

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 160/09
5162399

BETWEEN COLIN JAMES MUNRO
Applicant

AND RIVER DOWNS DAIRY
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Colin Munro in person
Hilary Webber, Representative for the Respondent

Investigation Meeting: 16 September 2009 at Invercargill

Determination: 23 September 2009

DETERMINATION OF THE AUTHORITY

[1] Colin Munro worked briefly for River Downs Dairy Limited from 14 August 2008. After his employment ended he wrote to the company raising a grievance alleging that there had been an agreement for work 6 hours per day, 7 days per week for 8 weeks but he was laid off after only 19 days. Mr Munro sought payment of the balance. The grievance was later lodged in the Authority.

[2] The position for the company is that Mr Munro was not laid off or asked to leave by the manager but agreed he should leave after an informal discussion with another person.

[3] To resolve this problem I must make findings about what terms of employment were agreed and what happened at the end of the employment.

The people involved

[4] Shayne Ryan is a minority shareholder and a director of the company. He is also employed by the company as its dairy farm manager. Mr Ryan employed Mr Munro and was involved in a discussion with him immediately prior to the employment ending.

[5] Hilary Webber is a majority shareholder and a director of the company. She was on the farm when Mr Munro's employment ended but was not personally involved in the discussions with him about his employment or its termination.

[6] Trevor Russo is a friend of Mrs Webber. At her request, he was helping out at the farm just before the end of Mr Munro's employment. He had the informal discussion with Mr Munro mentioned above.

Terms employment

[7] There is no written employment agreement. That is a breach of the law but there is no claim for a penalty. Evidence for the company is that it is quite common with casual or temporary farm employment for there not to be a written agreement. This case is an example of the problems that can arise in the absence of a written agreement. Mrs Webber told me that the company now complies with the law.

[8] Mr Munro saw an advertisement for casual staff for 3 months to help with calving. The ad was placed in a Gore newspaper. At the same time the company was advertising in the Invercargill newspaper for fulltime permanent staff. Mr Munro rang Mr Ryan. There is a dispute between them about whether Mr Munro inquired after the permanent job or the casual job, with Mr Ryan asserting the former and Mr Munro the latter. They also disagree over whether they discussed this on the phone. It is not necessary to resolve these disputes since it is not suggested that there was ever an agreement for fulltime permanent employment. It is common ground that Mr Ryan arranged for Mr Munro to come and see him at the farm to talk about possible employment.

[9] Mr Ryan's evidence initially was that he offered Mr Munro neither the permanent job nor the advertised casual job but a temporary job for a couple of weeks getting the cows onto the milking platform. This was to assess whether Mr Munro had any stockmanship skills for a role helping with milking and calving. Later in his evidence, Mr Ryan referred to Mr Munro's position as a *part-time job* a number of

times. Mr Munro says that Mr Ryan offered him a job for 6 hours per day, 7 days per week for 8 weeks. No-one else heard their discussion.

[10] Mr Ryan's and Mrs Webber's evidence is that they were only milking once per day at this stage because the property had been converted to a dairy farm and the land cultivated as part of that development. It had been too wet to permit twice a day milking although the intention was to move to that as conditions allowed. They only needed a person to work in the yards for about three hours daily for milking once a day but would need that person up to six hours daily when milking twice per day. I accept the evidence about once per day milking and its implication as to labour requirements. It is inherently unlikely that Mr Ryan would offer Mr Munro permanent employment of 6 hours per day when he did not need a person in that role for 6 hours per day at that time. Most likely what was said by Mr Ryan was that the job was for up to 6 hours per day but no guarantee was given as to the number of hours available.

[11] Labour was in short supply on the farm so there was no-one to cover for Mr Munro. Mr Munro ended up working continuously from 14 August 2008 until the employment ended on 1 September. Given these circumstances I accept Mr Munro's evidence that it was stressed to him that he had to be available 7 days per week. However I do not accept his evidence that he was engaged for a fixed period of 8 weeks. Mr Munro's expectation about the duration of employment came from the ad he answered but the offer was for part-time employment of an unspecified duration working hours as required by the employer. I reject Mr Ryan's initial evidence that the employment was temporary for a couple of weeks only although I accept that his intention was to assess Mr Munro's skills over the first few weeks of the employment. Mr Ryan told me that he did not expressly tell Mr Munro he was being employed on trial or probation or for a fixed period or temporarily, nor was there anything in writing so the circumstances fall well short of the requirements of ss.66 & 67 of the Employment Relations Act 2000.

