

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 356/09  
5134683

BETWEEN                      LOGAN HARTLEY  
   Applicant  
  
AND                                JD & RD WALLACE &  
   AVALON TRUST TRADING  
   AS GAMMA PARTNERSHIP  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            James Parlane for Applicant  
   Cor Speksnijder for Respondent  
  
Investigation Meeting:     22 June 2009  
  
Submissions Received:    13 July 2009 from Applicant  
   13 and 16 July 2009 from Respondent  
  
Determination:              8 October 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Logan Hartley was employed by JD & RD Wallace & Avalon Trust trading as Gamma Partnership (“Gamma Partnership”) from 30 July 2008 until 16 September 2008 when he was dismissed for serious misconduct. Mr Hartley claims the dismissal was unjustified, and claims the respondent has breached its obligations to treat him in good faith. He seeks remedies for these actions.

[2] In addition Mr Hartley says he paid rent for accommodation which was not provided and he claims arrears of wages for the period of his employment on the basis that he did not receive all wages due to him under his employment agreement. Mr Hartley claims the respondent is still in possession of items which belong to Mr Hartley.

[3] Gamma Partnership denies the claims.

[4] This issues for determination are:

- Is there a valid claim for arrears of wages?
- Was Mr Hartley unjustifiably dismissed?
- If so, what, if any remedies should be awarded?
- Did Gamma Partnership breach its obligation of good faith toward Mr Hartley?

### **Arrears of wages**

[5] Mr Hartley was employed pursuant to a written individual employment agreement. Prior to working for Gamma Partnership, Mr Hartley had been employed by JD & RD Wallace Limited at its Doone Farm from 1 June 2006 until he commenced his employment for Gamma Partnership in August 2008.

[6] Mr Hartley says he agreed to a salary of \$38,000 when he commenced his employment with Gamma Partnership. He says Gamma Partnership has failed to pay him in accordance with this agreement and seeks payment of arrears.

[7] As already stated Mr Hartley had previously been working on Doone farm which was owned by JD & RD Wallace and it was intended set the rate of pay at the amount Mr Hartley had been paid while on Doone Farm. Mr Wallace says that when he was completing the employment agreement he asked Mr Hartley what his pay rate was on Doone farm and Mr Hartley indicated that he wasn't sure how much he received but tendered a guess as to what he took home each fortnight.

[8] Mr Wallace extrapolated that information out over 12 months and that became his annual rate of pay. The effect of this was that Mr Hartley's rate was actually increased by \$7,000 with his base rate moving from \$31,000 to \$38,000 per annum.

[9] After the employment agreement was signed by both parties Mr Wallace discovered Mr Hartley had not been correct when he had indicated how much he had been paid at Doone Farm and acted to reduce the rate of pay.

[10] It is up to the employer to check and ensure the rate of pay stipulated in the employment agreement is correct. Mr Hartley indicated that he wasn't sure exactly what he got paid at Doone Farm and this should have been a signal to Mr Wallace to

check the accuracy of the information before committing it to the employment agreement.

[11] However, Mr Wallace did raise the issue with Mr Hartley prior to his first pay being calculated and paid. Mr Hartley's response was that the agreement had been signed and that's that.

[12] As the issue was not resolved Mr Wallace determined that Mr Hartley should be paid the equivalent fortnightly pay he had been previously receiving while at Doone Farm.

[13] The effect of Mr Wallace's evidence is that once he realised the salary provided for in Mr Hartley's employment agreement was not what he had been receiving at Doone Farm, the agreement no longer reflected the true terms agreed on between Gamma Partnership and Mr Hartley.

[14] In any argument over the terms of a bargain struck between two parties to an agreement the starting point must be the document which they signed. The whole point of recording an agreement in writing signed by the parties is to avoid the kind of argument over terms, which has occurred here.

[15] Mr Speksnijder submitted that s 6(1)(a) of the Contractual Mistakes Act 1977 applies and seeks rectification of the agreement. Rectification is an equitable remedy permitting correction of a document which does not correctly record the true bargain struck between the parties.

[16] The principle question is whether Mr Hartley knew that the Respondent was mistaken in the salary set in the agreement and deliberately allowed it to sign the agreement in that state of misapprehension<sup>1</sup>.

