

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Alec Hutchings (Applicant)

AND Graham and Karianne Wills trading as Kohunu Farm Partnership
(Respondents)

REPRESENTATIVES John Peebles, Advocate for the Applicant
Michael Smith, Counsel for the Respondents

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 27 June 2002

DATE OF DETERMINATION 26 July 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Mr Hutchings claims that he was unjustifiably dismissed from his employment at Kohunu Farm (“Kohunu”), effective from 26 October 2001. Mr Hutchings does not claim that his dismissal was of a summary nature, or on notice, but rather he claims that his departure from his employment at Kohunu was in effect, a constructive dismissal. Mr Hutchings seeks to be paid the actual loss of wages incurred because he did not work out the agreed term of the employment agreement. He also seeks to be awarded compensation, of a sum to be determined by the Authority, and costs.

Factual Background

In the Spring of 2000, Mr and Mrs Wills (“the Wills”) decided that they wanted some time away from their farm in order to pursue a different lifestyle. Mr Wills has a business degree and it seems that he was considering other possible options to farming at some time in the future. The Wills decided to employ a “relieving” farm manager for at least a year and possibly longer. Mr Hutchings was engaged in that role assisted by his wife, Susan Hutchings.

A written employment agreement was entered into, the parties being Graham & Karianne Wills and Alec and Susan Hutchings. The period of employment seems to have been for 18 months, although the agreement is somewhat ambiguous in that it had a “guaranteed” period of one year from 1 May 2001 to 1 May 2002, but with a provision that it could extend to 30 December 2002, but also may be terminated earlier than the latter date, with one months’ wages “to be paid after leaving.”

Mr Wills appears to be a very careful planner and matters were set out very clearly as to his expectations concerning the management of the farm in his absence. While Mr Hutchings was to be the manager, the employment agreement provided that he would be “reporting to and taking directions

from supervisor, Mark Spencer.” Mr Spencer had previously owned part of the farm so had some knowledge of its characteristics. Also, Mr Brian Wills, Graham Wills’ father, who had farmed the property for many years, prior to his son taking over, was, as Graham Wills put it, “to be my eyes regarding pasture and stock conditions and give practical advice to Alec,” as well as doing some general farm work from time to time.

It was also the role of Mr Spencer to pay the farm accounts and ensure that the farm was progressing to expectations. He was to report to Mr Graham Wills on a monthly basis. A shepherd, Mr Glen Robinson, was also employed to assist Mr Hutchings. Mr Wills says that he also “spent hours with Alec on the farm explaining my grazing techniques and rotations of stock.” Mr Wills also left written instructions as to how the grazing of stock should be managed over the next year. Subsequently, Mrs Hutchings compiled a computer generated and detailed grazing plan which set out where stock should be moved to at particular times and how long they should graze on each area of the farm. Mr Wills said that the grazing plan had been proven over a number of years taking into account the capacity of respective areas of the farm and seasonal fluctuations. I gained the impression that the plan had to be followed closely in order to ensure that both pasture and stock were managed to get the best from both. Mr Wills also made suitable arrangements for cheaper toll calls to Norway, arranged internet access and had a document scanner at the farm and in Norway. Mr Wills says that Mr Hutchings was to follow all policies and instructions as he had advised and that Mr Hutchings was to make phone contact at least every two weeks, or more frequently, if he was uncertain of anything.

Mr Hutchings says that while he was happy to take on the position he had two initial doubts. Firstly he was concerned that the Wills would return to the farm earlier than planned, and secondly: “That there were too many people at the top of the ladder to answer to when ever any seasonal variation to the grazing plan was deemed to be necessary.”

12 May to 2 August 2001

The Wills left for Norway on 12 May 2001 and everyone at that time appeared to quite satisfied that the arrangements that had been put in place were appropriate.

However, Mr Wills became concerned, as six weeks went by without any phone calls from Mr Hutchings. Mr Wills said that he had to initiate the first phone contact. Mr Wills says that he was concerned about this early lack of telephone contact as he expected that Mr Hutchings would have initially had numerous questions as to the overall farm management techniques that he had left in place. On the other hand, Mr Hutchings made some contact by e-mail and he says that he did not want to bother Mr Wills unnecessarily as he felt that everything was going along fine. Mr Hutchings also says that he had built up a good relationship with Brian Wills and Mark Spencer and that they were able to assist him with any queries that he had.