[12] From all this I conclude that Mr Munro was employed part-time to work each day hours as required by the employer up to approximately 6 hours per day. It is common ground that the parties agreed on \$20.00 per hour. Soon after the employment started Mr Munro asked to be paid some petrol money to cover his travel costs and Mr Ryan agreed to this.

The termination of the employment

[13] The company's herd came from a farm with a herring-bone milking shed while the company's conversion farm has a rotary milking shed. There were problems getting the cows onto the milking platform which those involved attributed to the history of the herd and the design of the yards. As mentioned there were also labour shortages which is why Mrs Webber was present at the farm. Mrs Webber rang her friend Mr Russo and asked for help with the labour shortage and to resolve the flow of cows onto the platform. He left his own business to travel to Southland for a few days to help out. He then had to return to his business for several days but went back to Southland to help out again.

[14] Mr Russo is experienced with dairy cows although he operates a cleaning business which employs a number of staff. I infer that he is experienced in employment matters. Mr Russo quickly came to think that the problem was with the handling of stock in the yards (and the person doing that – Mr Munro) rather than design or the history of the herd. To test that assessment Mr Russo decided he should relieve Mr Munro and bring the cows in himself. Mr Russo made that arrangement with Mr Munro who did other work. In that way, Mr Russo confirmed his view that the problem was Mr Munro's lack of stockmanship skills. He conveyed that opinion to both Mr Ryan and Mrs Webber. Meantime, Mr Munro wanted to resume bringing the cows in and was permitted to do so. The problems with getting the cows onto the platform reappeared.

[15] Mrs Webber's evidence which I accept is that Mr Russo told her that they would never get the shed right if they still had the same person (Mr Munro) there doing what he was doing. Further, her evidence is that Mr Russo was angry about the whole thing and went to speak to Mr Munro off his own bat. I accept the first part of that evidence and will return to the second part shortly.

[16] Mr Munro's evidence which I accept is that Mr Russo told him on 31 August 2008 that he was not needed for the afternoon milking as the cows were going on to the platform okay. That evidence was not disputed by Mr Russo. By then they had been milking twice a day for a few days.

[17] It is common ground that Mr Russo went to speak to Mr Munro the next day (1 September) but there is some dispute over what was said. Mr Munro's evidence is

that he said *I suppose you're here to tell me they don't need me anymore* and Mr Russo confirmed this. Mr Munro then said he was not happy and he was going to take the matter to Mr Ryan and Mr Russo responded *by all means* and they went to see Mr Ryan. Mr Russo's evidence is that he told Mr Munro *You are a nice guy but I don't think you have any stockman skills for dairy cows ... I think you should leave on good terms as it is just not going to work out here for anyone or for the animals*. Mr Russo says that after some discussion Mr Munro agreed with him then said *Maybe I should leave* whereupon they both went to talk with Mr Ryan. Mr Munro does not dispute that Mr Russo spoke about his lack of skills and so forth but he says that this happened during the discussion with Mr Ryan. However Mr Ryan did not support the idea that there was such a discussion in his presence on 1 September. On balance I prefer the evidence of Mr Russo about when he told Mr Munro about his lack of skills and so forth.

[18] The evidence of Mr Munro and Mr Ryan respectively is that Mr Munro was *a bit pissed off* and *quite irate* during their exchange. Mr Ryan's evidence which I accept is that Mr Munro asked him *What's the story?* and *Why not point this out early on?* That was a reference to what Mr Russo had said about Mr Munro's lack of suitability for working with dairy cows. Mr Ryan's evidence which I accept is that *He [Mr Munro] felt hard done by and irate about not being wanted*. I have already mentioned Mrs Webber's evidence that she knew that Mr Russo was going to speak to Mr Munro. Mr Ryan's evidence is Mr Russo was to speak with Mr Munro about what he thought was the problem with the cows going on to the platform – that is, Mr Munro's lack of stockmanship skills. In this context I also note Mr Ryan's clear and repeated evidence that these skills are born not made, by which he means that the necessary attributes cannot be taught to someone such as Mr Munro. From all this I find that Mr Ryan and Mrs Webber both knew that Mr Russo was to discuss with Mr Munro his lack of suitability with a view to Mr Munro leaving and they approved Mr Russo doing so. Additionally, Mr Ryan's evidence above makes it clear that he knew that Mr Munro had taken from Mr Russo's discussion that he was no longer wanted by the company as an employee.

[19] There is a dispute about whether, in response to Mr Munro's clear dissatisfaction about no longer being wanted, Mr Ryan offered him a further two week's work (according to Mr Ryan) or a further week's work (according to Mr Munro). However it is common ground that in response to that offer, Mr Munro said

that he did not intend to stay where he was not wanted or something to that effect. The conversation briefly continued, Mr Ryan asked Mr Munro to bring up his time sheet and Mr Munro shook hands with Mr Ryan and Mr Russo before leaving.

[20] Before they shook hands there was an exchange between Mr Munro and Mr Ryan about legal action. Mr Munro said that he had been promised 6 hours per day and he had a mind to take them to court for breaching that. Mr Ryan replied that Mr Munro would never win as the company had more money than him, or something to that effect.

[21] Mr Ryan's and Mr Russo's evidence is that Mr Munro was *happy as* when he left having shaken hands. Mr Munro does not dispute what they say about his demeanour by that time but he says that it does not indicate that he was leaving of his own accord. Mr Munro's evidence which I accept is that he was feeling bitter about the termination of his employment. His intention was to pursue a claim about the termination of his employment circumstances. He wrote to Mr Ryan on 13 October 2008 raising his grievance.

Dismissal?

[22] The company's position is that Mr Munro left the job of his own accord.

[23] A dismissal is the termination of an employment relationship at the employer's initiative: see *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965. Here, it appears that the initiative has come from Mr Russo. The company seeks to distance itself from Mr Russo's actions by describing his discussion with Mr Munro as *informal* and stressing his role there as a friend helping out. However it is clear from Mrs Webber's and Mr Ryan's evidence that they both knew about and accepted as accurate Mr Russo's assessment of Mr Munro as unsuitable for the work he was employed to do. Mr Ryan believed that Mr Munro could not be sufficiently trained to make him suitable. At least implicitly Mrs Webber and Mr Ryan endorsed Mr Russo approaching Mr Munro with a view to securing his departure from the farm. It was abundantly clear to Mr Ryan that Mr Munro's was not leaving of his own accord. From all this I conclude that the termination of Mr Munro's employment was at the initiative of the company and must be regarded as a dismissal.

Justification

[24] There was no attempt by the company to justify the dismissal. Accordingly I find that Mr Munro has established a personal grievance of unjustified dismissal.

Remedies

[25] I find that Mr Munro contributed but not in a blameworthy manner to the circumstances giving rise to his grievance. I accept that he lacked stockmanship skills handling dairy cows and that this caused or contributed to the problems with getting the cows on to milking platform. However, Mr Ryan knew that Mr Munro had never worked with dairy cows previously so the company should have monitored his work and given him appropriate guidance and instruction on stock handling rather than terminating the employment almost as soon as the problem with his handling of the cows was identified by Mr Russo.

[26] The evidence is that the company would have continued Mr Munro's employment for at least a week after 1 September 2008. I do not accept that Mr Munro's refusal to stay on disentitles him to compensation. His disinclination arose directly from the unjustified dismissal. Accordingly, Mr Munro lost remuneration as a result of his grievance. He obtained alternative employment on 9 September 2008 at a lower hourly rate but for more hours per week. I will take that as the cut off date for calculating Mr Munro's lost remuneration so he is entitled to have his losses assessed over 7 days.

[27] Mr Munro worked an average of 3.8 hours per day over the whole of his employment so I will take that as a reasonable estimate of his hours for the 7 days following the dismissal. That gives a total loss of \$532.00 (gross).

[28] Part of Mr Munro's original claim was for payment of the petrol allowance at \$20 per day. I agree with the company that the claim cannot succeed because Mr Munro did not incur the expense of travelling to and from work at the company's farm.

[29] There is no claim for compensation for humiliation, lost dignity or injured feelings.

Summary

[30] River Downs Dairy Limited is to pay Mr Munro reimbursement for his lost remuneration amounting to \$532.00 (gross).

[31] Mr Munro did not incur any legal costs other than the lodgement fee. River Downs Dairy Limited is to pay costs of \$70.00 to Mr Munro to reimburse him for the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority