

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 30/08
5089245

BETWEEN RICHARD BRUCE BARR
 Applicant

AND P AND L BYRNE FARMING
 PARTNERSHIP
 Respondent

Member of Authority: Helen Doyle

Representatives: James Firth, Advocate for Applicant
 Rachelle Lamb, Counsel for Respondent

Investigation Meeting: 7 December 2007 at Timaru

Determination: 31 March 2008

DETERMINATION OF THE AUTHORITY

Identity of respondent

[1] It was agreed with Mr Firth and Ms Lamb during a directions conference with the Authority on 5 October 2007 that the respondent originally cited as Paul Byrne should be P and L Byrne Farming Partnership.

Employment relationship problem

[2] The applicant, Richard Barr, says that he was a person intending to work for P and L Byrne Farming Partnership but his employment did not go ahead. Mr Barr says that he was unjustifiably dismissed on 14 May 2007 before he was to commence work on 1 June 2007.

[3] Mr Barr originally wanted his problem to be resolved by, amongst other remedies, an order for reinstatement. That remedy is no longer sought by Mr Barr. Mr Barr seeks recovery of lost wages for the period from 1 to 11 June 2007 at which date he obtained new employment, reimbursement of truck hire and fuel and assistance to move his family to Temuka in a sum between \$350 - 550, reimbursement

of a living assistance loan from his father-in-law in the sum of \$400 and new school uniforms for his children between \$300 and \$350. Mr Barr also seeks compensation for humiliation and loss of dignity and injury to feelings.

[4] The respondent, P and L Byrne Farming Partnership (the Partnership) say that Mr Barr was not a person intending to work because it was never intended that he would be employed until he had signed an employment agreement. The Partnership say that because of events on 8 and 9 May 2007 and Mr Barr's conduct at that time, an employment agreement was never presented to him for signature.

Issues

[5] The Authority has to determine the following issues:

- The first issue for the Authority to determine is whether an employment agreement was formed between Mr Barr and the Partnership. Mr Barr is only entitled to bring a personal grievance if he was an employee within the definition of *employee* in the Employment Relations Act 2000. The meaning of *employee* in s.6(1)(b)(ii) of the Act includes a person intending to work and *person intending to work* is defined in s.5 of the Act as *means a person who has been offered, and accepted, work as an employee.*
- If it is found that the Partnership offered work to Mr Barr which he accepted and a binding employment agreement was formed, then the next issue for the Authority is whether Mr Barr was unjustifiably dismissed from his employment.
- If it is found that Mr Barr was unjustifiably dismissed then the Authority will need to consider remedies and whether there was contribution to the circumstances that gave rise to the personal grievance by Mr Barr.

Was there an employment agreement formed between Mr Barr and the Partnership?

[6] It is helpful to set out briefly Mr Barr's employment situation when he was first approached by Mr Byrne in or about mid April 2007. Whether the parties intended to enter into an employment agreement is to be determined objectively and in considering whether the negotiating parties actually formed an employment agreement, it is permissible to look to the background circumstances from which their "agreement" arose – *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433.

[7] Mr Barr was employed for the 2006/2007 dairy season as a farmhand/milker by a sharemilker Roland Linde. Mr Barr's wife, Suzanne, was also employed by Mr Linde as a relief milker and filled in without additional expense to Mr Linde for Mr Barr when he was sick or otherwise not at work.

[8] Mr Linde was a sharemilker to Murphy Farms Limited on a farm at Glenavy. Murphy Farms Limited owns a number of dairy farms in the Waimate area.

[9] Mr Barr lived in a farmhouse which was provided as part of his employment agreement with Mr Linde. It was a farmhouse situated on the farm owned by Murphy Farms Limited and on which Mr Linde was a sharemilker. The farmhouse is known as 186 Glenavy-Tawai Road, Waimate but I shall refer to it as House 186 from hereon.

[10] Mr Linde initially talked to Mr Barr in or about February or March 2007 about his intention to move to another area. He asked the Barrs to follow and continue to work for him. Mr Barr said that his family had settled into the Waimate-Glenavy area and he wanted his children to remain settled at school in the area so he decided to stay.

