

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Meredith Bell (Applicant)
AND L and B Investments Limited (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Ann Lauder and Scott Lauder for the Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 16 December 2004
DATE OF DETERMINATION 24 January 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Carl Bell and Meredith Bell were employed jointly by L & B Investments Limited (L & B) as farm managers on L & B's dairy farm. As originally lodged, the problem related to personal grievance claims arising from their suspension from the employment on 28 July 2003 and their resignation on 8 August 2003. Carl Bell later withdrew from these proceedings so the investigation dealt only with Meredith Bell's claims. There is also a claim for arrears of wages payable.

[2] Ann Lauder and Scott Lauder are two of the three listed directors of L & B. Both are the only shareholders and directors of another company that holds about 90% of the shares of L & B. Ann Lauder is Scott Lauder's mother. Both participated in the investigation meeting and gave evidence, as did Mrs Bell.

Background

[3] By the time of the investigation meeting, Mrs Bell had suffered some health problems that clearly affected her recollection. However, she impressed as making a genuine effort to accurately describe in evidence her recollection of events. On the other hand, Mrs Lauder and Mr Lauder gave evidence which they stuck to even when it was inconsistent with documentary material or earlier accounts. For that reason, I must treat their evidence with caution. Having said that, much of the background can be followed from correspondence and there are only a few genuinely relevant disputes.

[4] Mr & Mrs Bell were looking for farm employment and were referred to L & B by an employment consultant. They attended at the farm on 8 July 2003 where they first met Mrs Lauder and then Mr Lauder. Terms of employment were discussed although no draft written employment agreement was proffered. Mrs Lauder and Mr Lauder were keen to employ Mr & Mrs Bell and it was left for them to ring Mrs Lauder or Mr Lauder later after they had considered the offer.

OF THE EMPLOYMENT

[5] There is a dispute about what questions the Bells were asked at the interview. In the statement of problem, the Bells say that they were asked if they smoked but were not asked any specific questions about their health or whether they took any medication. In the statement in reply, L & B says that Mrs Lauder asked if they smoked, if they did drugs and whether there were any health concerns but they were not asked if they were on any medication. Mr Lauder told me that Mrs Lauder asked *Do you do drugs?* and that he asked about smoking, health problems and whether there was anything else L & B needed to know. Mrs Lauder gave me a diary note which she said was made on 8 July 2003 that reads *Interviewed Karl & Meredith. Asked if on drugs, medication or smoked or drinkers Both smoked, no to the others. Meredith did lots of talking, answered a lot of questions directed to Karl.* The inconsistency between the statement in reply and the diary note was blamed on their lawyer's mistake as were several other inconsistencies between their evidence and the statement in reply. I accept Mrs Bell's evidence that there was a discussion with Mrs Lauder (before Mr Lauder's arrival) about Mrs Bell's and the children's health but there was no other questions about health, doing drugs or medication during the discussions on 8 July 2003. Whether or not all of Mrs Lauder's diary note was made on 8 July, it is not a true reflection of the discussions on the day.

[6] Mr Bell did ring the next day and accepted the employment. A salary of \$65,000 split equally between Mr & Mrs Bell was agreed. Mr Bell would manage the farm and oversee Mrs Bell's training, it having been earlier established that she was inexperienced in the required work. Mrs Bell was engaged to complete milking and calving. Arrangements were made for Mr & Mrs Bell to move into the farm accommodation, which they did on or about Saturday 12 July. Mr Lauder told me that the arrangement was for them to move into the house on Monday 14 July but he was unconcerned at the time that they had moved in earlier.

[7] Mr Lauder's evidence is that he received a phone call from someone who told him that Carl Bell was on methadone, had been on drugs and had criminal convictions. He told me that he did not recognise the voice and the caller declined to identify herself despite his request. However, the statement in reply says that the caller claimed in a phone message left on 15 July that Mr Bell was *on drugs*. It is common ground that Mr Lauder went to the farm house on 16 July. He demanded that the Bells come outside. Mrs Bell's evidence (which I accept) is that they told Mr Lauder about the methadone programme in response to the allegation that Mr Bell was *on drugs*. I find that there was no mention of methadone in the phone message left for Mr Lauder. Mr Lauder told me that he got *quite angry* and *I told them they weren't honest*. Mrs Lauder also gave evidence about her belief that the Bells had not been honest with them and were taking them *for a ride*. Both displayed hostility towards Mr Bell (particularly) and Mrs Bell during the investigation meeting. That is another reason for treating their evidence with caution.