[17] I find that Mr Hartley was aware that when he moved from Doone Farm to Gamma Partnership it was intended that he be paid at the same rate of pay as he was paid at Doone Farm. Mr Hartley says he was not sure what he was paid at Doone Farm and guessed, but he also says he provided a copy of his pay slip from Doone farm. I'm satisfied the salary amount entered into the Employment Agreement was a mistake. I am also satisfied it is more likely than not that Mr Hartley was aware it was a mistake. It follows therefore that when Mr Wallace and Mr Hartley signed the

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<sup>1</sup> *Laurence v Steffert Farms Limited*, unreported, [23 May 1997] HC, New Plymouth, AP 21/96, 7.

employment agreement, Mr Hartley deliberately allowed Mr Wallace to sign the agreement in that state of misapprehension.

[18] I am satisfied that to deny rectification would lead to an unconscionable outcome and therefore order that clause 5 of the employment agreement be rectified to reflect a base rate of pay of \$31,000 per annum. Mr Hartley's claim for arrears of wages therefore fails.

**Was Mr Hartley unjustifiably dismissed?**

[19] On 13 August 2008 while performing their duties on the farm, Mr Hartley referred to a fellow worker, Mr Richard Chapman, as "Oi". Mr Chapman requested Mr Hartley to refer to him by his own name and not "Oi". Mr Hartley continued to call Mr Chapman "Oi". This upset Mr Chapman who slapped Mr Hartley then proceeded to beat him with his fists.

[20] After Mr Hartley managed to get away from Mr Chapman, he picked up an iron bar and held it aloft as if to strike Mr Chapman. Mr Chapman responded by approaching Mr Hartley and hit him again, dislodging the iron bar from his grasp.

[21] As Mr Hartley exited the pen the men had been working in, Mr Chapman assisted his exit by pushing him off the top rail which was approximately 2 metres in height. It was common ground that Mr Hartley suffered from bruising to his face and a split lip. It was also common ground that Mr Hartley had not landed any punches on Mr Chapman who came out of the altercation unscathed.

[22] On the afternoon following the altercation, Mr Hartley sent two text messages. One to Mr Wallace saying "*I'll stab him*" and another to Mr Chapman saying "*Watch ya bak*".

[23] Mr Wallace says he did not respond to Mr Hartley's text, but did speak to him at or about 3.30pm after the Police arrived looking for him. Mr Hartley advised that he was too sick to attend work and was staying with family in Te Awamutu. Mr Wallace advised Mr Hartley that there would be an investigation into the incident and that a meeting would take place.

[24] On 14 February Mr Wallace left a message for Mr Hartley that a meeting would take place the following day.

[25] Mr Chapman says the next morning, 15 February 2008, Mr Hartley waited in the bushes for him to come past on his way to the milking shed. As he rode past on the farm bike he says Mr Hartley swung at him with an iron bar but missed. Mr Hartley then threw the bar towards Mr Chapman, whereupon the bar hit the motorbike. Mr Chapman complained to Mr Wallace about the confrontation and the text message he had received.

[26] At 7.39am Mr Wallace then received a second text message (the first being on 13 August) from Mr Hartley saying “*fuk da lot of ya*”.

#### *15 August Meeting*

[27] The purpose for this meeting was to allow the events from the previous three days to be investigated. Mr Hartley was one of four employees interviewed. At his interview Mr Hartley was questioned about the altercation with Mr Chapman, the text messages and the complaint from Mr Chapman about the incident that morning.

[28] I have received copies of the handwritten notes made at the 15 August meeting. With the exception of a very broad objection by Mr Parlane that responses were not recorded properly no substantive objection has been made to the notes. I have accepted that on the balance of probabilities the notes are a fair summary of the discussions which took place.

[29] The notes record that Mr Hartley was offered a representative to which it is recorded that he responded in the affirmative. At that point the meeting continued but was adjourned not long afterwards for about 10 minutes to allow for the arrival of his support in the form of Mr Hartley’s mother and step-father.

[30] After providing an explanation of the events on 13 August Mr Hartley was questioned about events since that date, specifically the threatening and abusive text messages and the attempted attack on Mr Chapman. The handwritten notes record that Mr Hartley told Mr Terry Truitt, General Manager, Mr Wallace and Mr Stuart Taylor, the assistant general manager, that he had lost the plot.

[31] Mr Hartley expressed his disappointment that no one from Gamma Partnership got hold of him over the incident with Mr Chapman. When asked why he had sent the texts Mr Hartley told the meeting that he didn’t know what else to do.

