

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 163/09  
5127159

BETWEEN                   DUSTIN HUTTON, KAYLA  
                                 GRAHAM, RUTH WRIGHT  
                                 AND WAYNE COSBROOKE  
                                 Applicants

AND                         COROMANDEL DAIRY  
                                 TRUST LIMITED  
                                 Respondent

Member of Authority:     Marija Urlich  
  
Representatives:         Alan Taylor, for Applicant  
                                 Lance Burt, for Respondent  
  
Investigation Meeting:    4 December 2008  
  
Submissions Received:    10 December 2008  
  
Determination:            22 May 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]     The applicants, Ruth Wright, Wayne Cosbrooke, Kayla Graham and Dustin Hutton were employed by Coromandel Dairy Trust (“CDT”) as farm workers from February 2008 until June 2008 when they say they were unjustifiably dismissed. CDT say there was no dismissal and that the employment relationship ended by way of abandonment.

[2]     Ms Wright and Mr Cosbrooke are domestic partners, as they were during their employment with CDT. Mr Hutton and Ms Graham were domestic partners at the time of their employment with Coromandel Dairy Trust. As is often the case with farm workers, the couples occupied homes on the property on which they were employed. There are no executed written employment agreements between the parties, though they were proffered on 12 June 2008, and no written tenancy agreement.

[3] This determination concerns whether the applicants were dismissed or abandoned their employment and if that question is answered in the applicants' favour, whether their dismissals were justified.

### **Employment - dismissed or abandoned?**

[4] The event precipitating the end of the applicants' employment with CDT was Mr Cosbrooke and Mr Hutton's decision to drive to Auckland after work on Wednesday, 4 June. Their intention was to return in time for work the following morning. This did not occur and they arrived back at the property at 8am, Thursday 5 June.

[5] David Telfer, the farm manager then confronted all four applicants and told them to "*feed your cows and you're finished*". Mr Cosbrooke attempted to explain the situation and Mr Telfer replied "*no it's over*". The applicants understood they were dismissed.

[6] Lance Burt, CDT's managing director, was not on the property that morning. He told me Mr Telfer contacted him to advise Mr Cosbrooke and Mr Hutton were not on the farm, he told Mr Telfer that was unacceptable and Mr Telfer said he would *sought it out*. Mr Burt was adamant that he did not instruct Mr Telfer to dismiss the applicants and that his actions in doing so were unauthorised. He said dismissing all the farm workers *in one hit* made no sense because the business needed them.

[7] The next communication between the parties occurred on the evening of Sunday, 8 June. At about 8pm that evening Mr Telfer attended Ms Wright and Mr Cosbrooke's home and handed Mr Cosbrooke a letter dated the same day which provided:

- Mr Cosbrooke had failed to attend work on time on 5 June;
- This had inconvenienced the business;
- Mr Telfer was not authorised to dismiss him;
- Mr Cosbrooke had not attended work that week;
- He was issued a written warning for absence from work;
- CDT expected that he should return to work the following day;

- If he did not return to work then CDT would conclude he had abandoned his employment.

[8] Mr Dutton received an identical letter (but for addressee) that evening.

[9] Mr Cosbrooke, Ms Wright and Mr Dutton instructed Mr Taylor to write to Mr Burt expressing their concern about their treatment, asserting that they had been dismissed, that they would not return to duties until the situation had been clarified and inviting Mr Burt attend mediation to that end. The letter was sent by facsimile to Mr Burt on 8 June. Notwithstanding Mr Taylor's advice to Mr Burt that he, along with the other applicants, would not be returning to work on 9 June, Mr Cosbrooke did attend work the following day. He did so only to perform stock related duties. He said he wanted to make a good faith gesture to Mr Burt to resolve matters between the parties. Mr Dutton, Ms Wright and Ms Graham did not return to work.

[10] Mr Cosbrooke told Mr Telfer that morning that he and Mr Wright would not be returning to normal duties until they had received a written employment agreement and had had a meeting with Mr Burt. An hour later Mr Telfer told Mr Cosbrooke an employment agreement would be provided along with a promise to lift the written warning.

[11] On the evening of Tuesday, 10 June Mr Telfer hand delivered letters to Ms Wright and Ms Graham. The letters were identical, but for the addressee, and provided:

- Ms Wright and Ms Graham had not been dismissed;
- They were being issued a written warning for failing to start work on time on 5 June; and
- If they did not attend work the following day they would be deemed to have abandoned their employment.

[12] Ms Wright telephoned Mr Burt that evening. The conversation failed to progress the issues between the parties – Ms Wright told Mr Burt Mr Telfer had promised them a written employment agreement and waiver of the written warnings

and that they were waiting for a meeting with Mr Burt, Mr Burt expressed his expectation that she return to work the following day.

[13] Mr Cosbrooke and Ms Wright decided not to return to work the following day. They said they were confused by apparent contradictions between Mr Telfer and Mr Burt. Mr Hutton and Ms Graham told me they reached the same decision on the same grounds.