[11] Mr Barr was uncertain what would happen when Mr Linde moved. He did not know whether Murphy Farms Limited was going to put a shareholder in to replace Mr Linde or simply run the farm with a farm manager and staff employed by Murphy Farms Limited. Mr Barr did not want to become part of the pooled staff because that involved shifting about the various farms and working with different managers.

[12] In or about March 2007 Mr and Mrs Byrne were offered a position of lower order sharemilkers by Murphy Farms Limited. Mr Byrne said that about this time he

was approached by Mr Linde and advised that Mr Barr would like to stay on the farm property if a position was available. Mr Byrne said that Mr Linde advised him that Mr Barr was a good worker. He did have some concerns with Mr Barr driving too fast and said that he should put some restrictions in place to deal with this.

First meeting

[13] It was common ground that in or about mid April 2007 Mr Byrne went to House 186 to talk to Mr and Mrs Barr about positions that would be available on the farm. The discussion concerning Mrs Barr will be the subject of a separate determination.

[14] There is no real dispute about what was discussed during the first meeting. There was some difference in the evidence about the duration of the meeting, but I do not find that to be material.

[15] Mr Byrne hadn't met Mr and Mrs Barr before this meeting. Mr Byrne explained to them what his requirements were for a full time position of farm hand/milker as well as a relief milking job for Mrs Barr. Mr Byrne discussed the roster he intended to operate on the farm, being 11 days on and 3 off.

[16] During the meeting Mr Barr explained to Mr Byrne that he wanted to stay in the area if possible for the children's education. Mr Byrne explained that he and his wife had four children who would live with them on the farm at home.

[17] Mr Barr talked to Mr Byrne about two offers he had from other employers. He explained to Mr Byrne that one was a managerial position which he was not interested in, and he also referred to another offer.

[18] Towards the end of the discussion Mr Barr asked Mr Byrne *what he was offering* and advised Mr Byrne that he did not consider the \$28,000 pa that he received from Mr Linde was enough.

[19] Mr Byrne told Mr Barr that he would pay \$30,000 pa for the full time position. Mr Barr recalls Mr Byrne advising that the budget was tight. There was no discussion about the house on the property which Mr and Mrs Barr and their children resided in as part of the employment agreement with Mr Linde. I accept that Mr Barr simply accepted that the house would be included in any package of employment.

[20] Mr Byrne clarified toward the end of the meeting that the job offer for Mr Barr was \$30,000 pa with Mrs Barr job sharing if for some reason Mr Barr was unable to work.

[21] Mr Byrne attached to his statement in reply some notes that he had taken with respect to his recollection of the discussion at the first meeting. The evidence that I heard is essentially consistent with those notes.

[22] Mr Byrne said that the discussion ended on the basis that Mr Barr would get back to him with his intentions. Mr Barr was led to believe that Mr Byrne also had some matters to clarify. I do not find that there was discussion during that meeting about a written employment agreement.

Second meeting

[23] Mr Byrne said that about one week later he had not heard from Mr Barr and needed to know what he intended to do. He met up with Mr Barr on a paddock on the farm where he was working with Mr Linde. I find that Mr Barr made it clear to Mr Byrne that the other offers were not what he wanted and he had turned them down and was keen to accept the job which Mr Byrne had talked about at the first meeting.

[24] It is common ground that Mr Barr and Mr Byrne then shook hands.

[25] Mr Byrne said he would drop a contract off for Mr Barr to read, discuss and sign.

[26] Mr Linde was working with Mr Barr at the time of this discussion but he was some distance away and did not overhear the discussion between Mr Byrne and Mr Barr. Mr Linde said that Mr Barr told him after the discussion that he had taken the position with Mr Byrne and was pleased that the family would be staying put.

[27] Mr Linde also said that he had a conversation with Mr Byrne who confirmed that he had taken Mr Barr on.

Determination as to whether Mr Barr was a person intending to work

[28] It was recognised in *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424 at p.432 that

in employment law there is an important distinction between the formation of the employment contract itself and the formation or articulation of its terms. The employment contract can be and often is formed in an informal way by conduct, or words of agreement and conduct. There is no requirement for writing at the formation stage

...

[29] I have considered the entire course of dealings between Mr Byrne and Mr Barr. Mr Byrne approached Mr Barr in mid April 2007, having been given a fairly positive reference from Mr Linde about Mr Barr and with the knowledge that Mr Barr wanted to stay on the farm if possible. The position discussed with Mr Barr and then offered to him was the same in nature to that which he had been employed by Mr Linde to carry out on the farm.

[30] Mr Byrne's evidence at the Authority's investigation meeting was that what took place during the two meetings with Mr Barr was a process of negotiation which had not reached the stage of an intention to offer employment to Mr Barr. Mr Barr's evidence was that the offer of employment was made by Mr Byrne at the first meeting in April and that he turned down the other offers of employment and accepted Mr Byrne's offer.

[31] Mr Barr was satisfied with the salary discussed by Mr Byrne of \$30,000. Mr Byrne's wife, Leanne Byrne, said that she would not have signed an employment agreement before she had met Mr Barr or any intended employee. I do not find there was any mention of any offer of employment being conditional on Mrs Byrne meeting Mr Barr at the first or second meeting.

[32] I find that the evidence about the course of dealings between the parties support that Mr Byrne offered Mr Barr employment with the Partnership for the 2007/2008 season at the first meeting in mid April 2007. The offer was that Mr Barr was to be paid \$30,000 pa and that Mrs Barr would fill in on a job share basis if there were occasions when Mr Barr could not work, at no additional cost. Mr Barr's employment with Mr Linde was to cease on 31 May 2007 and Mr Barr understood he would commence with Mr Byrne on 1 June 2007 for the 2007/2008 season. The dealings between the parties have to be considered in light of the fact that Mr Barr had already been working on the farm for Mr Linde. This was known by Mr Byrne and therefore a more detailed discussion about the nature of the role was not required.

[33] On the basis of the offer of employment, Mr Barr took steps to reject other opportunities that he had and when approached after the first meeting by Mr Byrne in

the paddock, it was clear that Mr Barr wanted to accept Mr Byrne's offer. Mr Barr and Mr Byrne shook hands and I find that Mr Barr did accept the offer of employment with the Partnership at the second meeting in the paddock. Mr Byrne said he would get an employment agreement to Mr Barr to look at, discuss and sign.

[34] I have taken into account Mr Linde's evidence, which I accept, that he was advised by both Mr Barr and Mr Byrne about the agreement to employ Mr Barr meaning Mr Barr could stay on the farm. I do not find that the evidence supports that the offer of employment made to Mr Barr was conditional on an employment agreement being signed. I am satisfied considering the background circumstances objectively that the parties intended to be bound by an employment agreement after they shook hands in the paddock.

[35] There was no discussion about House 186. Mr Byrne accepted that any issue about House 186 would be limited to whether Mr Barr paid rent or whether tax was calculated on the value of the house. The fact that not all terms of the agreement were not talked about at the time that the offer was settled does not mean that the parties had not formed a binding employment agreement. I find that they had.

[36] I find that Mr Barr was a person intending to work for the Partnership in terms of s.5 of the Employment Relations Act 2000.

Events of 8 and 9 May 2007

[37] On the evening of 8 May 2007 Mr Barr had an argument with his wife at home. He left the house and went to the Glenavy Hotel which was about 3kms down the road. Mr Barr became intoxicated over the evening and when friends at the hotel encouraged him to leave the hotel and return home, he insisted on driving.

[38] Mr Linde was at the hotel and followed Mr Barr home to make sure that he was all right. When Mr Barr arrived at the house he ended up having another argument with Mrs Barr and the friends who had returned from the hotel. It was decided that Mrs Barr should leave the house with the children and she spent the night at a friend's home. Mr Barr fell asleep on the sofa. At some point someone telephoned the Police to advise them about the situation. The Police asked whether there was a firearm in House 186 and the Police were advised that there was. Whilst Mr Barr was asleep on the sofa the Police attended at House 186 with the Armed Offenders Squad.

[39] On the morning of 9 May 2007 Mr Barr was charged with unlawful possession of a firearm which was unlicensed and he was bailed to appear at the Oamaru District Court on 30 May 2007. Mr Barr was unaware that he was facing any other charges at the time that he was bailed.

[40] Mr Barr said that prior to the incident he had stopped taking his usual medication for depression because he got side effects from the pills. Mr Barr said that whilst not excusing his behaviour, the fact that he had stopped taking the medication brought on the depression and the drinking binge contributed to his conduct and the arguments that he had.

[41] After the incident and the Court appearance Mr and Mrs Barr spoke to Mr Linde about that matter and the charge. Mr Linde put Mr Barr on sick leave until he could obtain a medical certificate that he was back on his anti-depressant medication and had the right dosage. Mr Barr attended his doctor and obtained a certificate after a few days and returned to work for Mr Linde for the balance of the 2006/2007 dairy season.

[42] Mr Byrne had heard about the events of 8 and 9 May 2007 from Mrs Murphy of Murphy Farms Limited. Mrs Murphy had been telephoned by Mr Linde who had reported the situation and described Mr Barr's state on 8 May 2007 as being *out of control*.

[43] Mr Byrne discussed the situation with Mrs Byrne and they decided they were not willing to sign an employment agreement with Mr Barr. Mr and Mrs Byrne said in their evidence that they had four children and did not want to expose them to that sort of thing with guns and alcohol. Mr and Mrs Byrne would be residing in a house on the farm about 400 metres from where Mr Barr and his family would be living.

14 May 2007

[44] On 14 May 2007 Mr Byrne called at the Barrs' home. Mr Byrne produced a handwritten note of the conversation that he had that day with Mr and Mrs Barr. Mr Barr accepted that the note which was provided to the Authority accurately set out the nature of the discussion.

[45] Mr Byrne told Mr Barr that he was there to see him about *our job offer*. Mr Byrne advised Mr Barr that he had the contracts at home but due to the incident

the other night he was not willing to sign them as he did not want to subject his family to that environment.

[46] Mr Barr advise Mr Byrne that he had a doctor's appointment to sort out his medication for depression and that he had been with Mrs Barr for 15 years and this was the first time he had erupted like that during the period. Mr Barr told Mr Byrne that he could not understand what had caused him to act in that way. Mr Barr explained about the firearm, the fact that he did not have a licence and he had been arrested. Mr Byrne advised Mr Barr that he was not willing to sign an employment agreement with him which meant he was unable to employ him and that Mr Barr's employment on the farm finished with the completion of Mr Linde's contract.

[47] I find that as a result of that conversation, Mr Barr's employment with the Partnership did not commence and he was dismissed.

Following the dismissal

[48] Mr Barr wrote to Mr Byrne on 15 May 2007 and asked that Mr Byrne reinstate his position or pay out the agreed contract amount. There was no reply to that letter and Mr Barr then instructed Mr Firth.

[49] On 30 May 2007 Mr Barr attended at the Oamaru District Court and was handed two more charges by the Police. One was for driving with excess breath alcohol and the other for possession of cannabis seeds. Both of the further charges arose from the events of 8 May 2007 and the subsequent attendance at House 186 by the Police. Mr Barr pleaded guilty to the drink driving charge but said that he had no knowledge of the cannabis seeds which were found in a film canister at the back of a cupboard at the time of the search for the rifle and bullets. Mr Barr said that the duty solicitor explained to him what being in possession meant. He was advised, he said, by the duty solicitor that the cannabis seeds were found on premises which he occupied. On that basis Mr Barr plead guilty to both that charge and the firearm charge.

[50] There was another visit by Mr Byrne to Mr Barr's house on 31 May 2007. Mr Barr did not want to talk to Mr Byrne and swore at him. Mr Byrne talked to Mrs Barr about her situation but did refer to issues with Mr Barr with drugs.

Was the dismissal justified?

