

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 142/10
5163919

BETWEEN MICHAEL MORELAND
 Applicant

AND PAUL & SHERYL
 JOHNSTONE TRADING AS
 JOHNSTONE FARMING
 PARTNERSHIP
 Respondent

Member of Authority: Vicki Campbell

Representatives: Eric Tanner for Applicant
 Monique Rush for Respondent

Investigation Meeting: 27 October and 5 November 2009 at Hamilton

Submissions Received: 23 November 2009

Determination: 26 March 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Michael Moreland was employed as a Farm Assistant by Paul and Sheryl Johnstone trading as Johnstone Farming Partnership (“the Johnstone’s”). Mr Moreland’s employment commenced on 5 June 2007 after he signed a written employment agreement dated 30 April 2007 which was a fixed term agreement for the 2007/2008 season.

[2] Mr Moreland claims a number of breaches of the Employment Relations Act including:

- that Mr and Mrs Johnstone breached the employment relations act s 4 in that they did not act in good faith toward him, in particular the failure to act in good faith when bargaining for the individual employment agreement and in relation to any matter arising under the employment agreement;

- a breach of s 63A(2) in that he was not provided with a copy of the proposed employment agreement, was not advised of his right or a reasonable opportunity to seek independent advice about the agreement or consider any issues that Mr Moreland raised about the agreement. Further that the bargaining was unfair pursuant to s 68 and a penalty applies pursuant to s 69; and
- that in breach of s 65(2)(a)(vi) there was no plain language explanation advising how to resolve any dispute.

[3] In addition to those claims Mr Moreland claims:

- a penalty against the Johnstone's for failure to provide wage and time records when requested;
- that he was not paid at least the minimum rate of pay for all the hours he worked;
- that deductions were made unlawfully from his wages and seeks reimbursement and a penalty;
- reimbursement for public holidays he worked for which he did not receive a day off in lieu.

[4] In his statement of problem Mr Moreland also claims that while the agreement he signed was for a fixed term, the agreement was in breach of section 66 of the Act and he was in fact constructively dismissed.

Alleged breaches of the Employment Relations Act

[5] Mr Moreland claims the Johnstone's breached section 4 of the Act in that they did not act in good faith toward him, in particular when they bargained for the individual employment agreement and in relation to any matter arising under the employment agreement.

[6] Mr Moreland applied for the Farm Assistant role after seeing an advertisement in the local paper. He has significant experience in farming having worked in the farming industry for about 9 years.

[7] Mr Moreland told the Authority that with regard to the breaches of good faith, he had experienced difficulties with ACC over his back problems which was a work related injury. He confirmed that he was paid for the first week on ACC by his employer at 80%. At the investigation meeting irregularities between the information provided to ACC with information set out in the wage and time record were highlighted. However, I am satisfied the Johnstone's did not deliberately set out to mislead or deceive ACC with regard to Mr Moreland's earnings or hours of work. I accept, that on the balance of probabilities the Johnstone's were acting at all times on the instructions and advice of ACC when completing the forms.

[8] Another example of breach of good faith given by Mr Moreland was that he had to work long hours when Mr Johnstone was off between January and April 2008. Mr Johnstone had an injury and was unable to work for that period. I am satisfied on the balance of probabilities that Mr Moreland continued to have regular weekends off during this period and that there was adequate cover to assist him with milking. I am satisfied Mr Johnstone also continued to have daily input into the tasks that were required to be undertaken on the farm.

[9] Mr Moreland has failed to establish to my satisfaction that the Johnstone's were in breach of their obligations of good faith toward him during the employment relationship. There is no evidence that the Johnstone's deceived or deliberately mislead Mr Moreland, indeed I am satisfied they treated Mr Moreland with openness and honesty.

[10] Mr Moreland claims the Johnstone's breached section 63A(2) of the Act in that he was not provided with a copy of the proposed employment agreement, was not advised of his right or a reasonable opportunity to seek independent advice about the agreement or consider any issues that Mr Moreland raised about the agreement. Further that the bargaining was unfair pursuant to s 68 and a penalty applies pursuant to s 69.