[8] There was a meeting on 17 July at L & B's lawyer's office involving the lawyer, Mr & Mrs Bell, Mrs Lauder and Mr Lauder. It was agreed that Mr Bell would get a report from his doctor about the effect of the methadone treatment on his work capacity. While they discussed 25 July as the date for the report, both Mrs Lauder's and Mrs Bell's evidence is that the lawyer indicated that L & B would understand if it took a few more days since she knew what the doctor was like. Mr Bell was asked about his criminal history. He explained that partly by reference to a heavy drinking habit. There was also some discussion about an employment agreement. It was agreed (then or earlier) that L & B would pay fortnightly for the first month then revert to monthly pays. Mrs Lauder's and Mr Lauder's evidence is that it was agreed that the Bells could start work on 21 July on the condition that the doctor's report was provided by 25 July.

[9] On Monday 28 July, Mr Lauder gave Mrs Bell a letter from his solicitor. It referred to the arrangement whereby the Bells commenced work on 21 July on the condition that the doctor's letter

was provided by 25 July and said: *...You have not provided the report.... The failure to provide the report has meant that the condition required to be fulfilled for the commencement of your employment with the company has not been met. We, therefore, call a meeting ...on Thursday 31 July 2003 to discuss this matter. In the meantime you are stood down from any further workif the company does not accept your explanation then you may not be employed on the company's property.* There is a diary note by Mr Lauder (which I accept as accurate) to the effect that Mr Bell was told of his suspension at 8.30 am on 28 July and Mrs Bell was given the written notice about 5pm. Neither was told whether the suspension was on pay or given any opportunity to discuss it.

[10] The Bells then got some legal advice and were able to track down the doctor's report. It confirmed that the medication being prescribed to Mr Bell was highly unlikely to impair his functioning. The report was provided to L & B and following a conversation between the lawyers, the Bells' solicitor wrote (on 31 July 2003) to confirm that the matter was resolved, ask for a copy of the written employment agreement, ask for confirmation that the suspension was on pay and ask that a problem with the toilet be fixed.

[11] L & B's solicitor replied on 1 August providing the proposed written employment agreement, advising that the toilet problem would have to await their client's return from Christchurch and raising two further problems. Mr Bell's brother (Mark) had been staying in the farm house with Mr & Mrs Bell. At the outset, the Bells said to Mrs Lauder and Mr Lauder that Mark would be with them to look after the children pending the commencement of childcare arrangements with someone else. However, the 1 August letter asked for Mark to vacate the property immediately. I should note that the draft employment agreement provided that only the employees and their children could reside in the farm house although that restriction had not been specifically discussed at any point. The Bells were also asked to explain why the Police had recently visited the property.

[12] On 5 August 2003, L & B's solicitor sent a follow-up email to the Bell's solicitor raising a further complaint that the Bells had been absent from work the whole of the previous day rather than the expected part-day and had not reported for work that morning. The Bells' solicitor responded on or about 6 August. The response included some substantive answers, raised some points about the draft employment agreement, provided a bank account and IRD numbers and said that wages were due since it had been two weeks since work commenced. The solicitor also explained that Mrs Bell was unwell.

[13] On 6 August, the Bells' solicitor wrote again to L & B's solicitor asking why the wages had not been paid. The response dated 6 August said that L & B would arrange for repair of the toilet as soon as a tradesperson was available, set out the days L & B claimed had been worked by Mr and/or Mrs Bell, made further complaint about unexplained absences, alleged that the Bells had been *running down* their employer, raised a concern about whether Mr Bell had a firearm on the property and said that L & B felt they were being taken advantage of despite having given the Bells a second chance. The second chance related to the claim that Mr Bell was not honest at the original interview about criminal convictions and the drug issue.

[14] On 7 August, the Bells' solicitor sent a fax making a further demand for payment of wages and cautioning that if the payment was not received that day, the Bells would be forced to leave the employment and apply for an emergency benefit. A grievance was threatened if that happened. There were then several emails between the solicitors. There was a dispute over the number of work days due for payment. By about 2 pm, L & B's solicitor advised that a cheque would be delivered to the Bells that day for the 9 days and 7 days worked (according to L & B) by Mr Bell and Mrs Bell respectively.

[15] On Friday 8 August, the Bells' solicitor sent a further fax claiming that no cheque had been received and demanding payment in cash by lunchtime. The fax said that some payment was required so that the Bells would be able to feed their children over the weekend. Later in the morning, the Bells received two cheques being their separate payments for 9 days and 7 days. It appears that the cheques were placed in the Bells' letterbox sometime on 7 August although they were not notified of that at the time.

[16] By their solicitor's email timed at 11.35 am on 8 August 2003, the Bells told their employer through its solicitor *My clients have received two cheques – it is not accepted that this is what is due and owing. My clients have simply had enough. They consider that they have been constructively dismissed. We will provide details of their grievance next week. They will vacate the property once they find alternative accommodation.*

[17] The Bells did stay on in the farm house for a period during which several issues arose, but they are not relevant for present purposes. However, there are some issues about the accommodation that Mrs Bell relies on as part of the constructive dismissal claim. There were problems with the water supply to the house. On or about 15 July, L & B disconnected the water supply from a farm well in order to commence construction of a new milking shed. That well also supplied water to a reservoir used for the main water supply to the farm accommodation. The reservoir had a hole so within 36 hours, all water had drained away and there was no water supply to the house. Mr Bell spoke to Mr Lauder and was instructed to use water from a rain water tank to provide a water supply for the house. Perhaps plumbing was not one of Mr Bell's strengths but he was unable to properly remedy the problem and spoke to Mr Lauder about this more than once. Mr Lauder did not remedy the problem. Depleting the rain water supply resulted in a loss of hot water pressure. Probably the water supply problems caused or contributed to the toilet flush problem referred to in the Bells' solicitor's letter of 31 July 2003. All water to the house dried up on 12 August. Problems with the water supply and the toilet were not resolved until after the Bells vacated the property.

Issues

[18] The first issue to resolve is whether Mrs Bell has been fully paid for the duration of her employment. There is a dispute about the commencement date. I accept that it was agreed on 17 July 2003 during the meeting with L & B's solicitor that the Bells would commence work on Monday 21 July. The corollary of that is that Mrs Bell had not already started work. The proposed employment agreement required the Bells to work such hours as required and as the employer may direct so as to best perform the duties and responsibilities of the position. There is no evidence that Mrs Bell was given any such directions by L & B with which she did not comply. Indeed, at the relevant time of the year, there was little for her to actually do. She is entitled to salary commencing on 21 July through until the termination of her employment on 8 August less an allowance for the days she was unavailable for work due to illness. Correspondence from her solicitor indicates that Mrs Bell was unwell on 5 August and (I infer) remained in that state for the remainder of the employment. She should have been paid for 19 days less 4, a total of 15 days at a daily rate of \$89.28, a total of \$1,339.20 plus holiday pay (\$1,419.55). She received \$625.00 (gross). She is therefore owed \$794.55 (gross). L & B is ordered to pay that sum to Mrs Bell plus interest.

[19] There was no reason for Mrs Bell to have been stood down from any work required of her and cautioned that she might be dismissed. She had no opportunity to comment before the decision and it was communicated to her in an insensitive manner. I accept that it caused Mrs Bell concern and upset for her continued employment and about whether she would be paid. That amounts to disadvantage in her employment. The unfair and unreasonable behaviour towards Mrs Bell gives

rise to a personal grievance. That grievance is remedied by ordering L & B Investments Limited to pay \$1,500.00 compensation to Mrs Bell.

[20] The next issue is whether Mrs Bell was constructively dismissed. The law has long recognised that sometimes a resignation should be treated as a termination of the employment at the initiative of the employer either because the employer gave the employee a choice of resignation or dismissal, or the employer embarked on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign or a breach of duty by the employer leads the employee to resign.

[21] There are aspects of the second category about the present situation. Mrs Lauder and Mr Lauder distrusted the Bells once the allegations about drug taking and criminal offending arose. In evidence and earlier they put that as a failure by the Bells to be honest at the interview but the failure was theirs and their employment consultant's in not asking questions or checking references. To some extent their subsequent attitude towards the Bells was affected by that misplaced sense of distrust. There is also information from a police senior constable that in the week prior to 27 July 2003 Mr Lauder told him that he had or was going to dismiss Mr Bell due to the non-disclosure of criminal convictions. However, there is not sufficient evidence to conclude that they embarked on a course of conduct with the deliberate and dominant purpose of coercing a resignation.

[22] I am left to determine whether there was a breach of duty sufficiently serious to warrant the termination action taken by Mrs Bell: see *Wellington etc Clerical IUOW v Greenwich* [1983] ACJ 965. In her evidence, Mrs Bell said that they did not accept that the cheques represented what was owed and *this was the final straw*. She went on to explain that by that stage there was only a dribble of cold running water, that her children had been sick with vomiting and diarrhoea, that they had to use a commercial laundry for the accumulated washing, that people were speeding up and down their drive creating a risk to the children, that she was depressed and that nothing was going right. The personal grievance letter dated 12 August 2003, referred to the failure to provide sanitary living conditions, the failure to pay any salary at all, personal comments by both Mr Lauder and Mrs Lauder to Mrs Bell about her remaining with Mr Bell, the over reaction to the police visit, the lack of a timely response to issues about the proposed written employment agreement and the request for Mark Bell to leave especially given Mrs Bell's incapacity. I find that the contents of the letter more accurately reflect Mrs Bell's concerns at the time.

[23] Problems over the wages were all in hand. Sensibly, the Bells through their solicitor had sought the acknowledged payment with the dispute over the total owing to be resolved in due course. The Bells provided their bank details on 6 August and cheques were delivered on 7 August. That would have met the Bells' immediate requirements if they had known the cheques were in the letter box. The communication lapse that resulted in the Bells not discovering the cheques until the next morning does not make any breach over the delayed payment sufficiently serious to warrant the Bells terminating their employment.

[24] Regarding Mark Bell, there had been no earlier agreement restricting the usual right of an occupier to invite guests into a property so the Bells were perfectly entitled to decline the request for him to leave immediately, as they did. The legal position perhaps is reflected by the fact that L & B made a request. I do not consider there was any breach by L & B regarding this matter. Similarly, the Bells' concerns over the proposed written employment agreement do not amount to a breach by the employer.

[25] Mrs Lauder and Mr Lauder denied making personal comments to Mrs Bell about her decision to stay together with her husband. It is clear that Mrs Lauder and Mr Lauder both came to think badly of Mr Bell but not of Mrs Bell soon after the employment offer was made and accepted. It is

probable that they voiced that view by asking Mrs Bell why she had remained or ended up with Mr Bell. However, any such comments were made shortly after the issues of his convictions and drug use arose so I do not accept that they could still be seen as causative of the resignations several weeks later.

[26] I do not accept that L & B overreacted to the news of a police visit to the property. L & B was entitled to ask why the police came to its property and quite reasonably raised that in the correspondence with the Bells' solicitor. An answer was given and that brought the matter to an end. There was no breach of duty by L & B in that conduct.

[27] The lack of sanitary living conditions relates particularly to the problem with the toilet. On 31 July 2003, the Bells had raised that problem saying that they had to empty water from a bucket into the cistern in order to flush the toilet. The response on 1 August was that instructions would be sought upon the return of Mr Lauder from Christchurch. By letter dated 6 August L & B advised that the toilet would be repaired as soon as a tradesperson was available. The problem with the toilet was no doubt inconvenient and annoying but it did not make the accommodation unsanitary. There was also the initial problem with water supply referred to above. It was not properly resolved but there remained some water supply to the accommodation until 12 August 2003. I was shown a bottle containing water which Mrs Bell said (and I accept) came from the kitchen tap on 12 August. It contains a lot of sediment no doubt from the bottom of the supply tank or reservoir. However, it reflects the quality of the water on 12 August before the water stopped. I cannot take it as an indication of the quality of the water on and before 8 August, the date of the resignation. One can understand why Mrs Bell had had enough on 8 August given her and her children's health but that cannot elevate the unresolved problems with the accommodation to the level of serious breaches of duty on the part of L & B.

[28] For the foregoing reasons, I find that Mrs Bell resigned but was not constructively dismissed.

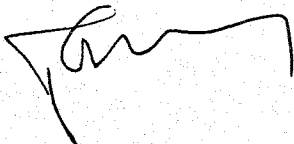
Summary

[29] L & B Investments Limited is to pay Mrs Bell arrears of wages and holiday pay of \$794.55.

[30] L & B Investments Limited is to pay Mrs Bell interest on the arrears of wages and holiday pay at the rate of 8.5% per annum from 8 August 2003 until the arrears are fully paid.

[31] L & B Investments Limited is to pay Mrs Bell compensation of \$1,500.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[32] Costs are reserved.



Philip Cheyne
Member of Employment Relations Authority