[51] The test of justification in s.103A of the Employment Relations Act 2000 requires the Authority to determine whether the dismissal was justified on an objective basis by considering whether it was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[52] When Mr Byrne talked to Mr Barr on 14 May 2007 his notes record that he referred to the incident the other night and not wanting his family in that environment. Mr Barr only knew in a general way what the concerns were and certainly did not know what the consequences would be before Mr Byrne attended at the house.

[53] Mr Byrne was certainly justified in going to talk to Mr Barr about the matter. Mr and Mrs Byrne were understandably concerned about what they had heard had taken place from Mrs Murphy with the armed offenders' squad being called to the house and the discovery of a firearm which was unlicensed. Mr and Mrs Byrne would be living close to the Barr house on the farm with their children. The Byrnes had also talked to the wider community and Mr Linde about the incident. A fair and reasonable employer would have given Mr Barr some warning that there was to be a meeting, what was to be discussed during the meeting and any consequences in terms of employment.

[54] A fair and reasonable employer would also have wanted to know Mr Barr's side of the story before making a decision about his employment. It is clear to me that Mr and Mrs Byrne had made up their minds that they were going to dismiss Mr Barr prior to Mr Byrne having the discussion with him on 14 May 2007.

[55] Mr Barr was not therefore able to give a real explanation for his conduct that was capable of being properly considered before a decision was made. A fair and reasonable employer would have approached the meeting with an open mind. Mr Barr did explain about his medication and he said that he had not previously behaved that way in his relationship. The notes taken by Mr Byrne of the conversation that day reflect that Mr Barr was open and honest about what he had done. When Mr Byrne talked about not wanting to subject his family to that environment Mr Barr replied that he did not want to either. Mr Byrne confirmed again at the end of the conversation that the Partnership was not going to employ Mr Barr and Mr Barr's employment on the farm would end on 31 May 2007.

[56] I find that there was a lack of fair process in this case before Mr Barr was dismissed. Mr Barr should have had a proper opportunity to explain his behaviour and have that explanation considered.

[57] In terms of substantial justification for the dismissal, I accept Mr Firth's submission that Mr Barr's conduct on 8 and 9 May 2007 was essentially misconduct away from work. In saying that, account does have to be taken to the fact that Mr Barr lived on the farm on which he worked. An employer would need to be satisfied that the misconduct impacted on Mr Barr's ability to perform his work or was such a significant breach of trust that it justified dismissal, notwithstanding that it was not misconduct during work hours at work.

[58] Mr Firth submitted that a fair and reasonable employer would have followed the same process that Mr Linde did of suspension until Mr Barr was able to produce a medical certificate that he was fit to work. Mr Linde had had an opportunity to build up a relationship of trust and confidence with Mr Barr as they had worked together over the 2006/7 season. Mr and Mrs Byrne had not had the opportunity to do so.

[59] A fair and reasonable employer would have wanted to be able to have trust and confidence in Mr Barr as a new employee, and these matters had arisen before the date of commencement of the employment. Mr Barr's conduct had been of concern to Mr and Mrs Byrne and there was clearly talk in the wider community and the Murphys had come to know of the matter. A fair and reasonable employer would have had regard to the fact that Mr Barr had stopped taking his anti-depression medication, that the firearm and bullets were in a locked cabinet and were not removed from the cabinet on the night of the incident, and it did not appear that Mr Barr had reacted like this on previous occasions. I do not find that a fair and reasonable employer would have dismissed Mr Barr in all the circumstances but would have considered other options such as a trial period to deal with the concerns.

[60] I conclude that the dismissal of Mr Barr on 14 May 2007 was unjustified, for the reasons I have set out, because it was not what a fair and reasonable employer would have done in the circumstances.

[61] The Partnership also relied on the other charges which were presented for the first time on 30 May 2007. These were the possession of cannabis seeds and the excess breath alcohol charge. I do not find that these matters formed part of the

reason for dismissal. They could not have because the Partnership had no knowledge of them as at 14 May 2007. Mr Barr would have had to have had an opportunity to explain the charge of possession of cannabis seeds notwithstanding the zero tolerance by Murphy Farms Limited to drugs on their farms.

