

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 224
5366448

BETWEEN TONY CLEAVER
Applicant

A N D TONY HALL
Respondent

Member of Authority: Alastair Dumbleton
Representatives: Riki Donnelly, counsel for Applicant
Stephen Bradshaw, counsel for Respondent
Investigation meeting: 13 September 2012
Submissions Received 13, 21 and 25 September 2012
Date of Determination: 16 October 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Tony Cleaver has a personal grievance. He was unjustifiably dismissed by Mr Tony Hall.**
- B. Mr Cleaver is to be reimbursed lost wages for a period of 17 weeks (less any payment received in lieu of notice) and he is to be paid compensation of \$4,500 under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Costs are reserved.**

Employment relationship problem

[1] The Authority has investigated and now determines a personal grievance raised by the applicant Mr Tony Cleaver against his former employer the respondent Mr Tony Hall.

[2] Mr Cleaver claims that he was unjustifiably dismissed from his job as a worker on Mr Hall's farm.

[3] Both men agree that the employment relationship, which began in December 2010, was a productive and promising one, at least until a day or so before it ended abruptly on 20 October 2011. On that morning Mr Cleaver contacted the Police and complained to them, and to his parents, that he had been assaulted by Mr Hall a short time earlier. He said he had been told by Mr Hall to leave the house he and his family were living in on the farm by the end of the day.

[4] A Police officer went to Mr Hall's farm and interviewed him and Mr Cleaver. His mother, Ms Sharon Ritchie, also went there to help her son and his partner and their two young children pack up and leave the house. She took photos of her son's face where he said he had been struck by Mr Hall an hour or two earlier while they were milking.

[5] There is no dispute that whatever occurred on 20 October while Mr Cleaver and Mr Hall were working together, the employment relationship ended immediately as a result. Mr Hall claims that Mr Cleaver had resigned suddenly during a disagreement they had over a \$5,000 wage increase and other benefits Mr Cleaver had asked for the previous day. Mr Hall accepts there was a verbal altercation but denies that he touched Mr Cleaver in any way.

[6] Mr Cleaver claims that he was dismissed by Mr Hall who struck him three times on the head and body and ordered him to vacate his house on the farm by the end of the day. The requirement to leave the house has been admitted by Mr Hall who says that he had not realised Mr Cleaver as a tenant had been entitled to more than just a few hours notice to go.

[7] The most significant conflict between the versions of what happened in the milking shed on 20 October is whether the disagreement over a pay rise led Mr Hall to tell Mr Cleaver he was fired and whether a remark Mr Cleaver made as he was walking away led Mr Hall to assault him.

[8] Mr Cleaver says that there was some shouting and swearing and expression by him of his disgust at Mr Hall's rejection of a pay increase and other changes he had sought to his employment agreement. He claims that a remark he made as to what his father had said he would have told Mr Hall to do (get fucked and stick his job), led

Mr Hall to tell him he was fired. He also claims that when he retorted “I’ll see you in Court” Mr Hall said “I’ll make it worth it,” sprang at him and struck him on the head and chest.

[9] The Police charged Mr Hall with assault and after a defended hearing he was convicted by the District Court and fined \$400. An appeal by him to the High Court was unsuccessful. During the Authority’s investigation meeting Mr Hall continued to maintain that he had not touched Mr Cleaver.

[10] It is contended for Mr Cleaver that Mr Hall’s alleged actions and how he acted as an employer on 20 October cannot be justified under the test of s 103A of the Employment Relations Act 2000. Assaulting an employee could rarely if ever be justifiable.

[11] The issues for the Authority are:

- (a) Was Mr Cleaver dismissed, whether by words and/or physical conduct of Mr Hall, or did he resign?
- (b) If he was dismissed was that action of Mr Hall justifiable?
- (c) If not, what remedies is Mr Cleaver entitled to after taking into account any contributory fault or blame on his part?

[12] The Authority must determine for itself from the evidence whether Mr Hall told Mr Cleaver he was fired and whether Mr Hall then struck him. The finding by the District Court that a criminal assault occurred is the opinion of that tribunal based on the evidence provided to it by the Police, including that of Mr Cleaver, and by Mr Hall in his defence. That finding cannot, however, be completely disregarded as it was made to the high standard of ‘beyond a reasonable doubt.’ The charge was also laid by an independent investigating and prosecuting authority which does have some discretion as to whether to proceed at all.

[13] From the transcript of the evidence, the Court’s scepticism in relation to Mr Hall’s account of events is obvious from one of the last questions he was asked by the Judge. I too consider it unlikely that when Mr Cleaver was told he would not be getting a pay rise and other requested benefits he quickly hatched a plan to take Mr Hall to ‘court’ over the rejection and, to enhance his case, contacted the Police, ripped

his hoodie, and made a false complaint to an officer, all the while putting himself out of a job he had been doing well at and putting his family out of their accommodation and his partner out of a job she had locally.

[14] I do not consider it likely that Mr Cleaver resigned in a fit of pique because Mr Cleaver told him he would not be getting a pay increase of \$5,000, as had earlier been discussed. Neither do I consider that Mr Cleaver's "see you in Court" remark was a response to being denied that increase. I find it is much more likely to have been made as a retort to Mr Hall telling Mr Cleaver that he was fired.

[15] On balance the Authority is satisfied that Mr Hall did strike Mr Cleaver in the way the latter complained of, and did so deliberately. I note that the District Court took into account the ripped hoodie Mr Cleaver said had been damaged during the assault. I also consider that the photographs taken by Ms Ritchie a short time after the alleged assault appear to show some contusion below Mr Cleaver's left eye, which he told the Authority had resulted from the blow to the head. There is too the fact that Ms Ritchie found Mr Cleaver when she went to him to be unusually quiet and subdued, which is apparently contrary to his normally outgoing and sometimes confrontational nature.

[16] Mr Cleaver is no stranger to the courts and has been in trouble previously for fighting. He is young and of reasonably strong build, yet it appears he was quite upset when he contacted his mother and father shortly after the incident in the milking shed. Mr Hall too has had a brush with the law for fighting, although many years ago. He is of robust build and speaks bluntly.

[17] I find that Mr Hall actually dismissed Mr Cleaver, initially by words to that effect. The dismissal was then confirmed emphatically by Mr Hall when he followed up with a brief physical attack on Mr Cleaver, as retaliation for the "see you in Court" retort.

[18] It goes without saying that the actions of the employer, Mr Hall, and how he acted were not what a fair and reasonable employer would have done in all the circumstances at a time when there was disagreement about changes to Mr Cleaver's terms and conditions of employment.

[19] Mr Cleaver's requests or demands in that respect cannot be regarded as any sort of provocation justifying the actions of Mr Hall, who was obliged to consider and

respond to Mr Cleaver's requests for new terms and conditions but was not required to meet them.

Determination

[20] Applying the test of s 103A of the Employment Relations Act, the Authority determines that Mr Cleaver was unjustifiably dismissed by Mr Hall and therefore has a personal grievance in that regard.

Reimbursement of wages and compensation

[21] The claim for lost wages is for 40 weeks, from the date of dismissal until Mr Cleaver obtained permanent work, an amount of \$26,773 based on the annual salary of \$35,000 and after deduction of \$150 earned in the period.

[22] Mr Cleaver was under a duty to mitigate his loss by making reasonable attempts to find other employment. I am not satisfied from the evidence he gave of his endeavours in this regard that he kept up his efforts for the 40 week period of the claim. I consider that his entitlement should be calculated over a period of four months or approximately 17 weeks. If Mr Cleaver was paid two weeks in lieu of notice, as suggested by Mr Hall, then after deduction the recovery period is 15 weeks at the rate of salary.

[23] As discussed at the beginning of the investigation meeting, the benefit paid to Mr Cleaver and his family are matters that he must account for to the appropriate welfare authority and are not required to be deducted from his payment for reimbursement of lost wages.

[24] Having heard something of his background and character, I am not persuaded that Mr Cleaver was seriously traumatised by what happened to him. Nevertheless, he did suffer hurt feelings, humiliation and distress through being dismissed abruptly after being assaulted, and through having himself and his family put out of their accommodation with virtually no notice. The award sought of up to \$20,000 is, in my view, excessive in the circumstances. I consider that \$4,500 is appropriate under s 123(1)(c)(i) of the Act.

Contribution

[25] Before awarding any remedies to Mr Cleaver to resolve his personal grievance, the Authority is required to consider whether there was any contributory fault or blame on his part for the situation that gave rise to the grievance. If he did contribute, the Authority must assess an appropriate reduction of his awards. There are two matters to be looked at. First, immediately before the dismissal occurred Mr Cleaver was seen by Mr Hall hitting a cow with a length of alkathene pipe. He was trying to free it from where it had become trapped by the leg in part of the milking shed. Mr Hall told him to stop immediately and he freed the cow by using a gentler method of tapping it on its backside. He uses alkathene in his shed when necessary to help get cows to move. Mr Hall claims that he would have dismissed Mr Cleaver for mistreatment of the animal.

[26] I consider Mr Hall exaggerated the seriousness of the situation. There was no suggestion that Mr Cleaver had mistreated cows or other animals at any other time and Mr Hall had reacted by merely asking him to leave the cow alone and carry on milking while he freed it himself. After that and quite independently, I find, the disagreement over the pay increase arose, leading to the dismissal.

[27] At most there was conduct that may have justified a warning or caution from Mr Hall, but it cannot sound as contribution because I do not consider it was causally linked to the unjustified dismissal. That was provoked by the disagreement over the pay rise which Mr Hall said he had withdrawn because of Mr Cleaver's attitude and behaviour at work on 20 October.

[28] The second matter is the failure by Mr Cleaver to warn Mr Hall that milk was spilling over from the calfeteria and flowing to waste. Mr Hall's evidence was that from time to time he forgets to close the taps and milk overflows. He accepted that when this happens it is entirely his fault. Mr Cleaver's evidence was that he did not see the milk overflowing, as he was facing away from the path it was taking while occupied with hosing part of the milking shed. Mr Hall was not able to say that he had seen Mr Cleaver looking in the direction of the overflow. In the circumstances, I am unable to find that Mr Cleaver deliberately or unreasonably failed to warn Mr Hall of a problem causing loss of product to his employer. Again, there is also a link missing between the overflowing milk and the unjustified dismissal.

[29] In the result, the Authority is not required by the Act to make any deduction to the remedies awarded above on account of contribution by Mr Cleaver.

[30] In summary, Mr Cleaver was unjustifiably dismissed by Mr Hall. He is to be reimbursed lost wages for a period of 17 weeks (less any pay in lieu of notice received) and he is to be paid compensation of \$4,500.

Costs

[31] Costs are reserved. Application may be made by Mr Cleaver within 14 days of the date of this determination. A reply on behalf of Mr Hall is to be filed within a further 14 day period.

A Dumbleton
Member of the Employment Relations Authority