

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Alan Spencer (Applicant)
AND Hughes Dairy Farms Limited (Respondent)
REPRESENTATIVES Owen Johnstone, Advocate for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 25 July 2005
DATE OF DETERMINATION 6 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Spencer, was employed as farm manager at the company's Makarewa, Southland dairy farm from 1 June 2004 until the employment relationship broke down. An employment agreement was signed by the parties on 17 April 2004 to come in force at the beginning of the season on 1 June 2004.

[2] Mr Spencer was paid a base salary of \$40,000 with bonus payment provisions and was supplied with a house by the company. The applicant says he was unjustifiably dismissed from his employment.

[3] The respondent, by its sole director Mr Wayne Hughes, says that the applicant was not dismissed but resigned from his position.

What caused the problem?

[4] Mr Spencer, who had been employed as an assistant dairy farm manager prior to accepting the position with the respondent, says that no issues or problems were brought to his attention prior to his asking Mr Tony Hughes to explain why he, Mr Hughes, was advertising the applicant's position on a rural website.

[5] The advertisement for an assistant farm manager was discovered by the applicant's wife while she was scrolling through fencepost.com on 3 September 2004. It caught her attention because of the contact details in the advertisement, *Contact details: Tony Hughes, Phone: 021 1859 006, Email: wayne.h@opac.co.nz.* As she was concerned that her husband might not be aware that the company was planning to employ an assistant manager, she raised the matter with the applicant. He became concerned also as neither Tony nor Wayne Hughes had mentioned this to him.

[6] In order to determine whether the position was at the Makarewa farm, the applicant's father-in-law, Mr Doug McLachlan, telephoned Tony Hughes at about 2.15pm on 3 September 2004. Mr McLachlan specifically asked Mr Hughes whether the job was for an assistant manager or a manager. He says that Mr Hughes replied, *I think it is a manager job because I will probably have to let the manager go as he is costing me too much money with grades and penicillin in the milk.* Mr McLachlan also asked Mr Hughes what his staff turnover was like. He says Mr Hughes replied, *pretty shocking actually.* At that point, Mr McLachlan terminated the call.

[7] Mr McLachlan reported this conversation to Alan and Susanne and Mr Spencer decided to approach Mr Hughes for an explanation. He approached him that same day. The applicant says Mr Hughes was *surprised* and *immediately became highly critical* of Mr Spencer's work performance. Mr Hughes told Mr Spencer that he no longer had confidence in him as a farm manager and went on to say, *we'll have to come to some arrangement.* Significantly, Mr Spencer says *at no time during that discussion with Tony did I offer to resign my position.*

[8] On 6 September 2004 the applicant received a letter from Mr Tony Hughes. I set it out in full:

6th September 2004

Mr Alan Spencer

Re Employment

Confirming our conversations over the past week.

A number of problems have arisen to the extent that we no longer have confidence in you to carry out your role as Farm Manager. A continuation of these would place our business in jeopardy.

We note your offer to resign and rather than go through the process of dismissing you we would prefer that you confirmed this in writing.

We are prepared to reduce the period of notice to 18th of September 2004.

Can you please confirm in writing that these arrangements are acceptable to you.

Yours sincerely

Tony Hughes

On behalf of Hughes Dairy Farms Limited

[9] Shocked and anxious over this turn of events and the downstream effects on his health, his wife and young family, the applicant sought advice from the Amalgamated Workers' Union advisor, Mr Owen Johnstone. On 9 September 2004, Mr Johnstone wrote to the respondent delivering the letter to Mr Tony Hughes' letterbox. The letter formally raised the employment relationship problem, raised his client's personal grievance, set out the applicant's position and sought a meeting with the company to attempt to resolve the issues.

[10] Mr Johnstone received a telephone message from Mr Wayne Hughes at about 11.20 am on 10 September 2004 in which Mr Hughes threatened to dismiss the applicant for poor performance. Mr Johnstone telephoned Mr Hughes who refused to agree with the applicant's request that he finish on 18 September 2004. The exchange appears to have been far from cordial.

[11] When advised of this by Mr Johnstone, the applicant tendered his resignation in writing to Mr Tony Hughes. The letter reads as follows:

Dear Tony

Please accept my written resignation from employment with Hughes Dairy Farms Ltd effective from the end of milking the 10th September 2004.

I have detailed my reasons for having to resign my employment in my personal grievance statement dated 9/9/04. I feel that I have no other alternative but resign because of my employers actions.

My employer has made it impossible for me to continue working in an employment relationship where my employer states it has no confidence in me and if I don't resign I am to be dismissed. I confirm that I have never been formally disciplined regarding non performance of my duties as Manager.

Please be advised that I intend to pursue my personal grievance case because I believe that my termination from employment was unjustified. I offered to finish on the 18th of September 2004, provided my employer consented to my request outlined in Mr Johnstone [sic] cover letter 9/9/04.

However, Mr Johnstone informs me that Mr Wayne Hughes contacted him at 11.20 am today leaving a message threatening to dismiss me for non performance of my duties and when Mr Johnstone contacted Wayne on his mobile, Wayne rather than being considerate acted entirely unreasonably, by refusing to discuss my request and hanging up on Mr Johnstone.

I ask that all my wages, holiday pay and any other benefits I am due be paid to me forthwith and I would appreciate being given until the 18th of September 2004 to vacate the farm cottage.

Yours sincerely

Alan Spencer

[12] On 20 September 2004, Mr Johnstone wrote to Mr Tony Hughes and advised him that he had spoken with Mr Wayne Hughes that day *who advises that Hughes Dairy Farms Ltd intends to withhold final wage and holiday payments from Mr Spencer because in his opinion Mr Spencer failed to give the required notice when he resigned.* Mr Johnstone on behalf of his client objected to this proposition and again requested that Mr Spencer be paid his final wages and holiday pay owing forthwith. He goes on to advise that *In the event that we have not heard from the employer by 24.9.04 we will seek a date for mediation from the Department of Labour.*

[13] In a letter written to Mr Johnstone on 23 September 2004, Mr Wayne Hughes, who lives near Opotiki, contested issues raised in a personal grievance application, the applicant's resignation letter and the telephone communications with Mr Johnstone.

[14] In large part, the letter relies heavily on information which can only have been provided by Mr Tony Hughes. For example, he claims that his brother Tony *spent a significant time with Mr Spencer through his employment counselling him about his performance in an attempt to secure an acceptable level of performance.* He speaks somewhat widely of *not feeding the cows enough, not getting work done, damage to property and a number of other matters. The list was extensive.*

[15] Mr Wayne Hughes claims that a positive penicillin test was returned as a result of the applicant's poor management. The letter states *Penicillin cows are to be kept separate from other*

cows. This is an industry requirement. Mr Spencer was responsible to ensure that this was to happen. The meeting we requested with you was to cover this issue. Rather than address this matter Mr Spencer chose to resign.

[16] Further down the letter, he says, *Mr (Tony) Hughes throughout the period of Mr Spencer [sic] employment had major concerns about Mr Spencer [sic] performance and hoped that he would improve with mentoring.*

[17] In closing a three page letter, Mr Wayne Hughes counterclaimed for one month's salary and \$150 for the rental of the cottage. He finishes by saying *We are happy to look at mediation but would suggest that unless Mr Johnstone is serious about making the payment required under his contract it will achieve little other than to waste both our time.* As I understand matters, Mr Johnstone does not have a contract with the respondent. He acts as advocate for Mr Spencer.

The non appearance for the respondent

[18] The support officer at the Authority was put to considerable trouble to elicit information and make arrangements with Mr Wayne Hughes, the company director. He declined to participate in a telephone conference, although fully informed of the time of that conference. That conference call was scheduled after several unsuccessful attempts to arrange others. Further, he was advised of the requirements to file a statement of evidence. I am confident that Mr Hughes received both the notice of direction and the notice of hearing sent to him by courier. Proof of delivery was established.

[19] On 20 July 2005, Mr Wayne Hughes sent the Authority the following email: *We have reviewed the position of the company and it does not have enough assets for us to hire a lawyer or justify me flying down. The costs exceed the worth of the company. We have decided that on that basis we will not attend the investigation meeting.* That email establishes Mr Hughes had received the Authority's communications.

[20] An extensive email trail clearly establishes the director's reluctance to engage in the Authority's investigation process and he finally chose not to attend the investigation meeting.

[21] I am thoroughly satisfied that the Authority, having delayed the investigation meeting to accommodate Mr Wayne Hughes's reliance on Mr Tony Hughes, said by Mr Wayne Hughes in his email of Sunday 5 July 2005 to be the company's primary witness, provided the respondent every opportunity to be represented at the investigation.