[62] There would also have to be consideration as to whether Mr Barr could obtain a limited licence for part of the period of disqualification so that he could drive as a requirement for his job. I do not find that either of these matters would have meant it was inevitable that Mr Barr could not continue to work.

Remedies

Lost wages

[63] Mr Barr seeks lost wages from 1 June to 11 June 2007, a period of 11 days. Mr Barr was to have been paid a salary of \$30,000 per annum and would have worked an 11 day on/3 day off roster. In order to calculate the quantum of lost wages, I have arrived at a daily rate of pay of \$82.20 and then multiplied that by 11 to arrive at a gross amount of \$904.20.

Relocation costs, uniform and living expense allowance

[64] I have considered the claim for these amounts in terms of s.123(c)(ii) of the Employment Relations Act 2000 as the loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have expected to obtain if the personal grievance had not arisen.

[65] I find that a benefit of the employment agreement with the Partnership was that accommodation would be provided. When it was clear that the employment was not to continue, then Mr Barr was required to move out of the accommodation on the farm and incurred relocation costs in shifting to his new position. Mr Barr was required to shift his possessions and his family very quickly and under threat of a trespass order if he did not do so.

[66] In this case, I find that the cost incurred in moving was a loss sufficiently proximate to the personal grievance and able to be compensated. The costs were incurred in the hiring of a truck, paying someone to assist and paying for fuel to move to Temuka. It was not clear to me exactly how the amount claimed by Mr Barr of up

to \$550 was made up. In the circumstances, I have limited the loss to the sum of \$350 made up of \$100 towards fuel and the balance for hire and assistance.

[67] As I understand the evidence with respect to the living allowance, it was required because Mr Barr was not receiving any income up to 11 June 2007 and then there was a delay before he would receive his first pay from his new job. I am of the view that this loss has been adequately dealt with by an award of lost wages and I am not minded to make another award.

[68] I do not find the purchase of new school uniforms was a loss that was sufficiently proximate to the personal grievance so that the Partnership should bear responsibility for it and accordingly I make no award in that respect.

Compensation

[69] Mr Barr spoke of the distress to himself and the pressure the dismissal put his family under when he was required to find a new place of work and then to shift his family. Mr Barr was fortunate enough to secure new employment quickly. I accept that there was pressure and stress on him at the time of dismissal but this is not a case where there has been evidence to justify an award at the higher end.

[70] In all the circumstances, I am of the view that there should be an award for compensation in the sum of \$3,000.

Contribution

[71] I find that Mr Barr did contribute toward the circumstances that gave rise to the personal grievance by his actions. His behaviour gave the Partnership cause for concern about his suitability before he had commenced his employment.

[72] In all the circumstances, I assess the level of that contribution at 25% and the above remedies are to be reduced by that amount.

[73] Applying the contribution assessed to the awards, I make the following orders:

- P and L Byrne Farm Partnership is to pay to Richard Barr the sum of \$678.15 gross being lost wages under s.123(1)(b) of the Employment Relations Act 2000.

- P and L Byrne Farm Partnership is to pay to Richard Barr the sum of \$262.50 being relocation expenses under s.123(1)(c)(ii) of the Employment Relations Act 2000.
- P and L Byrne Farm Partnership is to pay to Richard Barr the sum of \$2,250 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation, loss of dignity and injury to feelings.

Costs

[74] I reserve the issue of costs.

Summary of findings and orders made

- I have found that Mr Barr was a person intending to work for P and L Byrne Farm Partnership within the meaning of s.5 of the Employment Relations Act 2000.
- I have found that Mr Barr was unjustifiably dismissed.
- I have assessed Mr Barr's contribution at 25%.
- Taking that contribution into account, I have ordered P and L Byrne Farm Partnership to pay Richard Barr the sum of \$678.15 gross being lost wages under s.123(1)(b) of the Employment Relations Act 2000.
- I have ordered P and L Byrne Farm Partnership to pay Richard Barr the sum of \$262.50 under s.123(1)(c)(ii) of the Employment Relations Act 2000 for relocation expenses.
- I have ordered P and L Byrne Farm Partnership to pay Richard Barr the sum of \$2,250 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000 for compensation.

- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority