying *Coutts Cars*

Ltd v Baguley). However consultation requires the employer to provide information that enables an employee to state a view on the issues created by the decision to implement redundancy and for the employer to consider any comments from the employee with an open mind (applying *Communication and Energy Workers Union v Telecom NZ Ltd* [1993] 2 ERNZ 429, and *Wellington International Airport v Air NZ Ltd* [1993] 1 NZLR 671).

28. Consultation is not necessarily required in the decision to create the redundancy but relates to the impact of the decision to create redundancy - *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601. In other words the employer's entitlement to decide to run their business has to be justified and, in this case the Bradleys' decision to manage the farm themselves, should involve consultation over the impact of that decision.
29. In the problem before me the decision was made by the Bradleys before any input was requested and the views requested related to negotiating the termination in regard to the notice, use of accommodation and assistance that the respondents say did not happen because of the belligerent attitude of the applicants.
30. There are a number of credibility issues that I will deal to as required.

Determination

31. Much of this matter has to do with the way the Bradleys have dealt with it. Firstly, they decided (whether on advice or not) not to consult the Millers about their review of the farm that Mrs Bradley, in particular, now says concerned the expense of running the farm. They say they did not want to divulge any financial information to the Millers.
32. Secondly, in making their decision the Bradleys emphasised to the Millers their decision to manage their farm themselves and the bonus of enabling their children to have a farm experience. The Bradleys say they told the Millers this to "*soften the blow*". By giving the Millers that explanation I hold they were disguising the real reason for their decision. It seemed from the evidence that this was the reason purportedly for the redundancy at the time. However, during the course of the Authority's investigation Mrs Bradley in particular tried to say what she and Mr. Bradley had meant by them managing the farm. Even if the reason was justifiable by the right to manage their own farm the Bradleys failed to reasonably consult the Millers and provide the Millers with an opportunity for input on the impact of redundancy and consult on the options that they considered. When they did consult their decision that would create a redundancy situation amounted to a *fait accompli*.

33. Mrs Bradley produced a list of expenses she put together during the Authority's investigation meeting after telling the Authority that she had burnt documents that apparently related to their review. This leaves it open to me to conclude that the consideration given to this matter was at best informal at the time, and there is no paperwork for the record. This situation has not assisted the Bradleys. I have to rely upon the Bradleys' word that the financial details were considered as there is no evidence of this. The general reasoning given to the Millers at the time has left it open to the Millers to conclude that there were ulterior motives, possibly including the Millers' work performance, the dog incident, and the deteriorating relationship, that could have underpinned the decision being made.
34. A fair and reasonable employer could be expected to consult over the expenses of running the farm, particularly as the Millers were the farm managers, had been employed with an expectation to work until at least the end of the season and, purportedly as the Bradleys say, there were no performance issues and the farm was running well. It was unreasonable that consultation did not happen and that the reason of the expense of running the farm to justify the Bradleys managing the farm themselves, was not given properly to the Millers, as the justification for the decision at the time. It is difficult to reconcile the reasoning of there being any financial difficulties when the Bradleys' evidence refers to the farm "*running well*" and "*everything was running well*" (Bradley SIR) and the evidence produced about the reason and the expenses after the event. These factors make the decision unjustified.
35. The economic factors were raised for the first time at the Authority's investigation meeting without adequate evidence of any losses to justify the decision at the time. The accounts produced at the Authority's investigation, including the itemised expenses, attempt to justify the decision after the event. I accept that the Bradleys met 3 monthly to discuss their farms. But there was no corroborating evidence of them sitting down with their bankers and accountant to discuss the business in regard to the economic factors now being relied upon, despite having the opportunity to call these people to the Authority's investigation to support their decision.
36. Other factors supporting my conclusions include the Bradleys deciding not to move and live at the farm themselves because they lived just down the road, deciding to leave the farm house empty until another person in Mr. Bradley's brother's employment was offered it, and using other workers on the farm and using his brother's labour when Mr. Bradley was not able to work on the farm himself. I am further supported in my decision by Mr. Bradley's evidence when he told the Authority his feelings were:

- That he was frustrated by the Millers.
- That the Millers would not listen.
- That the Millers were antagonistic.
- That Sherilee Miller was aggressive.
- That the Millers were at times poor performers.
- That the Millers were not reasonable.

37. I can accept that any antipathy could have been associated with how the Millers' responded on 6-7 and 11 November and worked out their notice, but it is also likely that there were some views formed before this because of the earlier difficulties. These personally held views support a conclusion that Mr. and Mrs Bradley focussing on personal goals rather than the business needs of the farm including a genuine need for reorganisation. Mr. Bradley in particular says that: *"Everything is running well, but our kids are farm kids. They love the farm. They said to us daily that they missed being on the farm. We decided that we would run the Ball Road farm. It was the only option to us as a farm to manage."*
38. Mr. Bradley accepted that the decision could look like it involved ulterior motives but disputed them being the cause of the decision.
39. Also Michael Joyce (the farm advisor) was unaware of any problems except the interpersonal matters he considered had been resolved. He could not establish if there had been any abuse. He says he told the Bradleys to get advice when they raised the prospect of redundancies but was not aware of the details.
40. The Bradleys' evidence was that there were no other options when they made their decision. They say it was the only option available. A fair and reasonable employer could be expected to raise this issue for comment and input especially considering that the Millers were farm managers.
41. I have also noted that both parties have produced evidence to test the credibility of each other and each other's motives and their credibility in regard to alleged abusive behaviour. I have not had to turn to this to reach a determination on the problem. Disputed diaries have also been produced that are relevant in so much as the parties are arguing over who undertook the work the Millers did on the farm when the Bradleys took over.
42. The Bradleys claim that the Millers through Mr. Hayman set about to get evidence that their jobs had not disappeared. The evidence is clear that the Millers have used Mr. Hayman's

information but that is understandable given they have a problem about the reasons for the termination of their employment. It seems that Mr. Hayman of his own volition, decided to watch who was working on the farm after the Millers left. I have a doubt about the reliability of Mr. Hayman's evidence because he could not say for sure his record of who was working on the farm was accurate enough considering the Bradleys' evidence and diaries. Also, he was not accurate about his wages and how these were paid and I could have expected him to understand the arrangements that existed between himself and the Bradleys, especially when they were trying to help him with his finances.

43. I conclude that the Bradleys have not demonstrated a genuine belief for the decision to make the Millers redundant. This is supported by the changed and expanded reasons given, the failure to consult on the impact of any redundancies and discuss the options instead of redundancy because there was the probability that other reasons and motives existed for the termination of the Millers' employment. The Bradleys initial given reason to "*soften the blow*" for the Millers - (to manage the farm themselves and give the children a farm lifestyle experience) - was not sufficient to justify redundancies without some input and consultation on the options before finalising any decision, thus they could not have had an open mind on the matter. The only consultation that the Bradleys envisaged was on how to end the relationship e.g. notice and the use of the house and giving the Millers assistance. Any discussion on this seems to have broken down when the Bradleys considered the Millers' reaction was unreasonable. They should have anticipated there would have been some reaction by the Millers. The Millers had no reason not to expect to work at least until the end of the dairying season.
44. I do not accept for one moment that the Bradleys wanted to discuss flexible notice. The decision had already been made before the Bradleys told the Millers – for 4 weeks notice. The decision had already been made in accordance with the terms of the parties' employment agreements and written by the Bradleys as such in their summary of entitlements dated 6 November to the Millers. The evidence is inconclusive that they raised it at the time and they initially resisted the Millers challenge to their calculations for the final payments that the labour inspector was asked to intervene on.
45. I conclude that the Millers have personal grievances in regard to being unjustifiably dismissed. I now turn to the remedies to resolve the problem.
46. The Millers found new employment that started on 1 June 2004. They have claimed lost wages from December 2003 until June 2004. Before obtaining new employment in the South

Island I accept that they mitigated their losses with relief milking and other income - albeit they did not obtain full time work to earn the level of previous earnings. They reasonably expected to work out the season with the Bradleys and I accept the decision would have come as some shock to them considering the reaction the Bradleys say occurred. The Bradleys provided the Millers with their entitlements in writing as requested and when at another meeting the problem could not be sorted it was the Bradleys who attempted to get some assistance from the Department of Labour before the employment was terminated. The Millers have lost income as a result of the Bradleys' decision on the handling of the matter and the lack of any consultation on the impact of any redundancy and the termination of the Millers' employment. Notwithstanding how upset they were the Millers had an opportunity to find some solution to resolve the problem. The Bradleys have challenged the Millers on their attempts to get work with the jobs available and move if they needed to obtain work. The Millers did move later to another district for work.

47. The Millers' combined income since their dismissals from December 2003 until June 2004 (being 25 weeks) amounted to \$10,866 plus approximately \$500 cash. I have decided to order 3 months wages to resolve this problem as required under the Act because I am not satisfied that the Millers did everything they could to mitigate their losses in balancing the evidence over the full period before they obtained the work in the South Island. My calculation is that Sherilee Miller would be owed the sum of \$2,499.96 (\$384.61 gross earnings a fortnight) and Ross Miller the sum of \$10,779.99 (\$1,658.46 gross earnings a fortnight). The total combined loss of wages for 3 months would be \$13,279.95. I will deduct \$5,910.32 for 13 weeks' earnings. I therefore order Brain and Susan Bradley to pay Ross and Sherilee Miller the combined total of \$7,369.63 lost wages (how this is proportioned I will leave to the parties).
48. The Millers have claimed \$7,500 each for compensation. That is well within the range set by the Courts. They are entitled to compensation for humiliation, loss of dignity and injury to feelings of \$7,500 each for the effect of the dismissal on their feelings and humiliation. There is evidence of their shock and reaction to their dismissal. The sums are to be paid by the Bradleys under s 123 (c) (i) of the Act.
49. The Bradleys have requested that these sums be offset against money that they say the Millers owe them. I am not satisfied that any such other sums should be offset against the above to resolve this part of the parties' overall problems.

50. Mrs Miller's wage issue, since it was raised as an alternative remedy, is reserved (as discussed at the Authority's investigation meeting). It is therefore appropriate that the bonus payment that is an issue is also reserved. If these matters are being pursued I suggest that the parties' representatives attempt to resolve the calculations especially now that the wage and time records are available and in light of the labour inspector's letter confirming the amount of holiday pay. Leave is granted for further submissions and any other evidence if necessary.
51. Costs are reserved.

P R Stapp
Member of Employment Relations Authority