

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 304/09
5132982

BETWEEN DAVID TELFER AND
 LARRAINE ANDERSON
 Applicant

AND COROMANDEL DAIRY
 TRUST LIMITED (IN LIQ)
 Respondent

Member of Authority: Marija Urlich

Representatives: Alan Taylor, for Applicant
 Craig Alexander Sanson and John Howard Ross Fisk,
 liquidators appointed to Respondent

Investigation Meeting: 3 December 2008

Further submissions and 10, 15 December 2008, 24 August 2009
information received:

Determination: 26 August 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Telfer and Ms Anderson seek finding that they were unjustifiably dismissed from their employment with Coromandel Dairy Trust Limited (In Liquidation). These findings are opposed by CDTL (in liq).

[2] On 25 May 2009 the High Court appointed liquidators to the respondent company. Since then the Authority has sought the consent of the liquidator to continue its investigation of this employment relationship problem and issue a determination.

[3] In correspondence to the Authority dated 24 August 2009 the liquidator advised it cannot consent to the continued investigation of this employment relationship problem but will abide by any decision of the Authority in relation to

concluding the investigation. The reason for this is that at this stage in the liquidation there are insufficient funds to defend these proceedings.

[4] Mr Telfer and Ms Anderson wish this matter concluded. I am satisfied that the employment relationship problem has been investigated and I have sufficient evidence to determine the issues before the Authority. Those issues are:

- (i) Were Mr Telfer and Ms Anderson dismissed?
- (ii) Were their dismissals unjustified?
- (iii) If so, what, if any remedies are they entitled to?

Were Mr Telfer and Mrs Anderson dismissed?

[5] Mr Telfer was employed by CDTL (in liq) as the farm manager from 15 October 2007. As the respondent's name suggests, the farm was located on the Coromandel peninsula. Ms Anderson is Mr Telfer's domestic partner. They lived in a house on the property. Ms Anderson says she was employed as a farm worker carrying out calf-rearing, fencing and spraying.

[6] During the week of 3 August 2008 Lance Burt, the managing director of then CDTL, instructed Mr Telfer to vacate the farm house he and Ms Anderson were living in and relocate to a farm owned by a related company in Kaukapakapa, north of Auckland. Mr Burt said he needed to shift cattle from the Coromandel farm to Kaukapakapa property because there was insufficient feed on one and excess on the other. Mr Telfer said he did not wish to relocate. During the remainder of the week Mr Telfer said Mr Burt made repeated and increasingly threatening approaches to him to secure his agreement to relocate.

[7] On 10 August Mr Telfer's representative, Mr Taylor wrote to Mr Burt:

- (i) the request to relocate to Kaukapakapa was declined;
- (ii) Mr Burt's actions towards Mr Telfer in pressing the relocation request were threatening and intimidating and in breach of his obligations as an employer and landlord;
- (iii) Mr Telfer wished to continue in his position with the respondent;

- (iv) suggesting the parties attend mediation on an urgent basis; and
- (v) all further communications with Mr Telfer should be directed through Mr Taylor.

[8] The following evening Mr Burt hand delivered a letter to Mr Telfer at 10.10pm:

- (i) the relocation request was reasonable and necessary;
- (ii) Mr Telfer's refusal to comply with that request was very serious;
- (iii) Mr Burt had received a complaint from farm staff that Mr Telfer's conduct was bullying and causing disturbances on the farm;
- (iv) A trespass order was enclosed warning Mr Telfer to stay away from the complaint staff member's farm house;
- (v) Mr Telfer was to advise later that evening (by 9.30pm) if he would comply with the relocation;
- (vi) Mr Telfer was to remove his personal items from the central farm shed;
- (vii) Mr Telfer was to confine himself to the farm house and not enter the farm property; and
- (viii) if Mr Telfer did not reply by 9.30pm Mr Burt would take it he did not accept the transfer.

[9] Mr Taylor wrote to Mr Burt on 12 August:

- (i) all communication with Mr Telfer was to be through Mr Taylor;
- (ii) asserting Mr Telfer's right to peaceful possession of his rental property and the requirement for Mr Burt to give notice before entering the property; and
- (iii) repeating the request to attend urgent mediation with the Department of Labour.

[10] Mr Taylor lodged a request for mediation assistance with the mediation service and unsuccessful attempts were made to contact Mr Burt to set up a date for mediation.