[32] The handwritten notes record that Mr Hartley told Mr Wallace and Mr Taylor about the incident that morning when he chased Mr Chapman. Mr Hartley denied this at the Authority's investigation meeting and said he was not involved as he was asleep in bed at the time. I have not accepted Mr Hartley's evidence on this point. Mr Hartley says he was in bed asleep, however, I am satisfied that immediately following the incident on 15 August he sent a text message to Mr Wallace. It is unlikely, therefore that he was asleep.

[33] At the conclusion of the meeting Mr Truitt decided Mr Hartley was a threat in the workplace. It is common ground that Mr Hartley agreed to take paid leave until all matters had been resolved.

[34] The Authority was also provided with typewritten notes which purport to be minutes from the same meeting. These minutes set out conclusions reached by the respondent with regard to the altercation on 13 August and states that Mr Hartley confirmed these points. This fact is not included in the handwritten notes and therefore I have treated this statement with some scepticism. However the minutes clearly set out the conclusions reached by the respondent and are as follows(verbatim):

- While tagging cows in the side yards of the Gamma cowshed, LH called RC "oi". As a response LH stated "Don't call me Oi or I will slap you".
- When LJ called RC "Oi" again, RC then walked up to LH and proceeded to "slap" him across the face.
- We believe that LH then pushed his chest against RC in a challenging demeanour.
- RC then punched LH and he fell to the ground. We believe that LH then began to swear profanities at RC.
- LH stood up and picked up an iron bar and then said "Do you want to play like that?".
- We understand that RC then went to walk away from LH.
- LH continued to swear profanities at RC and he then moved forward and swung the iron bar and then punched LH again.
- As LH left the yarded area, RC pushed him off the top rail.
- LH then left the area and walked home.

[35] I have had the benefit of the handwritten notes taken at the meetings of the other three employees employed by Gamma Partnership, one of whom was Mr Chapman and the other two witnessed the events as they occurred

[36] Mr Chapman acknowledged in his interview that he had punched Mr Hartley. He is also recorded as saying Mr Hartley slapped him after he had been slapped by Mr Chapman, however, that does not appear in any other statements and does not appear to have been accepted as it is not included in the conclusions reached by Mr Truitt as set out in paragraph [33] above.

[37] Mr Chapman is also recorded as acknowledging that he punched Mr Hartley again after he raised the iron bar above his head and that on receiving Mr Chapman's punch, Mr Hartley fell to the ground.

[38] Mr Chapman is recorded as saying that Mr Hartley then got up and walked home. Mr Chapman has not acknowledged, in that interview that he then pushed Mr Hartley off the top of the railing (about 2 metres) as he tried to leave the pen.

[39] In the handwritten notes taken from the interview with Ms Lynley Gailey, Ms Gailey is recorded as telling Mr Truitt that she was not sure if Mr Hartley hit Mr Chapman, but that Mr Chapman had Mr Hartley pinned to the ground and was punching him while he was on the ground. Ms Gailey told Mr Truitt that Mr Chapman had hit Mr Hartley about 12 times. Ms Gailey also told Mr Truitt that she didn't believe Mr Hartley was trying to start a fight, rather it was more that he had a smart mouth.

[40] The handwritten notes recorded from the interview with Ms Kelly Johnson, indicate that Ms Johnson believed Mr Hartley had pushed Mr Chapman with his body. Ms Johnson told Mr Truitt that Mr Chapman punched Mr Hartley a couple of times before Mr Hartley crawled to the corner of the pen. Ms Johnson says Mr Hartley was swearing and calling Mr Chapman names but that she and Ms Gailey were trying to get Mr Chapman to stop punching Mr Hartley. Mr Chapman would not stop.

#### *Actions of the employer*

[41] I am required to examine Gamma Partnership's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act which states:

For the purposes of section 103(1)(a) and (b), 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.

[42] The section requires me to scrutinise Gamma Partnership's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal.

[43] The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[44] The employment agreement provides for complaints to be investigated, following which the issues will be put to the employee concerned with an opportunity for a response, after which a decision as to the appropriate disciplinary action will be made.

[45] The employment agreement also sets out acts which constitute serious misconduct including:

- The deliberate and/or malicious striking of another staff member; and
- Verbal or physical abuse of another staff member or off farm service providers.

[46] On 20 August Mr Taylor wrote to Mr Hartley inviting him to attend a disciplinary meeting on 24 August. He outlined three allegations of serious misconduct to which Mr Hartley was invited to respond. The allegations were that he had attacked Mr Chapman on the morning of Friday 15 August, and two separate allegations that he had sent abusive text messages. Mr Hartley was invited to bring a representative with him to the meeting and was advised that if the allegations were proven he could be subject to disciplinary action up to and including dismissal.

[47] Mr Hartley's representative at that time (not Mr Parlane) wrote to Gamma Partnership and asked for information on the process to be followed. In response Mr Hartley's representative was advised of the investigation process including advice that the date would be changed to allow Mr Hartley's representative to attend if necessary.

[48] Attempts to arrange a suitable meeting date in order to receive Mr Hartley's response to the allegations were unsuccessful. On 3 September Mr Parlane, who was

now acting on behalf of Mr Hartley, wrote to Gamma Partnership advising his view that as Gamma Partnership had already held a meeting with Mr Hartley (15 August) a second meeting was not necessary.

[49] In response Mr Parlane, was advised that a meeting was necessary in order to complete Gamma Partnerships' investigation into the allegations set out in the letter dated 20 August. A request for dates and times convenient to Mr Parlane, and his client was made. Alternatively, Mr Hartley, through Mr Parlane, was advised that if no meeting could be arranged or if a meeting was refused outright, then a decision based on the information available to the respondent would be made. Mr Hartley, through Mr Parlane was advised that this was not the preferred option.

[50] In response Mr Parlane advised:

I have discussed the matter further with my client.

He is happy for any explanation to be given via me as his solicitor.

The contract provides for an investigation. A meeting was held. My client was disadvantaged in that meeting as counsel was not present. A number of matters were raised therein and the responses were not recorded properly by your client. To avoid that my view is that your client should not be permitted to manipulate my client further by way of unsupervised investigation.

To clarify matters we do now unequivocally refuse to attend any further meeting that is not in the presence of the parties, their counsel and a mediator or member of the ERA.

[51] Mr Parlane requested the allegations to be put in writing and advised that he would provide considered answers so that the investigation could be concluded.

[52] While that was not its preferred approach, Gamma Partnership agreed to provide their questions in writing. On 11 September Mr Hartley was invited to provide comments or submissions to the summary of the original meeting notes and preliminary conclusions reached from Gamma Partnerships investigations to date.

[53] Mr Hartley responded in writing on 15 September. He denied the allegations made against him. Mr Parlane, on behalf of his client advised Gamma Partnership that he did not consider the text messages amounted to serious misconduct and that the third text message was understandable given that Mr Hartley had been abused by his employers in terms of their dealings with the matter. Further, while denying the alleged attack on Mr Chapman on 15 August, Mr Parlane advised his view that an attempt to swing a weapon at Mr Chapman on the Friday morning was not a breach of the agreement as there was no connection.

[54] After receiving Mr Hartley's response and on 16 September he was dismissed for serious misconduct. In dismissing Mr Hartley, Gamma Partnership considered Mr Hartley's actions on 13 August and 15 August constituted serious misconduct. Mr Hartley was given 14 days notice to vacate the farm house.

[55] Following the notice of dismissal Mr Wallace attempted to give Mr Hartley notice of a property inspection. The first notice was invalid as it did not provide the requisite 48 hours notice. Following a second notice, Mr Wallace and Mr Truitt attempted to inspect the house occupied by Mr Hartley. After getting Mr Hartley's attention, Mr Hartley came to the door of the house, closed it halfway and showed them a letter from Mr Parlane which had been taped to the door. Mr Hartley then proceeded to tell Mr Wallace and Mr Truitt to "...get the f\*\*\*k of this property".

[56] The law relating to serious misconduct is well settled. The definition of the kind of conduct that would justify summary dismissal is not possible, for it is always a matter of degree. What is usually needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship<sup>2</sup>. Common sense dictates that hitting a fellow employee could be categorised by an employer as serious misconduct justifying dismissal.

[57] This view is also supported in *NZ Crippled Children's Society v Vandermolen*<sup>3</sup> where the court stated:

Any deliberate violence, whether of a reactive kind or not, by a social worker/houseparent/employee ... comprises, I consider, serious misconduct in an employment setting.

[58] There was certainly misconduct on the part of Mr Hartley with regard to the threatening and abusive text messages he sent to Mr Chapman and his employer and then the attempt to ambush Mr Chapman on the morning of 15 August 2008. The question must be was it serious enough to warrant summary dismissal.