[22] The Authority accepts the company's decision not to be represented and must take into account only the correspondence available to it. This correspondence is, of course, unsworn and has little significance in a judicial setting. I would have preferred to have had both Tony and Wayne Hughes attend, if only to assess their credibility, as I had the opportunity to assess that of the applicant and his witnesses.

The issues

[23] The Authority is required to determine the following issues:

- Was the applicant dismissed or did he resign voluntarily from his position; and
- did the respondent in fact become dissatisfied with the applicant's performance; and

- did the respondent draw this dissatisfaction to the applicant's attention prior to the discovery of the website advertisement; and
- in the event the applicant was unjustifiably dismissed, what remedies are appropriate; and
- should any deduction for contributory conduct be applied in this particular case?

The investigation meeting

[24] At the investigation meeting, I heard from the applicant himself, his wife Susanne and the applicant's father-in-law, Mr Doug McLachlan. I also took the opportunity to question them on matters raised by the respondent in the statement in reply and in the correspondence between Mr Johnstone and Mr Wayne Hughes.

[25] I found each of the witnesses to be open in their responses to the Authority's questions and I found each of them to be thoroughly credible as witnesses.

Discussion and analysis

[26] Mr Spencer says he was dismissed. The respondent says he resigned following complaints about his performance, specifically because the applicant did not want to address the issue of *the penicillin cow* incident (see Wayne Hughes's letter of 23 September 2004).

[27] The evidence of Mr Spencer is that at the time of this incident, which led to contamination of the milk, he and his family were taking a break and were not present in the shed at the time which was under the control of Mr Tony Hughes. I was told that a member of the staff present in the shed told Mr Tony Hughes not to milk the cow in question, but Mr Hughes proceeded to milk it. Mr Spencer also says that prior to him confronting Mr Tony Hughes about the advertisement on the website, Mr Hughes had at no time raised any issue critical of his performance or of his management of staff or of the farm.

[28] A commonly applied test where a constructive dismissal is in question is whether the initiative for the severance came from the employer. To constitute a breach of the implied term that an employer ought not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence, it is not necessary to show that the employer intended any repudiation of the contract. It is also important to note that where the initiative for the employee's resignation has come from the employer, a claim for constructive dismissal would usually only succeed where the employee has made it plain that he or she is leaving because of the employer's conduct.

[29] The applicant's letter of resignation makes it clear at para.2 that *I have detailed my reasons for having to resign my employment in my personal grievance statement dated 9/9/04. I feel that I have no other alternative but resign because of my employers actions.* Clearly, the tenor of the letter establishes beyond any doubt that Mr Spencer resigned because Mr Tony Hughes made it clear that the company no longer had confidence in him.

[30] The claim by the respondent that the advertisement on the website was designed to fill the role of an assistant farm manager is unpersuasive for two reasons. The first is that if this was the respondent's intention, there seemed no clear reason why it would withhold from the applicant the fact that it was seeking to recruit someone for that specific position. The second is the clear

evidence of Mr McLachlan that in answer to his question whether the role was that of an assistant manager or a manager, Mr Tony Hughes clearly stated that *I think it is a manager job because I will probably have to let the manager go as he is costing me too much money with grades and penicillin in the milk.*

[31] Another issue which arose in the course of the investigation meeting was that at a meeting between Mr Tony Hughes and the applicant on 18 August 2004 which was convened to discuss disciplinary actions in respect of another employee, a general discussion took place between the applicant and Mr Hughes regarding the operation of the farm and at no time during that discussion did the respondent indicate that it had any concerns about the applicant's performance as farm manager. In fact, I am told that Mr Hughes said he was quite happy with the way things were operating. It appears that when confronted by Mr Spencer on 3 September 2004 about the website advertisement, Mr Hughes was caught on the wrong foot and responded instinctively by levelling serious criticisms of the applicant's performance in an attempt to justify the respondent's placing the advertisement.

The determination

[32] Returning to the issues as set out earlier in this determination, I find that the applicant was constructively dismissed as he did not voluntarily resign from his position, but did so in the face of a serious breach of the employment agreement. While I accept that a resignation was tendered, in the circumstances the severance of the relationship was at the instigation of the employer in what amounts to a dismissal.

[33] I find the evidence that the respondent in fact became dissatisfied with the applicant's performance lacks credibility because some three weeks prior to the action which gave rise to the dismissal, the respondent, through Mr Tony Hughes, had affirmed the respondent's satisfaction with the performance of the applicant as farm manager.