However, the evidence of Mr Brian Wills was that as at 16 June 2001, he had some concerns about how Mr Hutchings was implementing the grazing plan for the farm. Mr Wills said that: “I had a tactful discussion with Alec as to how Graham wanted the country grazed with the cows and was promptly told “I don’t need your explanations. I know all about management.” Nonetheless, Mr Wills says that he made some suggestions about what should be done in regard to grazing arrangements. It was the further evidence of Mr Wills, that in July there were clear indications of departures from the grazing plan.

Mr Hutchings says that he spoke to Mr Graham Wills on the phone about five weeks after the Wills had left the farm. He said that: “I found his manner abrupt and his questioning of my actions offensive. He did not appear to listen to any suggestions I had to make and was direct in authorising stock movements

without being able to view the stock or feed or realistically evaluate the effects of the weather and the exceptionally harsh winter.”

An inspection of the e-mail communications between Mr Hutchings and Mr Wills shows that while there was a very directive approach being taken by Mr Wills in regard to how Mr Hutchings should be managing stock and pasture, an e-mail dated 23 July 2001 concludes with Mr Wills saying: “We hope you don’t take this criticism too negatively, but I think it is important these points are raised sooner rather than later. Our hopes and expectations of this letter is more emphasis on forward planning and understanding of the whole operation. In my book, that’s what management is. If in any doubt about anything, call me.”

However, by 28 July 2001, on the basis of a report from Mr Spencer and discussions with his father, Mr Wills had an entirely different view and came to the conclusion that a crisis was looming in regard to the management of the bull blocks on the farm and the associated future feeding requirements for the bulls. Mr Wills said that: “This combined with the ongoing communication problems we were having, made me decide I needed to go home immediately to get these issues resolved.” Mr Wills left Norway for New Zealand on 30 July and arrived at the farm on 2 August 2001. Until the latter date, the Hutchings were unaware that Mr Wills intended to, or had, returned home.

3 August to 16 August 2001

On 3 August a meeting took place and Mr Wills outlined his concerns. The perspective of Mr and Mrs Hutchings was that “the meeting felt like an interrogation.” It seems that there were continuing discussions about how the farm should be managed. Mr Wills says that: “The conclusions we reached from these meetings and my observations were:

- (a) Neither Alec nor I was confident Alec would be able to run the farm to my policies over the summer months;
- (b) Alec does not want to communicate with me in Norway, he stated he would rather communicate with a supervisor on the farm.”

While the overall detail of exactly what was being discussed between the parties is a little unclear, what is certain is that Mr Wills decided that he would return home to manage the farm for the summer period beginning 1 December 2001. In the meantime, Mr Brian Wills was to replace Mr Spencer as the supervisor as the latter could no longer be afforded. Graham Wills would issue his instructions for Mr Hutchings via Brian Wills and those instructions would be more detailed and also in smaller portions. This put matters in a quite different perspective for Mr and Mrs Hutchings as now the agreement that they had entered into at the beginning of the relationship, was, in their view, being reflected in a different light and they were unhappy about that.

A meeting took place on 12 August and it seems that there were some straight talking. Mr and Mrs Hutchings say that they lost trust and confidence in the Wills but were still prepared to work at maintaining an amicable relationship. In the event, it was agreed that a reasonable solution would be for the parties to enter into a new employment agreement that would reflect the changes that were to take place and Mrs Hutchings duly put together a draft document.

The preface or introduction to the document states that:

“This document replaces the former agreement that has been restructured by mutual agreement to honour the previous commitment and maintain an amicable relationship for the following reasons: Graham has concerns about Alec’s ability to manage during the summer period. Alec has conceded that Graham’s conviction to his grazing management systems is so intent that it may be difficult to meet his requirements.

The parties agree that no disputes will be lodged with the Employment Court based on the former agreement.”

The draft agreement went on to set out the period of employment as being from 1 August 2001 to 30 June 2002.

Mr Wills took a copy of the draft agreement back to Norway with him to discuss with Mrs Wills. Mr Wills says that he returned to Norway on 16 August 2001, happy that the farm would now be operating to his programme and that they were going to make the most of the remaining time in Norway.

17 August to 26 October 2001

It transpired that upon further consideration, neither party were happy with the proposed new agreement and hence it never came into force. Nonetheless, Mr and Mrs Hutchings say that the following weeks went by quite smoothly and that Brian Wills visited about twice each week with his written instructions and amicable discussion occurred.

However, Brian Wills had a quite different perspective of things and said that:

“Eventually I had to report to Graham that despite my efforts I felt I was achieving little. Things were proceeding much as before, jobs were not being done to my instruction and after 49 years of farming and just recently retired I did not really need this. I had constantly kept my concerns to Graham very limited as I didn’t want to disrupt his Norwegian experience. However it had become obvious that the farm could not continue to achieve targets with Alec’s attitude and input.”

Upon hearing of his father’s concerns, Graham Wills wrote to Mr Hutchings on 10 September 2001, expressing his displeasure about the turn of events, including his unhappiness about the stock management and the lack of progress in regard to maintenance work. Mr Wills conveyed that:

“To summarise, there needs to be more happening and happening on time! I have put in place weekly supervision yet even this does not seem to be enough. I am left wondering what else I can do to achieve the performance that I described at the outset is required. As I have said before, this farm is supporting a high debt servicing cost, a high labour cost, plus we want a return on investment and progress made on maintenance.

I have reluctantly come to the conclusion, that to achieve this the farm needs daily supervision. Obviously I can not afford this and never thought it would be necessary. However, it seems it is, so we will be returning home by the end of the month.

We are extremely disappointed that our Norwegian experience has been cut short. However, we have always taken the attitude that we are in farming to make money, not for the lifestyle, so the farm must come first.

We will work out the details of how the new arrangement will work when we return.”

The Wills duly returned from Norway on or about 30 September 2001. A meeting took place at the farm on 3 October 2001. There was some discussion about what was to occur now that the Wills were back, including the possible redundancy of the shepherds position, housing arrangements and the financial position of the business. The evidence shows that there was some tension between the parties. This appears to have been anticipated as both had sought legal advice. Mr Wills says that the attitude of Mr and Mrs Hutchings was “very aggressive and uncooperative. They told us they had mediation booked for mid-October and refused to talk about the job.” In the event, there does not appear to have been anything conclusive arrived at that day.

A further, and apparently tense meeting, took place on 4 October. The discussion appears to have centered around the perceived shortcomings of Mr Hutching’s management of the farm and some personal attacks all round seemed to have occurred. The evidence of Mr Wills is that Mr Hutchings concluded the meeting by stating: “I do not want to work for you any more but I am not leaving empty handed.” However, Mr Wills says that he was still convinced that Mr Hutchings could do the job if he chose to apply himself.

The next day, Mr Wills clarified some matters as to the continued employment of Mr and Mrs Hutchings, by way of a written summary. According to the summary, Mr Hutchings would continue to manage the farm but now under the supervision of Graham Wills and that he would also be available for major work that may occur on the farm. It is unclear just how Mr Wills intended to occupy himself on a day to day basis. However, his overall evidence was that he was also uncertain as to whether Mr Hutchings intended to continue to work for him.

Furthermore, Mr Wills says that: “After considering Alec’s responses at the 4 October meeting we concluded that Alec’s main problem with following instructions was his arrogant attitude. Given this attitude we felt that encouragement and constructive criticism were no longer an option so we decided that the only option was to issue a formal warning. We hoped this would force Alec to take my instructions seriously. I continued to give Alec weekly instructions as Brian had been doing.”

A written warning was issued to Mr Hutchings on 8 October 2001. Curiously, while the warning is addressed to both Mr and Mrs Hutchings, and there was a provision for both of them to sign that they had received it, it seems that it was directed solely at Mr Hutchings as there was no criticism of Mrs Hutchings.

The warning concludes:

“As you have refused to give me any explanations and from what I have seen, our view that we expressed in the letter of 10 September still stands. That is: Obviously there has been very poor time management, a low work rate or simply less hours done than I was expecting and paying for. Or perhaps a combination of all three.

The conclusion we have reached from this meeting is that you have to give more attention to written instructions and follow them accurately and on time. This is critical for the business to meet its targets and achieve budget.

This is the second meeting we have had regarding instructions not being followed. We cannot afford to have any reoccurrence of these problems.

This is a written warning in regard to your performance, particularly your ability to follow instructions and manage/prioritise tasks. You are informed that a repetition of this poor performance may lead to another warning and a second repetition to termination.”

The evidence of Mr and Mrs Hutchings was that they did not know that this was a warning and that Mr Hutchings unwittingly signed that he had received it. While I find that the construction and delivery of the warning was somewhat less than satisfactory, I fail to see how Mr Hutchings could not have fully understood that he was receiving a warning and why he was receiving it

The parties attended a mediation meeting on 18 October but nothing appears to have been achieved by that. Mr Hutchings injured his eye and was on sick leave from 18 October but Mrs Hutchings continued to assist with some farm work in the period 20 – 24 October. She says that during this time she conceded and agreed that “Alec would not be able to work amicably with Graham.”

Indeed, the Hutchings concluded that they would leave and on 24 October wrote out their resignation which was delivered to the Wills the next day. The resignation concludes:

“In order to move on with our lives and leave this unpleasant experience behind us, we shall be finishing up on Friday 26th Oct and moving out by the end of the month.”

The Matters for Determination

Mr Hutchings claims that his resignation was in effect, a constructive dismissal. He says that he believes that he was forced out of his position of employment and therefore effectively dismissed. He further says that he was accused of incompetence and was issued with an unjustified and unacceptable warning and that his managerial role was taken from him.

Therefore the primary matter for determination is whether the resignation of Mr Hutchings should simply be seen as just that, or was there indeed a constructive dismissal as alleged. In deciding that question, the first step is to identify just what the term “constructive dismissal” means in legal terms.

The Legal Framework

There is considerable precedent in the area of constructive dismissal, but for the purposes of this case, there are two cases that have particular application. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] ACJ 963*, the Court of Appeal set out the following three, but non-exhaustive, categories that may constitute a constructive dismissal:

- (a) Where an employer gives a worker an option of resigning or being dismissed.
- (b) Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign.
- (c) Where a breach of duty by the employer leads an employee to resign.

It seems that Mr Hutchings is claiming that the second and/or the third category applies.

That then leads us to a later Court of Appeal decision, *Auckland Electric Powerboard v Auckland Provincial District Local Authorities Officers IUOW [1994] 1 ERNZ 168* at p.172, where the Court had this to say:

“In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate..... But in our view it can now be safely said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in *Woods v W M Car Services (Peterborough) Ltd* quoted in the *Auckland Shop Employees* case. As the Judge put it:

“In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy the relationship of confidence between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it

I then ask: Was the resignation of Mr Hutchings caused by a breach of duty on the part of his employer, and/or was the employer’s conduct, as a whole, such that Mr Hutchings could not be expected to put up with it ?

That then takes me to an examination of the employer’s conduct towards Mr Hutchings, and in order to do that, I have summarised the key events as follows:

1. Mr Hutchings was employed as a relieving farm manager under the supervision of firstly, Mr Spencer, and then Mr Brian Wills, but always, under the final and absolute control of Mr Graham Wills. Graham Wills had such concerns about the management performance of Mr

Hutchings, that in early August 2001, he returned from Norway to put things to rights. Upon returning to Norway on 16 August, the parties appeared, at least on the surface, to be back on track again, albeit it is clear there was still some unfinished business for all concerned.

2. By 10 September 2001, such was the view of both Brian and Graham Wills, as to the performance of Mr Hutchings, and the overall consequences for the farm as a business, that Mr and Mrs Wills and their family returned from Norway.
3. Several terse meetings took place between the parties. The general subject matter of those meetings was the performance of Mr Hutchings and his ability or inability to manage the farm as required by Graham Wills. There is a common enough view by each party as to the what happened at those meetings, but there is a quite different perspective of what the true agenda was. From the perspective of the Wills, they were unhappy that they had been required to give up their plans to be away for at least a year because of the lack of acceptable performance on the part of Mr Hutchings. On the other hand, the perspective of Mr and Mrs Hutchings was that Mr Wills was being unreasonable in regard to his requirements and that Mr Hutchings was quite capable of managing the farm and that he should have been left to do so.
4. Mr Wills was dissatisfied, not only with the performance of Mr Hutchings but also with his attitude and the lack of acknowledgement on the part of Mr Hutchings, that he was in any way at fault, and that things would improve. As a result, Mr Hutchings was issued with a written warning,
5. At that point, and probably earlier, both parties had probably lost trust and confidence in each other and the relationship was more probably than not, irretrievable, despite the evidence given by Mr Wills to the effect that he believed that Mr Hutchings was capable of making things work if he put his mind to it.

While it could be said that Mr Wills was an exacting and forceful employer, with high expectations as to how the farm should be managed, he was entitled to have those expectations. As he said, the farm is a business, and has to be run effectively and efficiently in order for it to be viable. Mr Wills made it clear to Mr Hutchings what his expectations were and as far as he was concerned, Mr Hutchings failed to meet the necessary requirements. There is no doubt that Mr Hutchings had a quite different view as to how the farm should be managed, and he was prepared to defend his position vigorously. Perhaps his methods may have been acceptable to another employer, but that is not the point. The requirements of Mr Wills were for the farm to be managed as he would have done himself and I find that there was nothing unfair or unreasonable about that. In any event, it is not for the Authority to be the judge of what is or what is not reasonable farming practice, that is the role of the employer. It only falls to the Authority to examine the fairness and reasonableness of the employer's actions towards Mr Hutchings and whether or not those actions led to a breach of Mr Hutchings employment contract, to the extent that his resignation was converted into a constructive dismissal, or alternatively, the conduct of Mr Wills, as a whole, was such that Mr Hutchings could not be expected to put up with it.

The main thrust of Mr Hutchings argument that his resignation was a constructive dismissal seems to be, that because Mr Wills came home to supervise the farm himself, the result of that was that Mr Hutchings was "demoted" and would no longer have his role as a farm manager and hence his employment agreement was so substantially changed, that the original agreement had been effectively repudiated.

I do not find that to be so. Had Mr Hutchings chosen to accept the requirements of Mr Wills, it seems to me he could have continued with the day to day management of the farm whilst under the supervision of Mr Wills. There was no reduction in income or other conditions of employment,

albeit I accept that the Wills took back the overall control of day to day expenditure, but that was not unreasonable given the overall circumstances.

The Wills had a clear view of how their farm should be managed and they were entitled to have it managed in the manner that they required, providing that Mr Hutchings was not treated unfairly or unreasonably in the process and that his employment agreement remained substantially as agreed. Perhaps one can understand that Mr Hutchings may have felt that he was losing some autonomy because of the return of Mr Wills, but that overlooks the fact that Mr Hutchings was at all times during his employment at Kohunu Farm, under the supervision of someone, including final accountability to Mr Wills in Norway, so it can hardly be said that being under continuing supervision was anything new.

It seems to me, that unfortunately, part of the problem here was two strong-willed and independent individuals who had their own views of how the farm should be managed. I think that Mr Peebles, in giving his closing submissions, may have encapsulated the situation when he said, that with the return of Mr Wills, Mr Hutchings was no longer the “top dog” on the farm and it seems that this was something that Mr Hutchings was unable to accept. Furthermore, Mr Hutchings does not appear to have accepted that his farm management was unsatisfactory. Had it not been so, the Wills would undoubtedly have happily remained in Norway and left him to manage the farm as originally agreed.

Determination of the Authority

I find that the resignation of Mr Hutchings was not a constructive dismissal, hence he does not have a personal grievance and the remedies that he seeks are not available to him.

Costs

Costs are reserved and I would ask that the parties attempt to reach an agreement upon that issue if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, Mr and Mrs Wills are invited to file submissions with the Authority, and copy to Mr Hutchings, within 14 days of the date of this determination. Mr Hutchings will have a further 14 days to respond to the Authority and copy to Mr and Mrs Wills.

Ken Anderson
Member
Employment Relations Authority