

Hughes to work six days on with two days off at the end and additional time off between milkings by agreement with Mr Hughes. Statutory holidays were days off unless specifically changed by agreement.

[4] Unfortunately the employment relationship did not last long as Mr and Mrs Hughes failed on numerous occasions to pay Mr Wilkie and Ms Hughes.

[5] In their statement of problem, lodged in the Employment Relations Authority Mr Wilkie and Ms Hughes claim they were unjustifiably constructively dismissed. They seek various remedies, a number of which, as explained at the investigation meeting, are outside the jurisdiction of the Employment Relations Authority.

[6] No statement in reply was received from the Respondent. In a memorandum dated 22 December 2008 the Respondent was advised that the matter had been set down and reminded that should it attend the investigation meeting it would require leave to reply or respond to Mr Wilkie and Ms Hughes' application. The Notice of Investigation Meeting sets out the consequences for the Respondent if it does not attend the investigation meeting.

[7] As at the scheduled commencement time for the 3 April 2009 investigation meeting, no representative of Mr and Mrs Hughes was present. I am satisfied Mr and Mrs Hughes received the notice of investigation meeting. The Authority attempted to contact the respondents who had previously been in contact with the Authority but no response was received.

[8] Mr and Mrs Hughes have not shown good cause for their failure to appear or be represented. After waiting for 30 minutes in the off chance that the respondents had been held up in traffic, I proceeded under clause 12 of Schedule 2 to the Employment Relations Act 2000 to hear and determine the matter as if Mr and Mrs Hughes had attended or been represented.

Constructive dismissal

[9] Mr Wilkie and Ms Hughes claim they were constructively dismissed after Mr and Mrs Hughes breached their employment agreement and failed to pay them

regularly each fortnight. They say they had no option but to look for alternative employment and leave the farm. At the investigation meeting Mr Wilkie and Ms Hughes acknowledged that all monies owed to them have since been paid and there are no outstanding wages.

[10] In coming to my conclusions under this heading I must determine whether the resignation was caused by a breach of duty on the part of the respondent. If I answer that question in the affirmative then I must be satisfied that the breach was sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Wilkie and Ms Hughes would resign. (*Auckland Electric Power Board v Auckland Provision District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA)).

[11] The basis for the applicants claim for constructive dismissal is that they left as a result of a breach of duty on the part of the employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

[12] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA)).

[13] By the time Mr Wilkie and Ms Hughes started looking for alternative employment Mr and Mrs Hughes had failed to pay their wages on time at all during the employment relationship. They were paid occasionally, but only after repeated verbal and written requests. Also, Mr Wilkie discovered that PAYE and Kiwisaver deductions had not been rendered to the IRD.

[14] Not paying wages as they fall due is repudiatory conduct on the part of an employer. In this case, it caused serious financial problems for the applicants as automatic bank payments were not honoured and penalty fees were charged.

[15] I am satisfied the respondents breached their duty to Mr Wilkie and Ms Hughes and that the breach was significant enough that a resignation was likely.

Remedies

[16] As already stated, Mr Wilkie and Ms Hughes have now received their wages in full. They left their employment on 2 September 2008. Mr Wilkie had secured alternative employment which he started on 9 September 2008, however Ms Hughes was not employed. There is no evidence however of the steps Ms Wilkie took to mitigate her loss. At the time of their dismissal Mr Wilkie and Mrs Hughes were earning \$1,130.50 gross per fortnight.

[17] I am satisfied the applicants accepted an offer of employment that they knew would not include Ms Hughes. They were unemployed for one week before the new employment situation started. They are to be reimbursed for the weeks' loss.

[18] As already stated the applicants were left in a financially difficult situation as a result of the breach by Mr and Mrs Hughes. I am satisfied they also suffered humiliation and distress as a result of the unjustified actions of their employer and are entitled to compensation for that suffering. In particular the evidence of Mr Wilkie is that Ms Hughes suffered greatly as a result of the stress of the situation. Mrs Hughes behaviour, on being repeatedly asked for the payment of the wages, became impossible to bear. Mrs Hughes yelled at Ms Hughes for no reason, and she was embarrassed at having to ask her brother's wife repeatedly to pay their wages.

[19] The employment relationship problem has caused a rift between the family members which is going to be difficult to bridge. Mr Wilkie told the Authority that he understands Mr and Mrs Hughes are not in the best financial situation themselves and that they have had to borrow against future milk cheques to pay them the outstanding wages. Also, I understand the IRD is currently working with Mr and Mrs Hughes with regard to the unpaid PAYE tax and Kiwisaver payments.

[20] Taking an overall view of the circumstances giving rise to this personal grievance an award of \$5,000 is appropriate.

[21] I am required pursuant to section 124 of the Employment Relations Act to take into account the extent to which the actions of the employees have contributed

towards the situation that gave rise to the personal grievance and if the actions so require, for the remedies to be reduced accordingly.

[22] I am satisfied that neither of the applicants have contributed in any way to the failure of the respondents to pay wages as they fell due.

Orders

Mr and Mrs Hughes are ordered to pay Mr Wilkie and Ms Hughes the sum of \$1,130.50 gross pursuant to section 123(1)(b) of the Act for lost wages.

Mr and Mrs Hughes are ordered to pay Mr Wilkie and Ms Hughes the sum of \$5,000 pursuant to section 123(1)(c)(i) of the Act by way of compensation for hurt, humiliation and distress.

The applicants are also entitled to be reimbursed for the costs associated with lodging this application in the Employment Relations Authority. Mr and Mrs Hughes are ordered to pay disbursements to Mr Wilkie and Ms Hughes in the sum of \$70.00.

Vicki Campbell
Member of Employment Relations Authority