[11] On Saturday, 16 August Mr Burt wrote to Mr Telfer requesting an urgent meeting to discuss the *clearly deteriorate[ing] state* of the employment relationship. The letter raised a number of serious allegations – Mr Telfer had failed to disclose criminal convictions, was responsible for discrepancies with stock numbers and farm supplies and had made defamatory statements to Mr Burt’s bank manager about his (Mr Burt’s) credit status. The letter then advised Mr Telfer that he was suspended and required him to attend a disciplinary meeting on Monday 18 August to hear his explanations.

[12] Mr Taylor wrote to Mr Burt that same day:

- (i) repeating the request for all communication to be through Mr Taylor;
- (ii) Mr Burt’s continued ignoring of that request amounted to a breach of good faith;
- (iii) the raising of allegations against Mr Telfer was in reaction to his assertion of his rights and amounted to discriminatory conduct;
- (iv) requesting specific details of the allegations in order to prepare a response;
- (v) challenging the lawfulness of the suspension;
- (vi) requesting access to Mr Telfer’s personal property located on the farm in order to retrieve it;
- (vii) requesting the proposed meeting be deferred until the requested information is provided; and
- (viii) suggesting the parties attend mediation.

[13] On Tuesday 19 August Mr Telfer’s wages were not deposited in his bank account as usual. Mr Burt wrote to mediation services asking that the proposed mediation be postponed to November due to understaffing and busyness of calving. Mr Burt also wrote to Mr Telfer that day; he had not received his response to the allegations, he therefore had to consider the allegations without his explanation, on balance the allegations were made out, he was dismissed for serious misconduct and given two weeks to notice to vacate the farm house.

[14] Later that day Mr Taylor lodged an application in the Authority seeking resolution of a personal grievance for unjustified dismissal arising from these circumstances.

[15] The fact of Mr Telfer's dismissal is not denied by the respondent.

[16] Ms Anderson says she was dismissed consequent to Mr Telfer's dismissal and the eviction notice. Mr Burt says Ms Anderson was not employed by CDTL (in liq). He says he told Mr Telfer during the interview process that he would not employ Ms Anderson but would agree to Mr Telfer's proposal and split his salary between him and Ms Anderson for tax purposes.

[17] I am satisfied that Ms Anderson performed work for CDTL (in liq) and received payment from CDTL (in liq). I find she was an employee of CDTL (in liq). I am also satisfied that Ms Anderson's employment was terminated consequent to Mr Telfer's dismissal. They were engaged as a couple and held a joint tenancy on the farm house they lived in on the property.

Were the dismissals unjustified?

[18] Section 103A of the Employment Relations Act 2000 sets out the test of justification:

...the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[19] It is fundamental to a fair disciplinary process that an employee has a reasonable opportunity to respond to allegations fairly put. Neither of these elements has been met in the dismissal process CDTL (in liq) followed in its dismissal of Mr Telfer. The allegations raised with Mr Telfer in the 16 August letter do not contain sufficient detail to respond to in a meaningful way. It was reasonable for Mr Taylor to write to Mr Burt seeking more detail and requesting the proposed meeting be postponed to accommodate that request. Mr Burt did not respond to Mr Taylor's request for further information and postponement of the meeting. His decision to proceed with the disciplinary process and dismiss Mr Telfer was unreasonable given

the reasonable requests made by Mr Telfer's representative and his physical proximity to Mr Telfer (Mr Burt cannot say he did not know where Mr Telfer was to invite his response).

[20] Mr Burt rejects the claim that his initiation of the disciplinary process was motivated by Mr Telfer's rejection of the relocation proposal. If this is the case then a scrupulous approach to the disciplinary issues was necessary to inoculate that process from the relocation issue. As it stands the correspondence mixes the issues and leaves the respondent vulnerable to the allegation that the disciplinary investigation was motivated by Mr Telfer's refusal to relocate to Kaukapakapa.

[21] Mr Telfer's suspension and the issuing of a trespass notice were excessive and unwarranted given the respondent had not carried out a full investigation into the serious allegations against Mr Telfer.

[22] For these reasons I find Mr Telfer's dismissal was unjustified.

[23] I have found Ms Anderson was an employee and that she was dismissed from her employment with CDTL (in liq). The respondent company did not discuss the potential consequences of Mr Telfer's dismissal with her. Ms Anderson did not have an opportunity to comment on those potential consequences. She had no opportunity to secure her employment. This was unfair and unreasonable. I find her dismissal was unjustified.

Remedies

(i) wage arrears

[24] Mr Telfer and Ms Anderson seek orders relating to unpaid wages for the last two weeks of their employment with CDTL (in liq). I accept those wages are due and owing.

[25] **Coromandel Dairy Trust Limited (in liquidation) is ordered to pay wage arrears due and owing at date of dismissal (19 August 2008) to David Telfer of \$1200 (gross).**

[26] Coromandel Dairy Trust Limited (in liquidation) is ordered to pay wage arrears due and owing at date of dismissal (19 August 2008) to Lorraine Anderson of \$860 (gross).

(ii) holiday pay

[27] Mr Telfer and Ms Anderson say they have not received their holiday pay entitlement which was due and owing upon dismissal. They say their total holiday pay entitlement is \$5000 calculated on a combined salary of \$75,000 per annum. This is not denied by CDTL (in liq).

[28] Coromandel Dairy Trust Limited (in liquidation) is ordered to pay holiday pay entitlement due and owing at date of dismissal (19 August 2008) to David Telfer and Lorraine Anderson of \$5000 (gross).

(iii) lost wages

[29] Mr Telfer and Ms Anderson say they have lost wages consequent to their dismissal. Mr Telfer claims 13 weeks lost wages which total \$7800 (gross). Ms Anderson claims 13 weeks lost wages less earnings of \$1300 (\$100 per week) which total \$4290 (gross).

[30] Mr Telfer said he could not leave the district to look for work because he was concerned about his property which remained in the possession of CDTL (in liq). He said Mr Burt deliberately distributed material in the district which has damaged his chances of securing alternative work. Mr Burt says all Mr Telfer's property has been returned and he denies distributing damaging material.

[31] Coromandel Dairy Trust Limited (in liquidation) is ordered to reimburse eight weeks lost wages to David Telfer total \$4800 (gross).

[32] Coromandel Dairy Trust Limited (in liquidation) is ordered to reimburse Lorraine Anderson four weeks lost wages, less earnings during that period, total \$3040 (gross).

(iv) hurt and humiliation

[33] Mr Telfer seeks an award of \$10,000 to compensate hurt and humiliation he suffered as a consequence of his dismissal. In support he says he was dismissed for refusing to relocate, he lost not only his job but his home, he has not been able to move on because the respondent has retained his property and holiday pay, the respondent has actively solicited personal information about him which has added to his distress, he attempted to comply with all reasonable requests made by the respondent and to resolve this matter at the lowest possible level and the respondent's lack of co-operation has unnecessarily extended the resolution of this employment relationship problem.

[34] Coromandel Dairy Trust Limited (in liquidation) is ordered to pay David Telfer \$3000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

[35] Ms Anderson also seeks an award of \$10,000 to compensate hurt and humiliation suffered consequent to her dismissal. In support she says she was never formally dismissed, just denied access to the farm and told to vacate her accommodation, she lost her job because her partner reasonably refused to relocate, she has lost her job and her home and the respondent's actions towards Mr Telfer have impacted on their personal relationship and reflect badly on her.

[36] Coromandel Dairy Trust Limited (in liquidation) is ordered to pay Lorraine Anderson \$2000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Interest

[37] Interest is to be calculated on the awards of wage arrears and holiday pay entitlement from date due and owing until date of payment to be calculated at today's 90-day bill rate plus 2%: order pursuant to schedule 2 clause 11 Employment Relations Act 2000.

Contribution

[38] CDTL (in liq) asserts that Mr Telfer and Ms Anderson have contributed to a high degree to the circumstances which have resulted in these personal grievances¹. It is not possible to assess any degree of blameworthy conduct because CDTL (in liq) failed to conduct a disciplinary process with conclusions which the Authority can rely on to make such an assessment. There will be no reduction for contribution.

Penalty

[39] Mr Telfer and Ms Anderson seek the award of penalties against CDTL (in liq) for failure to provide information, including wage and time records, on request of their representative. The requested information has not been provided. Failure to do so may warrant the award of a penalty.

[40] No reasonable explanation has been given as to why the wage and time records or other requested information was not provided on request. The requested information has not yet been provided.

[41] **A penalty is warranted which I set at \$100 to be paid into the Authority for the Crown².**

Property

[42] It is not possible to quantify with any degree of certainty the value of any items owned by Mr Telfer or Ms Anderson which remain on CDTL (in liq) property. Accordingly, no orders in relation to this issue will be made.

Costs

[43] Costs are reserved. Mr Taylor may file additional costs memoranda additional to those filed with his original submissions within 14 days of the date of this

¹ Section 124 of the Employment Relations Act 2000

² Section 135 Employment Relations Act 2000

determination. The liquidator, if it intends to file a response, should do so within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority