

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 304
5296379

BETWEEN WAYNE DUGGAN
 Applicant

AND DAVID AND KAREN HORI
 TRADING AS ORETE DAIRY
 FARM
 Respondent

Member of Authority: Vicki Campbell

Representatives: Darryl Andrews for Applicant
 Jeremy Paterson for Respondent

Investigation Meeting: 16 May 2011 at Whakatane

Submissions Received: 10 June 2011

Determination: 13 July 2011

DETERMINATION OF THE AUTHORITY

- A Mr Duggan had an ongoing employment relationship with David and Karen Hori trading as Orete Dairy Farm.**
- B Mr Duggan was not subject to an unjustified disadvantaged in his employment.**
- C David and Karen Hori trading as Orete Dairy Farm are ordered to pay Mr Duggan outstanding holiday pay in the amount of \$2,447.48 within 28 days of the date of this determination.**
- D Mr Duggan was justifiably dismissed from his employment.**

[1] Mr Wayne Duggan was employed by Mr David and Mrs Karen Hori as a Dairy Farm Production Assistant from 1 December 2008 to 23 April 2010.

[2] Mr Duggan claims he was unjustifiably dismissed, unjustifiably disadvantaged, did not receive at least the minimum wage for each hour he worked and was not paid for public holidays which he says he worked.

Nature of the employment

[3] The employment agreement between the parties states that the employment is subject to a fixed term. Mr Duggan says the fixed term was put into the agreement after he signed it and that the agreement he signed was not for a fixed term, but was an ongoing employment relationship.

[4] The agreement produced to the Authority has a date of 31 June 2010 (June has only 30 days). In January 2010 Mr Duggan was given notice that his employment would end on 31 May 2010.

[5] Mr and Mrs Hori say the agreement initially was an open ended agreement, however on 19 October 2009 after discussions with Mr Duggan it was agreed that the employment agreement would become fixed term.

[6] The Employment Relations Act (the Act) at s 66(4) requires a fixed term to provide for the reasons for the fixed term nature of the agreement. The employment agreement signed by the parties has a provision at clause 3.2.4 for the reasons to be stated in the agreement. This provision has not been completed. I find that the agreement was not a valid fixed term agreement and therefore Mr and Mrs Hori are unable to rely on the agreement to having expiry date of June 2010.¹

[7] The decision regarding the nature of the employment relationship does not affect any other findings in this determination as Mr Duggan was not dismissed on the basis of the expiry of a fixed term agreement.

Disadvantage grievance

[8] There are seven issues raised in the statement of problem which Mr Duggan says lead to his disadvantage in his employment. Those seven issues are:

- Failure to comply with the roster in that Mr and Mrs Hori continually pressured Mr Duggan into working hours and days beyond those provided for

¹ Employment Relations Act 200, section 66(6).

in the employment agreement and extended the hours of work without consultation.

- Failure to provide a healthy and safe working environment in that Mr and Mrs Hori:
 - expected Mr Duggan to carry out chemical spraying without providing the appropriate safety clothing; and
 - made threats of physical violence to him and allowed co workers and family members to abuse him; and
 - prevented Mr Duggan from using motor bike/ATV thereby not allowing Mr Duggan to carry out his work in a timely or efficient manner;
- Breach of the Residential Tenancies Act 1986 in that Mr and Mrs Hori failed to remedy faults in the accommodation provided.

The rostered hours and actual hours worked

[9] Mr Duggan claims Mr and Mrs Hori continually pressured him into working hours and days beyond those provided for in the employment agreement and extended the hours of work without consultation. This is denied by Mr and Mrs Hori.

[10] At the investigation meeting Mr Duggan produced two diaries which he says he completed at the end of each day. Mr Duggan says he recorded the number of hours he worked each day when employed by Mr and Mrs Hori. I have reviewed the diaries carefully and note that there are significant portions of the employment history not recorded in the diaries. For example there are no entries as to hours worked for the period 9 December 2009 to 11 January 2010, then from 26 February 2010 until the employment relationship came to an end in April 2010.

[11] I also note that there are inconsistencies in the information recorded in the diary which brings its reliability into question. For example on 16 December 2008 Mr Duggan records that he finished the morning milking at 9.30 but in his commentary notes "...home for breakfast at 9.00...". Also on 13 July 2009 Mr Duggan notes that he worked from 10.30am to 4.00pm however in his commentary he notes that he came in for "...very late lunch 3.30..." and "...went to bed at 3.45. I am sick with flu."

[12] On 25 August 2009 Mr Duggan attended a doctor in Opotiki, however, the time off work for the attendance at the doctor is not recorded in Mr Duggan's diary and in

deed claims he worked 12 hours that day. The doctor noted that while Mr Duggan had attended his office on 25 August, the doctor expressed an opinion that Mr Duggan would be medically unfit to work from 31 August 2009 for five days. Mr Duggan's diary records that he worked on these five days even though he was medically unfit to do so.

[13] Further on 18 September 2009 Mr Duggan records his hours of work as amounting to 10.25 hours yet claims in the commentary to have worked 13.20 hours. His hours are also overstated on 21 and 22 September 2009 where he says he worked in excess of 13 hours, however, the actual hours recorded amount to 10.25 and 11.05 respectively.

[14] At the investigation meeting two of the inconsistencies were put to Mr Duggan and he accepted that the diary notes were not as accurate as he was asking me to believe.

[15] Working on a farm is not like working in a 9.00am-5.00pm job. The employment agreement signed between the parties provided for no specified normal hours of work even though there was provision for the parties to agree on the hours to be normally worked. As far as any written expression as to the hours to be worked, the employment agreement at clause 6.1 simply provided:

The hours worked each week by the Employee shall be as directed by the Employer to best suit the management of the farm and may be on any, or all, days of the week.

[16] At clause 6.2 of the agreement Mr Duggan accepts that there may be seasonal fluctuations in the hours to be worked and rostered days off. The clause also requires Mr Duggan to comply with Mr and Mrs Hori's requirements. Clause 6.3 sets out that the standard roster of days on and days off will be 1 ½ days on 2 ½ days off.

[17] The page containing the hours of work provision is initialled by all parties, therefore the Authority has concluded that that is the extent of any agreement as to hours and days of work.

[18] As I understand Mr Duggan's complaint, he says he had to work some weekends during calving season instead of being able to take the weekends off. I find that this requirement was contemplated in the employment agreement and was something Mr Duggan had agreed to when he signed the employment agreement.

[19] It follows that Mr Duggan has not established to my satisfaction that the requirement for him to work the hours he worked was outside the agreement he entered into with Mr and Mrs Duggan and therefore he has not been subject to a disadvantage in his employment.

Health and Safety

[20] Mr Duggan claims the Hori's failed to provide a healthy and safe work environment for him. In particular, Mr Duggan claims he was subjected to abuse, required to spray without the appropriate safety equipment, was prevented from using the motor bike/ATV. These allegations are denied by Mr and Mrs Hori.

Abuse

[21] Mr and Mrs Hori say that Mr Duggan was abusive towards them as the employer. By way of example they say Mr Duggan turned a high pressure hose on Mrs Hori and hosed her down with it. Mr and Mrs Hori also noted that the diary notes provided by Mr Duggan contain a written threat to kill Mr Hori. This comment is recorded in Mr Duggan's commentary on 24 September 2009.

[22] Ms Adelle Cook, the daughter of Mr and Mrs Hori and someone who relieved for Mrs Hori in the milking shed, gave evidence of the language and comments she was subject to by Mr Duggan while working with him. At the investigation meeting Ms Cook acknowledged that she gave as good as she got, and that she did swear at Mr Duggan but only in retaliation for the way he was speaking to her.

[23] In answer to questions at the investigation meeting Mr Duggan told the Authority that he received a lot of warnings in relation to his behaviour and language and that some of these warnings were verbal while others were provided to him in writing. Mr Duggan has not challenged any of the warnings and therefore I have concluded that he has accepted the warnings were fair and reasonable.

[24] I find Mr Duggan was on the receiving end of some strong language from his employers and from Ms Cook, however, this was a two way street and I find it is more likely than not that any abuse was instigated by Mr Duggan. I have concluded that Mr and Mrs Hori attempted to remedy the problem of Mr Duggan's abusive language by issuing him with a number of oral and written warnings, however, these warnings appear to have gone unheeded.

Health and safety

[25] Mr Duggan claims he was required to spray without the requisite personal protective equipment (PPE) and that the farm bikes he was required to use were both dangerous.

[26] Mr Duggan laid a complaint with the Department of Labour on 29 December 2009 which relates to the issues he now raises in relation to his claim for disadvantage. The claim was investigated by the Health and Safety Inspectors employed by the Department of Labour and a final report on the outcome of the investigation was provided to Mr Duggan on 5 February 2010.

[27] The report from Mr Graham Bates, Team Leader, states:

- Personal protective clothing has been purchased and supplied to you for spray work.
- Maintenance has been completed on both farm bikes.
- Health and safety systems are currently in place but these are being reviewed and updated by a health and safety consultant to ensure that: effective identification and control of all significant farm hazards, general information is provided to employees, maintenance of farm vehicles is recorded, effective accident/incident reporting and recording and emergency systems are in place.

[28] Information obtained under the Official Information Act and which was provided to the Authority by Mr Duggan shows that on 7 January 2010 when the labour inspector visited the farm property, he was advised by Mr and Mrs Hori that the PPE required for spraying was on order and was due to be delivered the next day, and the farm bike was being sent to town for repairs.

[29] These actions were followed through by Mr and Mrs Hori, thus the statements by Mr Bates in his 5 February 2010 letter that the complaints by Mr Duggan had been addressed.

[30] In February 2010 Mr Duggan presented to his doctor complaining of nausea, vomiting, diarrhoea, skin rashes on the legs and groin, headaches and fatigue. Mr Duggan attributed the symptoms to the herbicide he was using when spraying the weeds on the farm.

[31] Mr Duggan's doctor was of the opinion that the agent used by Mr Duggan was not known to cause the symptoms he complained of, unless it was ingested in large amounts. No treatment ensued. Mr Duggan sought a second opinion and instructed his new doctor to lodge a claim with ACC for chemical poisoning which he did. A

third opinion was then sought by Mr Duggan, although by this stage Mr Duggan was no longer in the employment of Mr and Mrs Hori and his symptoms had all but disappeared.

[32] An ACC panel was convened to consider Mr Duggan's claim for ACC coverage. In its report the panel members state that they considered it likely that Mr Duggan had been exposed to chemicals through skin contact. The panel members thought it unlikely Mr Duggan had experienced any chronic health problems from his work exposure and no long term ill effects had been reported. The panel did not accept that Mr Duggan's condition had caused any incapacity for work.

[33] The Health and Safety in Employment Act 1993 sets out obligations on both employers and employees to take all practicable steps to prevent harm to people while at work. Mr Duggan was provided with the appropriate PPE. I have accepted the evidence of Mr and Mrs Hori that Mr Duggan did not follow instructions when filling the knapsack. I find on the balance of probabilities that Mr Duggan, keen to spray as wide an area as possible in one go, would overfill the knapsack which caused the fluid to spill over his overalls and come into contact with his skin.

[34] I find the issues relating to Mr Duggan's chemical exposure were not an action taken by Mr and Mrs Hori. Further there is no evidence Mr Duggan had to take any time off work as a result of the dermatitis. I find Mr Duggan was not disadvantaged in his employment due to health and safety concerns in his employment.

Motorbikes/ATV

[35] Mr Duggan claims he was disadvantaged in his employment as a result of him not being allowed to use the ATV and because of the poor maintenance of the motorbikes. Mr and Mrs Hori say Mr Duggan was not prohibited from using the ATV. Rather, Mr Duggan claimed the vehicle was unsafe and called in the Department of Labour Health and Safety Inspectors. The Inspector confirmed the bike was safe, however, Mr Duggan refused to use it. His refusal to use the ATV impacted negatively on Mr Duggan's ability to perform his work in a timely and efficient manner.

[36] As already set out in this determination I am satisfied that when it was brought to Mr and Mrs Hori's attention they addressed the problems with the motorbikes.

Further I find Mr Duggan was not prohibited from using the ATV but made a conscious decision not to.

[37] While the lack of transport did impact on Mr Duggan's ability to perform his work, it was not an action attributable to his employer.

Residential Tenancy

[38] Mr Duggan says Mr and Mrs Hori breached the Residential Tenancies Act 1986 in that they failed to remedy faults in the accommodation provided to Mr Duggan. Mr and Mrs Hori say the accommodation was not owned by them, but by Orete Incorporation and any faults or problems with the accommodation were passed on to the owners. On one occasion a plumber attended the house to fix the fireplace, but was verbally abused by Mr Duggan and was told he was not welcome.

[39] I am satisfied that on the balance of probabilities Mr and Mrs Hori attempted to rectify matters with Mr Duggan's accommodation however Mr Duggan was less than co-operative.

Conclusion

Mr Duggan has not established that he was disadvantaged in his employment. I can be of no further assistance to him regarding this claim.

Arrears of wages

[40] Mr Duggan claims holiday pay in the sum of \$4,513.41 for holiday pay outstanding. Mr Duggan says he was not paid for days in lieu of public holidays which he had worked during his employment and that these ought to have been paid on termination. He also claims a sum for unpaid annual holidays.

Public Holidays

[41] Mr Duggan complained to the Department of Labour that he had not been paid according to the Holidays Act for public holidays worked. Mr Duggan's complaint was investigated by Labour Inspector, Mr Alan Reid.

[42] In response to the claims by Mr Duggan regarding the public holidays, Mr and Mrs Hori say they reached an agreement with Mr Duggan that rather than take 2 days off each fortnight, he could take an extra ½ day which they would treat as his alternative holiday for the purposes of any public holidays he worked during the year.

[43] In his report to Mr and Mrs Hori, the Labour Inspector correctly advises that the arrangement between the parties that Mr Duggan take an extra day off each month did not constitute compliance with section 57 of the Holidays Act.

[44] Section 57 requires employers to agree with an employee on a day to be taken as an alternative holiday where an employee has worked on a public holiday. The Act refers to "...a day..." and a "...whole day...". Half a day, is not "...a whole day...".

[45] The section also requires that the day be an otherwise working day for the employee. Mr Duggan's employment agreement set out that his hours of work included an entitlement to 2 ½ days off each month. Therefore the ½ day which Mr and Mrs Hori say was Mr Duggan's alternative day, does not meet the requirement of the Act as that day was not an otherwise working day for Mr Duggan.

[46] Mr Duggan is entitled to be paid for 14 alternative holidays for public holidays worked by him.

David and Karen Hori trading as Orete Dairy Farm are ordered to pay to Mr Duggan the sum of \$1,873.76 (being 14 days @ \$133.84 per day) pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Minimum wage

[47] Mr Duggan says that although his employment agreement stated that he would receive \$41,760.00 per annum, he was only in fact paid the equivalent of \$28,240 which he says is less than the minimum wage. He claims \$1,914.84 under this heading.

[48] Mr Duggan has not established his claim under the Minimum Wage Act. I am satisfied Mr Duggan was paid salary payments equivalent to \$41,760.00 which incorporated the market rent for the accommodation provided to him on the farm. It is a requirement that employees living in farm accommodation pay PAYE on the market rent for the accommodation. This was set out the employment agreement signed by Mr Duggan.

Annual leave

[49] Mr Duggan claims he has not been paid his full entitlement to annual leave. There is no dispute that Mr Duggan is owed \$573.72 for outstanding holiday pay. This is the figure arrived at by the Labour Inspector having investigated Mr Duggan's complaint to the Department of Labour.

[50] Mr Duggan says this figure should be \$1,562.73. Mr Duggan relies on his diaries to support his claim which he says shows he took only 12.5 days off for annual leave between 1 December 2008 and 1 December 2009. Given that I have already found the diaries to be unreliable, I have preferred to rely on the Labour Inspectors report which was concluded after a full and complete investigation into Mr Duggan's annual leave entitlements.

David and Karen Hori trading as Orete Dairy Farm are ordered to pay to Mr Duggan the sum of \$573.72 pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Unjustified dismissal

[51] On 1 December 2009 Mr and Mrs Hori gave notice to Mr Duggan that his employment would end at the end of the season, on 31 May 2010. This was followed on 2 December 2009 with a final written warning. The warning records the issues with Mr Duggan's employment as being his refusal to follow reasonable directions to perform his job, unfounded allegations made about his employers, and his general insolence and aggression shown in the workplace. On 21 January 2010 Mr Duggan raised a personal grievance contending the notice given to him on 1 December 2009 was unjustified and unfair.

[52] On 15 April 2010 Mr Hori approached Mr Duggan and asked him why he had not attended work the previous day. Mr Duggan's response was that it had been raining. Mr Hori told the Authority that he was trying to talk to Mr Duggan but he kept walking away. After discussing an issue relating to an overpayment of wages made to Mr Duggan, Mr Duggan gave Mr Hori the fingers and threatened him with physical violence. Mr Hori reminded Mr Duggan that his employment was subject to a final written warning.

[53] The following day Mr Duggan was suspended from the workplace until 19 April 2010. The 14 April 2010 incident was to be discussed at a mediation meeting which had previously been arranged to discuss Mr Duggan's personal grievance and was to be held in Rotorua on 19 April 2010.

[54] On 16 April 2010 Mr Duggan advised Mr and Mrs Hori that he would no longer be attending the mediation meeting. In response, on both 16 and 18 April 2010 Mrs Hori reminded Mr Duggan in writing that he was still suspended and set out her

expectation that Mr Duggan would be available to attend a meeting on 19 April 2010 at the Orete office instead.

[55] Mrs Hori also notified Mr Duggan that the suspension would be lifted on 19 April 2010 at which time he was expected to undertake the spraying of ragwort which was the job he had been undertaking at the time of his suspension.

[56] Mr Duggan did not attend the meeting on 19 April 2010. On 20 April 2010 Mr and Mrs Hori provided written notice to Mr Duggan of their view that his conduct on 14 April 2010 constituted misconduct justifying the termination of Mr Duggan's employment. Mr Duggan was then given a further opportunity to provide a written response or to meet with Mr and Mrs Hori on 22 April 2010 to provide a response to the allegations of misconduct.

[57] Mr Duggan was reminded that he had received verbal and written warnings and in particular the written warning issued to him on 2 December 2009 that if he responded to directions from his employer with insolence and aggression he would face dismissal.

[58] No written response was received from Mr Duggan and he failed to attend the meeting on 22 April 2010. In the absence of any explanation from Mr Duggan, Mr and Mrs Hori made the decision to terminate Mr Duggan's employment for serious misconduct.

[59] I find Mr Duggan was provided with a reasonable opportunity to provide an explanation for his actions on 14 April 2010 but had failed to do so.² In such a situation it was open to Mr and Mrs Hori to make a decision to dismiss.

[60] I find the decision to dismiss was what a fair and reasonable employer would have done in all the circumstances of this case. Mr Duggan had a history of bad behaviour in the workplace which is evidenced by the many warnings received by him. He had been warned in December 2009 that his habitual insolence and disrespect would no longer be tolerated and that dismissal would be a likely outcome if he continued to display such behaviours.

[61] Mr Duggan does not have a personal grievance for unjustified dismissal.

² *Auckland Chemical Paint etc IUOW v Healtheries of NZ Ltd* [2990] 2 NZILR 701, followed.

[62] In coming to my conclusions in this matter I have considered whether Mr Duggan's suspension may have led to a successful claim of unjustified disadvantage. However, I have concluded that it would not. The Employment Court has stated:³

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.

[63] The Court considered its decision in *Tawhiwhirangi v A-G in respect of Chief Executive, Department of Justice*⁴ where the Court confirmed a flexible and sensible approach should be taken.⁵

[64] Given that Mr Duggan had previously assaulted Mrs Hori with a high pressure hose, and that he had made a threat of physical violence against Mr Hori I accept that suspension in all the circumstances was warranted. Mr Duggan did not oppose the suspension and it provided a cooling off opportunity for both parties.

[65] Even if I had found in Mr Duggan's favour, Mr Duggan provided no evidence that he had attempted to mitigate his loss. Indeed following the investigation meeting the Authority received information to the effect that Mr Duggan was unable to work as he was on a sickness benefit. Mr Duggan gave limited evidence of the impact of the dismissal on him and therefore any award of compensation would be at the lower end of the scale. Further, there would have been considerable scope for reductions of any remedies because of contributory fault.

Costs

[66] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, either party may lodge and serve a memorandum as to costs within 28 days of the date of this determination with a further 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this time frame without prior leave.

³ *Graham v Airways Corporation of New Zealand Limited* [2005] ERNZ 587 at [104].

⁴ [1993] 2 ERNZ 546.

⁵ See *Supra* n 1 at [104].

[67] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that I am of a mind to let costs lie where they fall, given the partial success of both parties in this matter.

Vicki Campbell
Member of Employment Relations Authority