[11] Mr Moreland received a copy of the employment agreement at a meeting with the Johnstone's in April 2007. At that meeting the Johnstone's went through the agreement together with Mr Moreland who signed his copy at that time. Mr Moreland confirmed Ms Johnstone's evidence that during the meeting she offered for Mr Moreland to take the agreement away with him but that he believed it looked pretty standard and signed it.

[12] Mr Moreland then took a copy of the agreement away with him and discussed the agreement with his mother. At the investigation meeting Mr Moreland told me he and his mother were happy with everything in the agreement at that time.

[13] I am satisfied that Mr Moreland had an opportunity to take the proposed agreement and seek advice about it prior to entering into the employment relationship. He had a copy of the agreement in April and did not commence employment until June 2007.

[14] Mr Moreland claims the Johnstone's breached section 65(2)(a)(vi) in that there was no plain language explanation advising how to resolve any dispute. I accept the employment agreement failed to provide a plain language explanation for resolving employment relationships problems. However, the Act does not prescribe a penalty for this breach.

[15] With the exception to the breach of section 65(2)(a)(vi) I have found that the Johnstone's did not breach the Employment Relations Act during Mr Moreland's employment with them. Mr Moreland's application for penalties has not therefore, been successful and I can be of no further assistance to him in that regard.

Further claims

Failure to provide wage and time records

[16] Mr Moreland claims a penalty be awarded against the Johnstone's for failing to provide wage and time records when requested. I am satisfied the wage and time records were produced when requested by the Department of Labour. However, I also accept that there are some irregularities contained within the wage and time records with respect to the hours of work the records state were worked by Mr Moreland.

[17] Having said that however, Mr Moreland was paid a salary. This payment was intended and did cover all the hours he was required to work. He received the same salary payment whether he had a weekend off or worked on all seven days of the week. There is no dispute that the amounts paid to Mr Moreland and as reflected in the wage and time record are accurate.

Minimum wage claim

[18] Mr Moreland claims arrears of wages in that he agreed to a salary but was not aware of the hours he would be required to work and that therefore, he was not paid

enough and when extrapolated out, his hourly rate does not meet the minimum wage rate.

[19] Mr Moreland has extensive experience in the farming industry. He was aware going into the employment relationship what would be expected of him. He agreed to be paid an annual salary in full compensation of the hours he was required to work. I am satisfied the relationship was such that Mr Moreland had flexibility in the number of hours he was required to work, and that if he finished tasks early he was able to spend time away from the workplace.

[20] There was, as is usual in employment relationships in the farming industry, a certain amount of give and take as to hours worked, particularly in the early part of the season when there is not a lot of milking to be done. My conclusions are supported by diary notes provided by Mr Moreland which show the weather was wet and he did no extra work except milking and feeding out two mobs. Further, he states that he took the afternoon off on 15 April, did no feeding out and the only task was to move the milkers from one paddock to another.

[21] I find Mr Moreland was paid according to the employment agreement and that he has been paid at more than the minimum wage. I am also satisfied that Mr Moreland was able to take all his weekends off in accordance with the employment agreement.

Promised salary increases

[22] Mr Moreland claims he was promised a pay increase but that the Johnstone's never met that promise. It was common ground that Mr Moreland received two salary increases during his employment. The first was in October 2007 when he received an increase of \$3,000 plus a bonus payment of \$500 to recognise his reliability and the good work he was doing on the farm. The second increase of \$2,000 was made in April 2008.

[23] I am satisfied there is no substance to Mr Moreland's claim that promises were made that were not then met with respect to salary increases.

Unlawful deductions

[24] Mr Moreland also says that deductions were unlawfully made from his wages and he seeks reimbursement of those wages and a penalty to be ordered against the respondent.

[25] Mr Moreland's bike broke down and he did not have another one. Mr and Mrs Johnstone paid \$1,138.52 for a service on Mr Moreland's old bike. Following this, Mr Moreland approached Mr and Mrs Johnstone for assistance to purchase a new bike.

[26] Mr and Mrs Johnstone purchased a new Suzuki bike and paid \$2,100 for it. Mr Moreland's bike was traded in for \$300. This left a balance of \$1,800 which Mr Moreland agreed could be deducted from his wages. The deductions were duly made and by the time the employment relationship ended on 31 May 2008 Mr Moreland had paid off the debt for the purchase of the new bike.

[27] There is no dispute that at the end of the employment relationship the Johnstone's deducted an amount of \$1,138.52. There was no express agreement for the deduction to be made. The Johnstone's say the expenses related to the servicing of Mr Moreland's motorbike and that they paid the account because Mr Moreland was not in a financial position to do so.

[28] At the investigation meeting it was accepted by the Johnstone's that they had deducted \$70 more than necessary for the motorbike repayments. As set out below Mr Moreland was overpaid \$450.19 in November 2008. As requested by the Johnstone's the extra \$70.00's paid as part of the motorbike payments is to be offset against the overpayment amount.

[29] I find the deduction of \$1,138.52 was an unlawful deduction and is to be reimbursed to Mr Moreland. It may be open to the Johnstone's to pursue Mr Moreland for payment of some or all of the account given that it largely relates to the servicing of his own personal motorbike and given that the Johnstone's felt they were assisting Mr Moreland in paying the account themselves.

[30] While I have found the Johnstone's made an unlawful deduction from Mr Moreland's final pay, I have concluded that this is not an appropriate case for a penalty to be awarded. I am satisfied the Johnstone's were acting under the honest belief that they could make the deduction as it was a debt owed to them by Mr Moreland which they had incurred on his behalf.

[31] The Johnstone's raised concerns with the Authority with respect to an overpayment of wages made to Mr Moreland in November 2007. At the investigation meeting Mr Moreland accepted that he had been overpaid in the amount of \$450.19 in November 2008. This money has never been repaid to the respondent and Mr

Moreland did not take any steps to alert his employer to the fact of the overpayment. The Johnstone's never sought the repayment of the \$450.19 however in their statement in reply the Johnstone's requested that any awards made to Mr Johnstone with respect to deductions or arrears of wages be offset against the overpayment. Mr Moreland did not raise any objections to taking this approach at the investigation meeting.

Holiday Pay

[32] Mr Moreland claims payment for public holidays worked for which he says he did not receive a day off in lieu of working. Mr Moreland also claims he has not received his full entitlement to holiday pay.

[33] It was agreed at the investigation meeting that Mr Moreland worked on one public holiday, being Auckland Anniversary Day, 28 January 2008. I am satisfied Mr Moreland chose to take a payment instead of the day off lieu and that this payment was made direct to Mr Moreland's bank account.

[34] With regards to holiday pay, as Mr Moreland did not complete 12 months employment with the Johnstone's he was entitled to receive 8% of his total gross earnings for the period of his employment at termination. This equates to \$2,519.43. Mr Moreland received total holiday pay of \$2,580.14 for annual leave taken in advance of his entitlement falling due. I find Mr Moreland has received his full entitlement to holiday pay and was in fact overpaid by \$60.71.

Unjustified dismissal

[35] Mr Moreland claims that he had no option but to leave his employment at the end of the season, rather than take on a second term with the Johnstone's. Mr Moreland is claiming that he was constructively dismissed.

[36] Mr Moreland says the fixed term agreement does not comply with section 66(4) of the Act in that it does not state the way in which the employment will end or the reasons for it ending in that way.

[37] I agree that the agreement did not meet the requirements of section 66(4). The consequence of breaching section 66(4) is that the Johnstone's are unable to rely on the fixed term nature of the agreement.

[38] However, the employment relationship did not end through the Johnstone's reliance on the fixed term nature of the agreement. If anything, it could be said that Mr Moreland relied on the ending of the season and the fixed term of the agreement when he left his employment at the end of June 2008 without providing any notice. Indeed, it is common ground that the Johnstone's approached Mr Moreland and offered him a second season on the farm as the Farm Assistant but Mr Moreland declined that offer.

[39] A second issue that arises under this heading is whether Mr Moreland is able to pursue his personal grievance in the Authority given that he did not raise it inside the requisite 90 day period following his dismissal.

[40] I find Mr Moreland is entitled to pursue his grievance. Pursuant to section 115(c) of the Act Mr Moreland is entitled to have his dismissal claim considered by the Authority due to the fact that his employment agreement does not contain an explanation concerning the resolution of employment relationship problems as required by section 65 of the Act.

Was Mr Moreland constructively dismissed?

[41] Mr Moreland is claiming the employer breached the employment relationship to such an extent that he had no option but to leave his employment.

[42] The conduct amounting to a breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.¹

[43] In coming to my conclusions under this heading I must determine the following issues:

- did Mr Johnstone leave his employment as a result of a breach of duty on the part of the Johnstone's? and
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Johnstone would leave his employment?²

¹ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA).

² (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168).

Was the resignation caused by a breach of duty on the part of the respondent?

[44] In support of his claim for unjustified dismissal Mr Moreland says the Johnstone's breached their obligation of good faith and committed other statutory breaches during his employment. I have earlier found that the Johnstone's did not breach their obligations of good faith toward Mr Moreland. However, I have found two breaches of statutory obligations when the Johnstone's breached the Wages Protection Act when they made a deduction from Mr Moreland's final pay and the Employment Relations Act when they omitted to provide for an explanation concerning the resolution of employment relationship problems in the employment agreement.

[45] In addition Mr Moreland says he had to work long hours on the farm and that this created difficulties between him and his son and that his son's health deteriorated while they were on the Johnstone's farm.

[46] I have earlier found that Mr Moreland's hours of work were reasonably flexible. Mr Moreland gave evidence that when he moved to the Johnstone's farm he took on sole responsibility for the care of his son. He says that the hours he was required to work meant that he was not able to be at home at the time his son needed to be getting ready for school or later in the afternoon/evening.

[47] Unfortunately for Mr Moreland such is the nature of farm work, especially when cows need to be milked. Given Mr Moreland's experience in the farming industry he must have known that cows are generally milked in the early morning and late afternoon. The requirement to work at these times does not constitute a breach of good faith or the employment agreement.

[48] Further, Mr Moreland received all his contractual entitlements to weekends off and received other time off when he requested it and the Johnstone's were able to accommodate it.

[49] Mr Moreland raised issues with the Johnstone's in early 2008 with respect of his wages and his claim that he was not being paid the minimum rate of pay. A Labour Inspector from the Department of Labour fully investigated his claim and concluded he was being paid correctly. Mr Moreland was not satisfied with that outcome and has pursued his claim in the Authority. I, also, have found that the Johnstone's have met the minimum wage requirements in respect of Mr Moreland's employment.

[50] However, I have found one breach of the Employment Relations Act and one breach of the Wages Protection Act. I am not satisfied it can be said that these two breaches were the reason Mr Moreland left his employment. He was not aware until well after he left, of either breach. I find on the balance of probabilities that it is more likely than not that it was Mr Moreland's unhappiness with the outcome of the Labour Inspectors report and concerns he held about his son that caused him not to continue working with the Johnstones.

[51] I find the reasons for Mr Moreland leaving his employment were not as a result of any breach of duty on the part of the Johnstone's. It follows that Mr Moreland's claim for personal grievance has not been successful and I can be of no further assistance to him.

Summary of Orders

Paul and Sheryl Johnstone trading as Johnstone Farming Partnership are ordered pay to Mr Moreland within 28 days of the date of this determination \$1,138.52 being an unlawful deduction made from Mr Moreland's final pay.

Costs

[52] Costs are reserved. Given the extent to which both parties have been successful I am of a mind to let costs lie where they fall, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority