

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Julie Joy Warner & Vaughn Albert Warner (Applicant)

AND Judy & Paul Clark (Respondent)

REPRESENTATIVES Julie and Vaughn Warner In person
Kasey Templer, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 20 April 2005

DATE OF DETERMINATION 23 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Judy Clark and Paul Clark operate a dairying farming business on several farms near Otautau in Southland. They employed Julie Warner and Vaughan Warner to assist, initially part-time and full-time from 1 June 2003 when Mrs Warner was engaged as a shed manager and Mr Vaughan as a farm assistant.

[2] On 7 August 2004, Mrs Warner was suspended from her employment on pay pending the outcome of an investigation by the employer into allegations that had been made against Mrs Warner. The suspension ended on 10 August 2004 when Mrs Warner was advised that her explanation was accepted. To that point, there had been a good employment relationship. Mrs Warner says that the suspension was unlawful and caused her stress and upset, a point first made by her in a letter dated 6 September 2004. At the date of the investigation meeting, Mrs Warner was still employed by Mr & Mrs Clark. To resolve her problem, it is necessary to consider whether Mr & Mrs Clark had a good reason to suspend her employment and whether that decision was made in a fair and reasonable manner. If not, then Mrs Warner may have a personal grievance provided her situation falls within the definition set out in section 103 (1) (b) of the Employment Relations Act 2000.

[3] By letter dated 7 October 2004, Mr Warner resigned from his position effective 14 October 2004. By then he had been off work since early August 2004 as a result of a pre-existing carpal tunnel injury, surgery for that injury and then recuperation. In that letter he complained about the suspension of his wife, a comment allegedly made by Mrs Clark to his ACC case manager, and Mr & Mrs Clark's then recent insistence that Mrs Warner sign a written loan agreement in respect of funds lent to her by them in June 2004. In a subsequent letter, Mr Warner raised a personal grievance for stress and duress. In particular, the letter referred to stress and duress caused by physical and verbal aggression by Mrs Clark towards his family, threatening his family financially, a dispute about his entitlement to half a beast, and payment of his holiday pay by cheque.

[4] To an extent, Mr Warner in evidence and in the statement of problem relied on incidents between Mrs Warner and Mr & Mrs Clark as grounds for his own personal grievance claim. Some of these incidents occurred after Mr Warner's employment ended. To determine Mr Warner's claims, it is necessary to consider whether an employee's grievance can be founded on an employer's actions affecting another employee and whether actions after the employment has ended can give rise to a personal grievance for a former employee. Around November 2004, Mr Warner was re-employed for some weeks. He says that Mr & Mrs Clark breached that employment arrangement by ending it. He also says that he has been discriminated against because, despite him being the best candidate for several other farm vacancies, Mr & Mrs Clark engaged others to fill them. The breach issue will be resolved by identifying the terms of the re-employment, determining how it ended and considering whether there was any breach. The discrimination issue will be resolved by setting out the law on discrimination and applying that to the facts. It is convenient to deal with Mr Warner's claims first.

Mr Warner's grievance claims

[5] Mr Warner went on ACC in early August 2004 and his resignation took effect on 14 October 2004. In his letter of resignation he explained that they had not been able to engage a nanny so *Due to this I must resign to look after our children*. In evidence, Mr Warner described that as the *base reason for the resignation*. The letter refers to several matters between Mrs Warner and Mr & Mrs Clark, more of which shortly. The letter includes the claim that Mrs Clark told ACC that Mr Warner went on ACC only after their nanny left, suggesting that the purpose of his ACC claim was to cover the nanny's departure. There is no evidence that Mrs Clark's conversation with the ACC officer caused any difficulty with Mr Warner's ACC claim. I accept Mrs Clark's evidence that she never doubted the legitimacy of Mr Clark's ACC claim and did not suggest to ACC that there was any reason to doubt it. Mr Warner's assertion about the purpose of Mrs Clark's conversation with ACC is unsupported by any evidence and I reject it. There is a letter dated 30 August 2004 from Mrs Clark to Mrs Warner in which she says *Your nanny left & directly after Vaughn went on ACC on 4th August* Apparently, the two events occurred in the opposite order. However, Mrs Clark's letter was about a different point and the mistake was unintentional and irrelevant. Mr Warner simply resigned, as he was entitled to do. The resignation does not give rise to a personal grievance claim.

[6] Personal grievance is a term defined by the Employment Relations Act 2000. There are six types of personal grievance: unjustifiable dismissal, unjustifiable disadvantageous action, discrimination, sexual harassment, racial harassment and duress in relation to union membership. The statutory definitions of the last four types of grievance include the words *that the employee has been discriminated against* [or sexually harassed etc] *in the employee's employment*. Those words make it clear that a grievance is about a claim by an employee that they personally have been discriminated against [or sexually harassed etc] while their employment subsists.

[7] I have found that Mr Warner was not unjustifiably dismissed. More needs to be said about the second type of grievance. More fully, that grievance is defined as a claim *that the employee's employment, or 1 or more conditions of the employee's employment ...is or...was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer*. The definition is directed at the on the job situation, the employment activity: see *Wellington AHB v Wellington Hotel IUOW* [1992] 2 ERNZ 466. While there has been a change to the statutory definition since that case, the change is not relevant to the present situation as there was no condition of Mr Warner's employment that survived its termination. Mr Warner was not at work from early August 2004 and then resigned in mid October. He commenced casual work in mid November 2004. The several issues that arose between Mrs

Warner and her employer did not affect Mr Warner's employment activity or his on the job situation between August 2004 and October 2004. It is also clear from the words of the definition that the unjustified action must occur while the employment subsists for there to be an actionable grievance so anything that occurred after 14 August 2004 is irrelevant. It follows that Mr Warner does not have any type of sustainable personal grievance against Mr & Mrs Clark unless connected with his re-employment about November 2004.

[8] Mr Warner's evidence is that he did some paid casual work on the farm and then about 3 weeks before the mediation on this problem he arranged with Mr Clark to do irrigators and weed spraying. Mr Warner said that, the day of the mediation, Mr Clark told him *Don't call us, we'll call you* effectively terminating the work. Mr Warner's evidence is that 16 December 2004 was the last day he worked for Mr & Mrs Clark. Mr Warner is clearly wrong about this evidence. Time sheets written out by Mr Warner demonstrate that he continued casual work until 3 January 2005. I accept Mr Clark's evidence that, on 16 December 2004, he told Mr Warner that he would personally *OK* any casual work since he had become concerned about the amount of work that Mrs Warner had been arranging for Mr Warner. Mr Clark gave evidence about events on 4 January 2005 when Mr Warner resigned again, which I accept. Mr Warner came into the cow shed and was angry about not getting enough work, having seen someone who he (wrongly) thought was a new employee. Mr Clark told him to calm down, which he did. About half an hour later, Mr Warner came back to the cow shed. He told Mr Clark *That's it, I quit*. Accordingly, I reject Mr Warner's claim that there was any breach by Mr & Mrs Clark of the employment arrangements for this second period of his employment.

[9] The next issue is Mr Warner's claim that Mr & Mrs Clark discriminated against him by not rehiring him when in his view he was the best candidate for several vacancies that occurred after his first resignation. Mrs Clark made the point that they are entitled to make their own decision about the best person to employ for any vacancy and with the exception of the casual work just discussed, that was not Mr Warner. I agree that it is for the employer to make this assessment. Subject to the law regarding unlawful discrimination, an employee is free to choose who to employ. There is no suggestion that Mr Warner was not employed because of his race, sex or any of the other grounds of illegal discrimination. This claim also fails.

[10] Mr Warner says that the payment of his holiday pay by cheque was done deliberately so that he could not access the funds until cleared by his bank. I accept Mrs Clark's evidence that there was nothing malicious or improper in her offering a cheque for the final pay. If it was a problem, Mr Warner should have spoken to Mr & Mrs Clark at the time. He did not have to accept payment by cheque and he could have utilised the law to obtain payment in a more negotiable form.

The suspension of Mrs Warner

[11] The suspension followed a complaint by an employee supervised by Mrs Warner that she had been verbally abused by Mrs Warner. Mrs Clark told me that she and Mr Clark jointly had made the decision to suspend Mrs Warner and they went to tell her of that decision. On 7 August, they went to the farm house that Mr & Mrs Warner were living in. Another person was present and they asked to speak to Mr & Mrs Warner alone. Mr Clark said that they had received allegations of verbal abuse by Mrs Warner. That caused Mr & Mrs Warner to get up in arms and Mrs Warner nominated who she suspected had made the allegations. Mr & Mrs Clark refused to confirm that. Mr Clark also raised a work performance matter and told Mrs Warner that she was suspended on full pay pending an investigation. Arrangements for a meeting were discussed. That meeting was held a day or so later. Mrs Warner denied most of the specific allegations but admitted calling another employee a *nark*. Mr & Mrs Clark said they would do some further investigation and told Mrs Warner to take the next day off work on pay as well. Mr Clark rang Mrs Warner on 10 August

and told her that her explanation was accepted and she should resume work on 11 August 2004. No disciplinary action ensued.

[12] When Mrs Warner resumed work, two employees objected to working with her. Mr & Mrs Clark organised with the agreement of all concerned for those two employees to transfer to another milking shed and for their place at Mrs Warner's shed to be taken by another employee. Subsequently, Mrs Warner wrote to Mr & Mrs Clark to say that she wanted to confront the two complainants but Mr & Mrs Clark did not agree to that.

Unjustified disadvantage

[13] When making a decision to suspend an employee, an employer must give the employee an opportunity first to be heard: see *Ruffell v Women's Refuge Sexual Assault Resource Centre Marlborough Inc* [2002] 1 ERNZ 409. A failure to do so means that the decision to suspend is likely to be unjustified and may give rise to a personal grievance. It is also necessary to comply with any procedure in the relevant employment agreement but suspension is not mentioned in the Mrs Warner's agreement.

[14] There is another aspect to this definition of personal grievance that needs to be considered. To amount to a personal grievance, the employee's employment or one or more of the conditions of employment must be affected to the employee's disadvantage by the employer's unjustified action. I find that Mrs Warner felt aggrieved by the suspension. As a result, it was not surprising that she sought to confront the complainants directly even though Mr & Mrs Clark had accepted her denial of the allegations. I find that the suspension caused a souring of the employment relationship between Mrs Warner and Mr & Mrs Clark. That may well have been avoided if Mrs Warner had had an opportunity to comment on a proposed suspension before the decision was made.

[15] In assessing an appropriate award of compensation, I have endeavoured to ignore Mr Warner's claims and the effect of several other matters affecting Mrs Warner which I will deal with shortly. The unjustified suspension was brief and the falling-out between Mrs Warner and the complainants was well handled, all of which minimised the effects of the unjustified action. On the other hand, it soured Mrs Warner's view of her employer when the relationship had previously been good. Assessing that, a small award is appropriate. I order Mr & Mrs Clark to pay compensation of \$1,000.00 to Mrs Warner.

The loan agreement and other issues

[16] There is an issue about Mr & Mrs Clark's attempts from about September 2004 to get Mrs Warner to sign a formal loan agreement in respect of money lent to her in June 2004. At the time of the advance, both sides agreed to document the loan in writing. I accept the evidence that, well before the suspension issue arose, Mr & Mrs Clark instructed their solicitors to attend to the documentation. However, it took a little time for that to be done so Mrs Warner received the proposed documentation after the suspension. She wrongly thinks that the attempt to document the loan represents a change in how her employer viewed her related to the complaint and the suspension. She also complained about the formal nature of the loan documentation but I accept that it is in a standard form which would have been explained to Mrs Warner if she had got proper legal advice. There is no merit in Mrs (and Mr) Warner's complaint about the attempt to document to loan. I do note that the remainder of the loan will probably not be repaid because of Mr & Mrs Warner's bankruptcy. The Authority has no jurisdiction over that matter and it would have been improper for me to allow that to influence the personal grievance finding and compensation award made above.

[17] I reject the claims by both Mr & Mrs Warner that either Mrs Clark or Mr Clark was verbally or physically aggressive towards them. I also reject the claim that Mr & Mrs Clark somehow financially threatened Mr & Mrs Warner. Rather, Mr & Mrs Clark financially assisted Mrs Warner over and above the terms of the employment, ultimately to their detriment.

[18] There remains an issue between the parties about a freezer beast. Apparently, Mr Warner had a cow (number 1120) killed for meat. Mr Clark says that he did not authorise that and he has only recently learnt of its slaughter although he had known it was missing for some time. While there was discussion about the matter during the investigation meeting, it is irrelevant for the purposes of the grievance claims dealt with above and I make no findings about the matter.

Summary

[19] All the claims by Mr & Mrs Warner are dismissed except I find that Mrs Warner has a personal grievance in respect of the suspension and order Mr & Mrs Clark to pay her compensation of \$1,000.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[20] Costs are reserved. Only Mr & Mrs Clark were legally represented. Often an award of costs is made in favour of the successful party. Because Mr & Mrs Warner were not legally represented, they probably have no legal costs that could be recovered, except for the \$70.00 lodgement fee. However, it might be thought that the outcome in this case is properly seen as a victory for Mr & Mrs Clark who have defended themselves against large, ill defined and completely unmeritorious claims by Mr Warner. If either party does want to claim costs against the other, they should do so in writing to the Authority setting out details of the costs claim. The other party will then have an opportunity to comment in writing before a decision is made.

[21] Finally, I should say that it may be that the correct identity of the respondent is a company although that was not discussed during the investigation meeting. I will reserve leave for that to be dealt with if necessary.

Philip Cheyne
Member of Employment Relations Authority