[14] Two days later, on Friday, 13 June, Mr Telfer attended Mr Cosbrooke and Ms Wright's home and delivered a written employment agreement for, he told them, immediate execution. They sent him away. He then delivered written employment agreements to Mr Hutton and Ms Kayla. They also refused to accept the documents. The next day, Saturday, Mr Telfer delivered to the two couples individually addressed letters advising their employment had ended due to abandonment and giving notice they were to vacate their homes by 22 June.

[15] CDT accepts Mr Telfer purported to dismiss the applicants on 5 June but says the dismissals were not effective because he had no authority to do so and those dismissals were effectively revoked.

[16] Mr Telfer was CDT's farm manager. There is no dispute he was responsible for the day-to-day management of the farm. I have no difficulty in concluding that Mr Telfer had ostensible authority to dismiss the applicants, that he exercised that authority on 5 June and that the applicants had a reasonable basis to believe, as a consequence of his actions, that the employment relationship was severed. In such circumstances agreement would have to be reached between the parties to re-establish the employment relationship.

[17] In the case of Ms Wright, Ms Graham and Mr Hutton no such agreement was reached – they did not return to work because they were dismissed at the initiative of CDT's representative, there is no issue as to abandonment. Mr Cosbrooke did return to work, albeit, on a limited basis, until Wednesday 11 June, when he again stopped attending work. In returning to work on Monday, 9 June Mr Cosbrooke reaffirmed the employment relationship, albeit on limited terms. Did he abandon his employment two days later?

[18] The application of the concept of abandonment of employment concerns an examination of whether an employee has *given up*<sup>1</sup> on their employment. Given the maelstrom of communication between the parties, the clear notice to CDT that an employment relationship problem existed<sup>2</sup> which Mr Cosbrooke (along with the other applicants) wished to discuss with Mr Burt with a view to reaching resolution, Mr Cosbrooke's reaffirmation of the employment relationship, albeit on limited terms, and Ms Wright's reassertion to Mr Burt during the telephone conversation of 10 June of the applicants desire to meet and discuss the issues between them, I cannot find that Mr Burt had any reasonable basis to believe Mr Cosbrooke had *given up* on his employment. Mr Cosbrooke was physically on the property, he continued to discuss employment issues with DCT's agent Mr Telfer, his domestic partner, Ms Wright, made representations on his behalf to Mr Burt and, significantly, the 8 June request to attend mediation remained unanswered.

### **Dismissals – unjustified?**

[19] A justified dismissal is one which meets the test set out in section 103A of the Employment Relations Act 2000 – objectively judged, the employer's actions were fair and reasonable in all the circumstances.

[20] Applying this test, Ms Wright, Ms Graham and Mr Hutton's dismissals were not justified. Mr Telfer, who I have found was acting as CDT's representative, dismissed them without making any inquiry as to the reasons why they were ½ an hour to 1 hour late for work on the morning of 5 June; he did not know why they were late to work, so CDT cannot show that the decision was fair or reasonable. In addition, it is unlikely lateness of such limited degree could justify dismissal in the harsh terms meted out to Ms Wright, Ms Graham and Mr Hutton. While I appreciate farm management involves important issues of animal welfare, there was no clear evidence that the late start on 5 June endangered any animals or significantly hampered farm production. For these reasons I find Ms Wright, Ms Graham and Mr Hutton's dismissal were unjustified.

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<sup>1</sup> *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 (CA)

<sup>2</sup> Refer Talyor letter 8 June 2008

[21] The same test must be applied to Mr Cosbrooke's dismissal. For the reasons set out in paragraph 22 above there was no reasonable basis for CDT to conclude Mr Cosbrooke had given up on the employment relationship. The letter asserts Mr Cosbrooke had not returned to work, this was not the case. CDT had not responded to Mr Cosbrooke's representative's request for mediation. Mr Burt had not responded to Ms Wright's request for a face to face meeting. In its letter of 14 June CDT called a halt to the employment relationship; that action was, on an objective assessment, premature and unjustified.

## **Remedies**

### **(i) Ms Wright and Mr Cosbrooke**

[22] Ms Wright gave evidence of the tumult caused to her family as a result of her and Mr Cosbrooke's dismissals – they lost their home and their children had transfer to different schools when they found new work out of the district. She said they had worked hard for CDT and she found it humiliating to be dismissed. They did not receive their final pay and had to borrow money to move off the CDT property. I accept Ms Wright has been detrimentally affected by her dismissal.

**[23 Coromandel Dairy Trust Limited is ordered to pay Ruth Wright the compensatory sum of \$4000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[28] Mr Cosbrooke said he had worked like a devil for CDT and had been treated in an over the top manner, which was not deserved. He said the last week of their tenancy was very difficult with trespass notices being served on himself and 14 year old son. I accept Ms Wright has been detrimentally affected by his dismissal.

**[25 Coromandel Dairy Trust Limited is ordered to pay Wayne Cosbrooke the compensatory sum of \$4000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[26] Ms Wright and Mr Cosbrooke seek reimbursement of lost wages consequent to their dismissals. They worked on a combined salary package of \$45,000 per

annum (weekly net income of \$375 each). It is appropriate to deal with their wage claim together.

[27] In claiming lost wages Ms Wright and Mr Cosbrooke must show they have taken reasonable steps to mitigate those lost wages. CDT offered them back their positions. They declined those offers (with the exception of two days work performed by Mr Cosbrooke in the week beginning 9 June). This is a relevant factor in an assessment of their claim for lost wages. Taking this into account along with their evidence of efforts to find new positions I set the reimbursement at 1 months wages.

**[28] Coromandel Dairy Trust Limited is ordered to reimburse Ruth Wright and Wayne Cosbrooke lost wages of \$3000 (net) pursuant to section 123(1)(b) of the Employment Relations Act 2000.**

[29] Mr Cosbrooke claims unpaid wages two days payment for work performed on 9 and 10 June. I accept he worked those days for which he has not received payment.

**[30] Coromandel Dairy Trust Limited is ordered to pay Wayne Cosbrooke \$150 (net), being two days wages calculated at his usual rate.**

[31] Ms Wright and Mr Cosbrooke also claim outstanding holiday pay entitlement totalling \$5550.00 (gross). I am satisfied that that payment remains outstanding and has been due and owing since their employment with CDT ended.

**[32] Coromandel Dairy Trust Limited is ordered to pay Ruth Wright and Wayne Cosbrooke outstanding holiday pay entitlement each of \$2775.00. Interest is to be calculated on these sums at the rate of 5% from 22 June 2008 until date of payment: refer schedule 2 clause 11 Employment Relations Act 2000.**

[33] The claims for reimbursement of loan repayment sums and removal costs are declined. There is no evidence such claims are based on any benefit provided under the parties' employment agreement and therefore no basis upon which such awards can be made.

**(iii) Ms Graham and Mr Hutton**

[34] Ms Graham also said she had worked really hard for CDT and felt she had been *shafted*. She said the water was turned off in the last week of her tenancy and she was unable to clean the property to the standard required.

**[35] Coromandel Dairy Trust Limited is ordered to pay Kayla Graham the compensatory sum of \$2000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[36] Mr Hutton said he found his dismissal devastating and massively stressful. He said he had invested a lot in moving to take up the position with CDT and felt humiliated that that had turned out to be unnecessary. He said he had relied on the promise of final wages and holiday pay to finance his move off the property and when the wages were not forthcoming he had to borrow money from his parents. He said the dismissal had placed his relationship with Ms Graham under strain.

**[37] Coromandel Dairy Trust Limited is ordered to pay Dustin Hutton the compensatory sum of \$3000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[38] Ms Graham and Mr Hutton were also employed on a combined salary package of \$45,000. They claim reimbursement of four weeks lost wages. Taking into account CDT's offer of re-employment and their evidence of efforts to find alternative employment I set reimbursement at 2 weeks..

**[39] Coromandel Dairy Trust Limited is ordered to reimburse Kayla Graham and Dustin Hutton lost wages of \$1500 (net) pursuant to section 123(1)(b) of the Employment Relations Act 2000.**

[40] Ms Graham and Mr Hutton claim outstanding holiday pay entitlement totalling \$1800 (gross). I am satisfied that that payment remains outstanding and has been due and owing since their employment with CDT ended.

**[41] Coromandel Dairy Trust Limited is ordered to pay Kayla Graham and Dustin Hutton outstanding holiday pay entitlement each of \$900.00(gross). Interest is to be calculated on these sums at the rate of 5% from 22 June 2008 until date of payment: refer schedule 2 clause 11 Employment Relations Act 2000.**

[42] The claim for reimbursement house removal costs is declined. There is no evidence the claim is based on any benefit provided under the parties' employment agreement and therefore no basis upon which such awards can be made.

### **Contribution**

[43] While Mr Cosbrooke and Mr Hutton's late arrival back to the farm was entirely their responsibility, there is no evidence CDT made any attempt to investigate why they were late. CDT's failure to deal fairly and reasonably with this initiating issue snowballed into the applicant's dismissals. The applicants' did not contribute to this rash conduct. There will be no deduction of remedies pursuant to section 124 of the Act.

### **Penalty**

[43] The applicants seek an award of a penalty against CDT for failure to comply with information requests made to CDT. I decline to award a penalty; firstly, because the failure to provide the material has not prejudiced the applicants'the applicants have been able to calculate their claims for lost wages and holiday pay without reference to holiday records and I have accepted those calculations and secondly,

### **Costs**

[44] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted for application to be made to the Authority to set a timetable for the filing of costs submissions.

Marija Urlich

Member of the Employment Relations Authority