[34] I find that the respondent, caught on the wrong foot when approached by the applicant to explain the advertisement on the website, reacted instinctively to defend its position by casting aspersions on Mr Spencer's performance.

[35] In short, I find the applicant was unjustifiably dismissed and now turn my mind to the remedies which are appropriate in the circumstances. In that context, given the lack of any credible evidence of contributory conduct on the part of Mr Spencer, I will be applying no deductions in this case.

Remedies

[36] In the statement of problem filed with the Authority, the applicant sought an award of \$15,000 compensation under s.123(c) of the Employment Relations Act 2000 and lost income under s.123(b) of the same Act equivalent to 12 weeks' wages.

[37] At the investigation meeting, the applicant outlined his claim in more detail and included calculations of his loss of income over a three month period. In that document, his compensation claim lifted from \$15,000 to \$25,000. He also sought relocation expenses associated with his need to find alternative accommodation for his family at short notice. The applicant's detailed claim was as follows:

- (a) Lost remuneration:

- 20 days without work before finding a position - \$1,785.40 nett
 - 10 weeks differential in income - \$671.55 nett
 - Milk solids bonus (13 weeks average calculated at $\$20,250 \div 52 = \389.42 average x 13 weeks) - \$5,062.50 nett
- (b) Compensation for humiliation, loss of dignity, injury to feelings and stress: \$25,000
- (c) Costs associated with relocation detailed as:
- Storage (13 weeks @ \$46 per week) - \$609.70
 - Rent at motor camp (4 weeks @ \$150 per week) - \$600
 - Truck hire - \$500
 - Rental of house (9 weeks @ \$320 per week) - \$2,880.

[38] Having analysed the applicant's claim for lost remuneration resulting from his unjustified dismissal, I order the respondent to pay Mr Spencer the sum of \$7,519.45 nett.

[39] I have carefully considered Mr Spencer's compensation claim. Initially, he claimed \$15,000 being later amended (as he was entitled to do) to a claim of \$25,000. Reviewing the signed employment agreement between the parties, it is clear to me that it does not limit the period of employment to the season, that being 1 June 2004 to 31 May 2005, but states at clause 2:

2. *Term*

This agreement shall come into force on 1st June 2004 and shall remain in force until renegotiated or terminated pursuant to any provision of this agreement.

[40] This clearly distinguishes the agreement from the common practice of seasonal contracts, and indicates that, all going well for both parties, the applicant's employment was ongoing until severed by the above clause or for cause under the serious misconduct provision. That fact influences the issue of Mr Spencer's legitimate expectation of ongoing employment and the stress induced by his dismissal.

[41] Against that I need to consider the short period of the employment. Having stood back and weighed the factors, I believe it is just to award the applicant the sum of \$12,000 without deduction. This is based on the evidence the Authority heard from him, but more particularly from his wife, Susanne and the effect that the disruption had on both Mr Spencer's career and the dislocation to the family.

[42] Turning to the expenses incurred in the unexpected move occasioned by the applicant's dismissal, the one cost I do not accept as reasonable is that relating to the truck hire. I am of the view that whenever the applicant and his family moved from the respondent's farm, this cost would have been incurred. The other costs were, I find, incurred solely because of his unjustified dismissal.

[43] I order the respondent to pay the applicant the sum of \$4,089.70 without deduction to cover these expenses.

[44] For the purposes of completeness, I dismiss the respondent's counterclaim for failure on the part of the applicant to give notice and rental up to 18 September 2004.

Costs

[45] On behalf of his client, Mr Johnstone sought a contribution to costs in the sum of \$2,000.

[46] In a costs setting, the Authority is required to consider whether the costs incurred are reasonable and in doing so, needs to weigh a number of factors in the balance. It appears to me that, given the reluctance of the respondent to accept the existence of an employment relationship problem and the difficulties thus caused to the applicant's advocate, a contribution to Mr Spencer's reasonably incurred costs is warranted.

[47] I think it just in the circumstances to award Mr Spencer the sum of \$1,300 as a contribution to his costs.

Summary of orders

[48] The respondent is to pay the following sums:

- (a) Lost remuneration in the sum of \$7,519.45 net;
- (b) Compensation under s.123(c)(1) of the Employment Relations Act 2000 in the sum of \$12,000.00;
- (c) Relocation expenses in the sum of \$4,089.70;
- (d) Contribution to legal costs in the sum of \$1,300.00.

[49] These payments are to be made by the respondent within 28 days of the date of issue of this determination.

Paul Montgomery
Member of Employment Relations Authority