

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Justin Wiley (Applicant)
AND Matthew Benge trading as Bencarri Farm (Respondent)
REPRESENTATIVES Karina Tifaga, Counsel for Applicant
Nicole Ironside, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 29 August 2005
DATE OF DETERMINATION 24 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Wiley, alleges that he was unjustifiably dismissed by the respondent, Mr Benge, on 23 October 2004.

[2] Mr Benge denies that there was ever an employment relationship between him and Mr Wiley and thus contends that there can be no dismissal from that relationship, unjustified or not.

[3] Because issues of credibility were paramount in the investigation meeting, I made an order at the commencement of proceedings to exclude witnesses who had not given their evidence.

[4] Mr Wiley says that he was offered employment by Mr Benge on certain terms and conditions in an informal discussion that the two parties had at Mr Benge's farm on 12 June 2004 and that in reliance on that offer, Mr Wiley subsequently resigned from his employment on a South Canterbury farm and then, over a lengthy period of time, sought to obtain Mr Benge's agreement as to when he (Mr Wiley) would commence employment.

[5] Mr Wiley said that it was agreed with Mr Benge in a telephone discussion in September of 2004 that his start date would be 15 November but that on 22 October 2004, Mr Wiley received a voice message on his cellphone from Mr Benge in the following terms: *Giddy Matthew Benge here Willy. Sorry didn't get back to you when I said I would the other week but I've had a disaster with my company in Australia and I have to go back over there and it looks like I'm going to have to borrow quite a bit of money to sort it out and if that happens I don't think I can employ anybody because I won't be able to afford to. That's a bit of a bastard but that's what its looking like at the moment. I'll try you again.*

[6] Mr Wiley says that this voice message from Mr Benge constitutes the unjustifiable dismissal.

[7] For his part, Mr Benge says that there was never a concluded agreement between them and that the only discussions that took place were about the possibility of work and nothing more.

[8] Mr Benge agrees that there was a meeting between the parties on 12 June 2004 or thereabouts, but denies that that meeting resulted in an offer of employment and acceptance of employment. He also denies that the terms and conditions of the so-called employment which Mr Wiley identifies would in fact have been agreed to by him because they are inconsistent with the terms and conditions of employment which applied to every other worker that he employed on his farm.

[9] Mr Benge agrees that there were various telephone discussions between himself and Mr Wiley but characterises those discussions as Mr Wiley seeking further information about possible employment in the future, rather than discussion between the two parties about the terms and conditions of an actual employment arrangement already made.

[10] In particular, Mr Benge denies absolutely that he ever agreed to Mr Wiley commencing employment on 15 November 2004.

[11] At the hearing, Mr Benge indicated that he thought he was overseas at about this date (15 November 2004) and in response to a request from me, Mr Benge subsequently, through counsel, provided a photocopy of the visa page from his passport which shows him returning to New Zealand from Australia on 17 November 2004. Mr Benge advances this evidence to support his contention that he would not have agreed to that start date.

[12] Mr Wiley says that the return of Mr Benge on 17 November is absolutely consistent with his commencing employment on 15 November, given the proximity of the two dates.

[13] Mr Benge acknowledges leaving the telephone message which Mr Wiley relies upon on 22 October 2004, but denies that its meaning is as Mr Wiley contends. Mr Benge says that he simply meant to convey the intelligence that, given the business issues which he refers to in the telephone message, he is in no position to employ anybody, not that he is in no position to continue to employ somebody such as Mr Wiley who he has allegedly already committed to employ.

[14] Mr Benge says that this telephone message is absolutely consistent with his view that all that he and Mr Wiley had been doing was talking about the possibility of some future employment rather than the actuality of employment on agreed terms and conditions.

Issues

[15] Although there was a good deal of evidence advanced by both sides around the central issues, the key issues in respect of the employment relationship problem are:

- (a) Whether there was in fact an employment relationship at all and whether Mr Wiley is a *person intending to work* within the meaning set out in section 5 of the Act; and
- (b) If the answer to (a) is in the affirmative, whether the telephone message from Mr Benge to Mr Wiley on 22 October constituted an unjustifiable dismissal.

[16] If there is no employment relationship between the parties, then the question of the meaning of the 22 October telephone message is somewhat academic.

Was there an employment relationship?

[17] It is common ground that there was a meeting between the parties on or about 12 June 2004. The actual date is not material, but for the sake of convenience, I will refer to this meeting as the 12 June meeting.

[18] At that meeting, there undoubtedly was a discussion about employment matters between Mr Bengé and Mr Wiley. It seems to be agreed that the meeting took place in the outdoors where Mr Bengé was working on a cottage on his farm and both parties agree that neither took any written notes.

[19] Mrs Bengé, who also gave evidence at my investigation meeting, was present for some of this meeting but it is by no means clear how long Mrs Bengé was there.

[20] In her brief of evidence, Mrs Ruth Bengé says that she was with her husband, Mr Bengé, and Mr Wiley for about the first 15 minutes of the meeting that the two of them had and then she left. It is unclear how long the meeting went on after Mrs Bengé left, but it may not have been very long.

[21] Mr and Mrs Bengé both gave evidence that neither of them had met Mr Wiley before this meeting.

[22] Mr Wiley could not confirm if he had been asked by Mr Bengé to present himself for an interview, but certainly Mr Bengé's evidence and that of Mrs Bengé indicate it was that Mr Wiley had arrived unannounced on an entirely unplanned basis and had asked to have a conversation about possible employment.

[23] Mr and Mrs Bengé say that in no sense was the discussion an interview whereas Mr Wiley claims that it was.

[24] Mr Wiley said that this discussion had the following elements:

- (a) A discussion about the nature of the work that would be required;
- (b) A discussion about a salary figure of \$37,000 that he would be paid;
- (c) Accommodation would be provided in the Bengé family home;
- (d) Mr and Mrs Bengé were to move to Nelson to live and thereafter Mr Wiley would live in the family home by himself;
- (e) Mr Bengé would stay on the farm for the first six months to help Mr Wiley get settled in and that Mr Bengé would relieve Mr Wiley for his days off.

[25] With the exception of the discussion about the nature of the work, all these elements are contested by the Bengés. Mrs Bengé's evidence was that her husband told Mr Wiley about the nature of the work and the kinds of employment relationships that the Bengés entered into with their employees.

[26] Mr Bengé's evidence is similar in that he recalls that he discussed with Mr Wiley the nature of the work and the way in which he employed staff. In particular, and of critical importance in my view, is Mr Bengé's absolutely explicit evidence that he *never employed permanent full time workers on the farm*. Yet, Mr Wiley was claiming that he had been offered a permanent full time position.

[27] When I put this to Mr Wiley again in evidence at the investigation meeting, he remained adamant that he had been offered a permanent, full time position and he denied any possibility that he had misunderstood Mr Benges's discussion.

[28] That however is only one of the difficulties. Just as Mr Benges says he would never employ anybody on a full time permanent basis and Mr Wiley says that that was what he was offered, Mr Benges also says that he never employed staff on a salary and yet Mr Wiley claims that he was offered a salary of \$37,000.

[29] Again on the subject of accommodation, where Mr Wiley says that he was offered accommodation in the family home, both Mr and Mrs Benges gave evidence that they had decided before their recent return from Australia that they would no longer have any staff living in the family home with them. The Benges absolutely denied Mr Wiley's assertion that they had made this accommodation proposal.

[30] They also denied Mr Wiley's assertion that Mr Benges had asserted that he and his wife were moving to Nelson. Mr Benges said that that was completely untrue. It followed that Mr Wiley's claim that he had been offered the opportunity of living in the family home after Mr and Mrs Benges had left to move to Nelson was also denied by the Benges.

[31] Mr Benges also denied any suggestion that he had agreed to work for Mr Wiley on the latter's days off.

[32] It follows that only one of the items which Mr Wiley says was discussed at the meeting on 12 June is not the subject of disputation from the Benges. That one matter which is undisputed is of course the nature of the work and it is important to point out that that subject matter is not peculiar to concluding an employment relationship. That subject matter would be absolutely consistent with a discussion of the sort that Mr Benges says the parties were having concerning a possibility of future employment.

[33] Everything else is disputed. Mr Benges denies agreeing to a salary and denies even that there was a discussion about money. He says he would never have agreed to a salary because he has never employed staff on a salaried basis and wonders why he would start doing that now.

[34] Again, both the Benges are very clear that they absolutely would not have agreed to Mr Wiley living with them in the family home, having recently made the decision when they returned from Australia that they were not going to do that again. It is also worth noting that given this was their very first meeting with this young man, to suggest that they would agree to offering to take Mr Wiley into their home on the strength of one meeting is in my view to draw a very long bow indeed.

[35] That bow becomes even longer, if that is possible, when Mr Wiley contends that it was agreed that when the Benges moved to Nelson (again which the Benges deny any intention of doing), he would move into their home and live there by himself.

[36] Finally, Mr Benges denies any suggestion that he would, as it were, relieve Mr Wiley in the way that Mr Wiley suggests.

[37] The Benges also gave evidence about their employment practices. Mr Benges said that at one stage, he had been the largest employer in Golden Bay and so he had significant experience in employing staff. He said that in effect, staff were always employed on a particular basis, and he outlined in his evidence in some detail the way in which that process would be undertaken.

[38] As well as emphasising that nobody was employed on a permanent full time basis and all staff were employed on an *as-and-when required* basis, he noted a rigorous interview process, referred to reference checking and the like, and noted that an offer would only be made at the end of that process and then the offer would be in a formal context by way of an employment agreement.

[39] Mrs Benges's evidence was that she was intimately involved in that engagement process and that she thought it highly unlikely that Mr Benges would have engaged somebody without talking with her and having her involved in the process. Given that she knew nothing about any suggestion that Mr Benges would employ Mr Wiley, this evidence was designed to support the contention that Mr Wiley had not in fact been engaged by Mr Benges in Mrs Benges's absence.

[40] In short then, the Authority is being invited to accept Mr Wiley's contention that his employment was on a unique and entirely dissimilar basis to any other engagement that the Benges had been involved with, notwithstanding their experience as employers.

[41] The Authority is invited to accept that Mr Wiley was offered a permanent full time position when Mr Benges's evidence (for good reason) was that he would only employ workers on a temporary basis.

[42] The Authority is invited to accept that Mr Wiley was offered a salary of \$37,000 when Mr Benges says that he has never employed anybody on a salary, no doubt at least in part because he has never employed people on a permanent full time basis.

[43] The Authority is asked to accept Mr Wiley's understanding of the accommodation position which he claims was offered to him at the first meeting he had with his potential future employers. Again, Mr Wiley's evidence in relation to accommodation provisioning seems absolutely inconsistent with the Benges' evidence and it seems to me frankly incredible that an employer would agree to provide accommodation in their own home to a young man they had met, in effect casually, for the first time that very day.

[44] It seems even more incredible that the Benges would vacate their home (something they say they had no intention of doing anyway), in favour of this young man so that he could live there by himself.

[45] For the reasons I advance above, I have come to the conclusion that Mr Wiley is simply mistaken about the nature of the discussion that he and Mr Benges had on 12 June. Here we have a situation where Mr Benges says this was a discussion about possible future employment and Mr Wiley says this was an interview which resulted in a confirmed agreement by which he was to be employed.

[46] I do not find that there is evidence to support Mr Wiley's contention that this was an interview which resulted in a concluded employment agreement for performance in the future. In terms of the definition in section 5, I find that Mr Wiley is not *a person intending to work* because I find he has not been offered work. I think the evidence suggests that this was in fact a discussion about the possibility that Mr Benges might want to employ Mr Wiley at some point in the future.

[47] I am not persuaded that it helps Mr Wiley's argument to differentiate between the two parts of the Benges business, namely the farm and the llama park and café. Certainly, the two parts of the enterprise are, by common consent, different and the labour needs different. But conversely, Mr Benges's evidence about his employment practices concerned both parts of the farm. Mr Benges draws no distinction in his recruitment practices between the farm and the llama park. I accept his evidence in that regard, supported as it is by his wife's evidence.

[48] Nor do I think it helps for Mr Wiley to identify other people who he alleges may have worked for Mr Bengé on a basis which is more analogous to permanent part time work for instance than to temporary seasonal work. The issue has to be what arrangements were made, if any, pertaining to the employment by Mr Bengé of Mr Wiley and the conclusion I reach above are based on an analysis of the evidence available to me of the meeting on 12 June 2004.

[49] This evidence presumably is advanced to suggest that Mr Bengé's evidence is untrustworthy. But even if I was to accept that Mr Bengé's recollection was imperfect, so clearly is Mr Wiley's.

[50] In his statement of problem, he alleged that he had in fact been offered work earlier by Mr Bengé's son, Mr Colin Bengé, but at the investigation meeting he withdrew that suggestion. Mr Wiley also contended that this earlier discussion about employment with Mr Bengé's son had taken place in April of 2004 when it was clear that in fact the discussion certainly had not taken place then and probably had taken place in October of the previous year.

[51] In any event, nothing turns on that now because Mr Wiley withdrew that allegation at the investigation meeting. I refer to it now simply to point up that Mr Wiley's recollection of significant events (even on his own admission) is not perfect.

[52] Finally, I note, for the sake of completeness, that Mr Wiley produced a witness who confirmed his view that he had been offered a job in the 12 June discussion and confirmed many of the terms of that alleged offer. I accept without reservation that that evidence is genuine but I must observe that the source of the evidence is Mr Wiley himself in that his supporting witness is simply reporting what Mr Wiley himself told her. The fact that Mr Wiley should have told a friend about his conclusion that he had been offered work does not assist me to determine what actually happened at the meeting on 12 June 2004.

[53] Because I have reached the conclusion that there is no employment relationship between the parties it is unnecessary for me to make findings in respect of the telephone message which Mr Wiley says constitutes the unjustified dismissal.

[54] In my judgment, the Authority must focus on the events of the 12 June meeting and whether it is more or less likely that an employment relationship was formed there. As I have already said, I think it much more likely that all that meeting was about was the possibility of future employment and I am certainly not attracted by any of the elements of the alleged employment relationship which Mr Wiley suggests for the reasons that I advanced above.

Determination

[55] As I am not persuaded that any employment relationship was ever constituted between the parties (and by common consent the only occasion on which that relationship could have been constituted was the meeting on 12 June 2004), Mr Wiley's claim fails in its entirety.

Costs

[56] Costs are reserved.

James Crichton
Member of Employment Relations Authority