[59] In light of the beating Mr Hartley received from Mr Chapman, I have considered the actions of Gamma Partnership toward Mr Hartley, in comparison with the action taken against Mr Chapman.

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<sup>2</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1990] 3 ERNZ 483

<sup>3</sup> unreported, [ 21 August 1992], Christchurch Employment Court, CEC 36/92.

[60] Mr Chapman was subject to a disciplinary meeting on 22 August 2008 at which he accepted he had acted inappropriately. According to the notes compiled by Gamma Partnership, Mr Hartley did not deny that he had sent the text messages or that he had attempted to ambush Mr Chapman on 15 August.

[61] Mr Chapman was issued with a written warning and required to attend a workshop to assist him in dealing with conflict and confrontation. Although at the investigation meeting Mr Chapman acknowledged that he had not undertaken that workshop during the nine months leading up to the Authority's investigation meeting.

[62] Mr Chapman beat Mr Hartley by punching him more than twice and as known by Gamma Partnership, at least 12 times (according to Ms Gailey) and when told to stop continued his beating (according to Ms Johnson).

[63] Gamma Partnership says the difference between Mr Hartley's actions and Mr Chapman's actions are that Mr Hartley's attempted attack on Mr Chapman on the Friday morning was pre-meditated and unprovoked and that this added gravity to Mr Hartley's serious misconduct.

[64] Mr Hartley was punched around the face, not once, but multiple times by a man who was previously employed as a Prison Officer. Mr Chapman then proceeded to push Mr Hartley at least two metres off a rail when he was obviously trying to escape the situation. Mr Hartley required medical attention, however, Mr Chapman escaped from Mr Hartley's ambush completely unscathed.

[65] Given the decision to issue Mr Chapman a warning, when his misconduct was, on any reasonable assessment, very serious I find that the action of Gamma Partnership in dismissing Mr Hartley was not what a fair and reasonable employer would have done in all the circumstances. It seems to me that Gamma Partnership has failed to take into account the seriousness of the attack on Mr Hartley by Mr Chapman.

[66] I find that in all the circumstances Mr Hartley was unjustifiably dismissed.

### **Remedies**

[67] I am bound by section 124 of the Act to consider the extent to which Mr Hartley's actions contributed towards the situation that gave rise to his personal

grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[68] Mr Hartley was dismissed as a result of his conduct when he sent threatening and abusive text messages to Mr Chapman and Mr Wallace and for attempting to attack Mr Chapman on 15 August 2008.

[69] I have found that the treatment of Mr Hartley by comparison to Mr Chapman was disparate. However, in considering Mr Hartley's actions he was less than co-operative during Gamma Partnership's investigation into his misconduct. He flatly refused to attend any meetings to put his side of the story and then following his dismissal was uncooperative and abusive when Gamma Partnership sought to undertake a house inspection.

[70] With regard to the unjustified dismissal claim I am satisfied it is just to reduce the remedies available as a result of Mr Hartley's conduct. Mr Hartley is entitled to an award for contribution to his costs but no other remedy. This will acknowledge Mr Hartley established to my satisfaction a personal grievance based on a claim that he was dismissed unjustifiably, without rewarding him for significant blameworthy conduct.

### **Breach of Good Faith**

[71] Mr Hartley's claim for a breach of good faith has not been made out to the requisite standard. Mr Hartley says Gamma Partnership failed to treat him in good faith when it did not follow up with him or support him after he received the beating from Mr Chapman. Mr Hartley was contacted on 13 August at or about 3.30pm. While he advised his employer at that time that he was too sick to attend work, he did not provide any details about the injuries he had suffered.

[72] The Authority requires the parties to approach it with clean hands when resolving disputes. In his claim for breach of good faith I find Mr Hartley does not have clean hands. Good faith is a two way street. Mr Hartley was obliged to treat Gamma Partnership in good faith. I find Mr Hartley breached his obligations when he flatly refused to attend a disciplinary meeting, being uncooperative following the meeting on 15 August and being abusive when Gamma Partnership sought to undertake a house inspection.

[73] Mr Hartley's claim under this heading fails.

**Costs**

[74] Costs are reserved. The parties are encouraged to resolve the question between them. If they fail to reach agreement on the matter of costs, Mr Hartley may file and serve a memorandum as to costs within 28 days of the date of this determination with submissions by Gamma Partnership 14 days later. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority