

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Eric John Rutten in his capacity as Trustee of Rutten Family Trust
(Applicant)

AND Collin Owen Cooper (Respondent)

REPRESENTATIVES Len Andersen, Counsel for Applicant
Mary-Jane Thomas, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 30 September 2004

DATE OF DETERMINATION 22 October 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Collin Cooper worked for the Rutten Family Trust on Trust farming properties. The Trust seeks damages against Collin Cooper for financial losses said to arise from the loss or destruction of calving records.

[2] By way of counter-claim, Collin Cooper seeks wages and holiday pay. The wages claim relates partly to time worked in the final pay period and partly to earlier work cleaning sheds.

Applicant's identity

[3] Eric Rutten is the trustee of the Rutten Family Trust. Properly, the applicant should be Eric John Rutten in his capacity as trustee.

Background

[4] Relevant events occurred in 2001 and 2002. In December 2002 when the employment ended, Collin Cooper was 16 years old. Collin Cooper's mother (Coleta Thomson) and step-father (Dennis Thomson) worked for the Trust as shed manager and farm manager respectively. Their employment ended about two weeks before Collin Cooper's ended.

[5] Mr Rutten told me (and I accept) that Mr and Mrs Thomson were obliged as part of their employment to keep calving records and other information relating to Trust livestock. The records are important for the proper management of a farm. I am also told that animals sold without records to establish ancestry are less valuable than those with records.



[6] Mr and Mrs Thomson were given notice of dismissal due to redundancy and their employment ended in November 2002.

[7] As part of their employment, Mr and Mrs Thomson had lived in a farm house and Collin Cooper also lived there with them. When their employment ended, Mr and Mrs Thomson vacated the farm house but Collin Cooper continued to live there for the following two weeks. There was no tenancy arrangement between Mr Rutten and Collin Cooper and he was allowed to remain in the house without charge. Mr Rutten's evidence was that he just assumed that Collin Cooper would take over the tenancy responsibilities but did not talk to him about that.

[8] Mr Rutten asked Mr and Mrs Thomson about the calving records and was told that they had been left at the farmhouse in a drawer. When Mr Rutten was unable to locate those records after the end of Collin Cooper's employment, the Trust commenced proceedings against Mr and Mrs Thomson. As part of their defence, Mr and Mrs Thomson produced a statement by Collin Cooper that he last saw the notebooks (calving records) on the night that his parents vacated the property, his mother having left them in the drawer. The proceedings between the Trust and Mr and Mrs Thomson were settled on agreed terms.

[9] Mr Rutten's evidence (no doubt correct) is that he thought at the time that the settlement also covered any claim by Collin Cooper against the Trust but I am told by counsel that there is no mention of Collin Cooper in the settlement agreement. As a result, Mr Cooper was free to pursue a claim about arrears of wages and holiday pay and made that complaint to the Labour Inspector in Dunedin. The Labour Inspector spoke to Mr Rutten in mid December 2003 about that complaint. The complaint included a claim that the Trust made an unlawful deduction from Collin Cooper's final wages for cleaning the farmhouse after he vacated it. That is also part of the problem before me.

[10] On 11 March 2004, the Trust lodged a statement of problem in the Authority and sought either an award of damages or the return of the calving records.

[11] To return to the narrative about Collin Cooper's employment, he gave two weeks' notice of resignation pursuant to which his employment was to finish on 5 December 2002.

[12] On 4 December, Mr Rutten had cause to speak to Collin Cooper about a work issue. Collin Cooper responded by swearing and stormed off. Another staff member present at the cowshed (Irene Saul) then told Mr Rutten of some threats made earlier by Collin Cooper to damage farm property. Mr Rutten followed Collin Cooper to the house. By that time Collin Cooper was doing some dishes. Mr Rutten told him to clear out of the house by 8 pm that evening or he would call the police. Mr Rutten also said that if he did not have all his gear removed by then, it would be shipped to him and that he would *trespass him*. Mr Rutten then left. The time was about 3.30 pm.

[13] Collin Cooper was distressed by those threats and soon after Mr Rutten left, he made his way to a neighbour's place to get some assistance. He did not return to the house until later in the day by which time Mrs Thomson had arrived to help him to pack up his belongings. Mr Thomson also arrived to help.

[14] Mrs Thomson's evidence is that she spent some time cleaning up inside the house before they left with Collin Cooper's belongings. There is evidence from Mrs Saul (who moved into the house) that the house first had to be cleaned from top to bottom as it was in an *appalling state*. In fact, her daughter helped Mrs Rutten clean inside the house. There are a number of photos showing the inside of the house before the efforts of Louise Saul and Mrs Rutten. Clearly enough, areas such as the sink, bath, oven, shower and porch are not clean, some discarded items and rubbish are in cupboards and on the floors. On the evidence of the photos, the inside of the house was left in a

state that no reasonable incoming tenant would find acceptable. There is no reason to doubt Mrs Saul's evidence to the effect that the photos are a fair representation of how the house was left on 4 December.

[15] There are other photos that show the gardens and grounds around the house both at the time Mr and Mrs Thomson moved in and when Collin Cooper left. They were not well tended at the beginning and were somewhat more overgrown at the end.

[16] When Mr Rutten paid Collin Cooper his final pay, he deducted \$380.00 to cover cleaning the house. That cost was notional in the sense that Louise Saul was paid about \$200.00 for her assistance and Mrs Rutten was not separately paid for her efforts.

[17] After Collin Cooper left, Mr and Mrs Rutten were unable to find the calving records in the house. Collin Cooper's evidence is that he last saw them in the drawer at the time Mr and Mrs Thomson moved out. He says he does not know what happened to them after that time. Mrs Thomson's evidence is to similar effect.

Analysis and conclusions

[18] There is no express term of Collin Cooper's employment dealing with the calving records in issue. It was Mr and/or Mrs Thomson who were obliged to maintain the records. Counsel for the applicant argued that Collin Cooper had control of the records but I do not accept that is accurate. Collin Cooper simply continued to live in the house where the records had apparently been left for Mr Rutten to collect. He cannot be said to have thereby assumed any of the express duties binding on his parents in respect of the records.

[19] At best for the Trust, Collin Cooper had an implied duty of fidelity not to deliberately do anything that was likely to injure its business: see *Walden v Barrance* [1996] 2 ERNZ 598.

[20] The best evidence to support a conclusion that Collin Cooper deliberately took or destroyed the calving records is as follows. He had made vague threats to do some damage by contaminating the milk or something similar (I accept Mrs Saul's evidence on that point). Following the flare-up on 4 December 2002, he had a brief opportunity (perhaps five minutes) before Mr Rutten told him to leave and a similar brief opportunity immediately after then. He and his mother were the last people to see the calving records in the drawer. The records have not been seen since then. Collin Cooper's statement attached to the statement in reply (*Collin states he never saw the books as he had no need to ever go into the drawer ...*) differs somewhat from the statement provided as part of the defence for Mr and Mrs Thomson. It is fair to say that not all of what Collin Cooper said could be regarded as reliable evidence. On that basis, I accept that it is possible that Collin Cooper either destroyed or took the calving records.

[21] The standard of proof in proceedings such as this is on the balance of probabilities. There are at least four other possible explanations for the missing records. Mrs Thomson may not have left them in the drawer as she claims. Mrs Thomas may have taken the records out of the drawer while she was at the house of 4 December. An outsider may have entered the house and taken the records. Mr Rutten may have located the records on or after 4 December. I acknowledge that the last two seem the least likely of these four possibilities. However, I certainly cannot and do not conclude on the available evidence that it is more probable than not that Collin Cooper destroyed or took the calving records. It is not necessary to make any further findings about the records.

[22] To finish this part of the problem, I am not satisfied that there was any breach by Collin Cooper of the express or implied obligations owed by him to Mr Rutten. The claim for damages must fail.

Final wages/unlawful deduction

[23] Following discussion during the investigation meeting, counsel for Collin Cooper accepted that the only issue around the final pay related to the deduction of \$380.00 by Mr Rutten to cover the cleaning of the house.

[24] Collin Cooper did not consent to the deduction nor was he even asked about it. Section 4 of the Wages Protection Act 1983 makes it illegal, quite apart from whether Collin Cooper actually owed the money to Mr Rutten.

[25] I also find that Collin Cooper owed no obligation to his employer about the state of the house and grounds. That was wholly a matter between Mr Rutten and Mr and Mrs Thomson. Further, I accept counsel's point that it was unreasonable to charge Collin Cooper anything for cleaning when it was Mr Rutten who ordered him off the property on very little notice.

[26] Accordingly, I order Mr Rutten to pay Collin Cooper \$380.00 (without deduction).

Shed cleaning

[27] Before Mr and Mrs Thomson worked at the Balfour property, they worked for the Trust at a Mt Joy property. The Trust's right to use that property came to an end and Mr Rutten had to make arrangements to clean out some sheds before he handed the property over to the landowners. At the time, Collin Cooper was still at school but an arrangement was made between Mr Rutten and Mr Thomson that Collin Cooper would clean out the sheds after school for an hourly rate. Collin Cooper started doing that work but then it became clear that he was going to spend more time on the job than Mr Rutten anticipated. A different arrangement was agreed through Mr Thomson that Collin Cooper would be paid \$1000.00 for the job.

[28] It is common ground that Collin Cooper did some but not all of the work. After he vacated the property, Mr Rutten received an invoice from the landowner for the landowner's costs in completing the work. I assume that it was a condition of the Trust's use of the Mt Joy property that it had to restore the facilities to good condition at the end of the lease and that the landlord was entitled to charge relevant costs if there was any default.

[29] Mr Rutten never paid Collin Cooper for any of the work he performed. Mr Thomson and/or Mrs Thomson several times asked for the payment but it was not forthcoming and neither they nor Collin Cooper pursued it further at the time.

[30] It was suggested for Mr Rutten that the arrangement with Collin Cooper was one for services rather than employment. That is unrealistic. I have no doubt that Collin Cooper was not undertaking the work as part of his own business but was doing it as an employee of the Trust from the outset. The only change was to the amount to be paid. That did not alter the real nature of the relationship. Collin Cooper was an employee throughout.

[31] To a significant extent, the parts of the job that were not completed were tasks that Collin Cooper was unable to perform. For example, some work required the use of a tractor, something he could not do. Against that, I do accept that Collin Cooper could have taken further steps to complete the work.

[32] I was urged to determine the quantum that should be paid for the work actually done by Collin Cooper. I consider justice is achieved if I order Mr Rutten to pay Collin Cooper a further \$750.00 to account for this work.

Summary

[33] Mr Rutten cannot recover anything from Collin Cooper for the lost calving records.

[34] Pursuant to the Wages Protection Act 1983, Mr Rutten is to pay Collin Cooper \$380.00 without deduction.

[35] Pursuant to section 131 of the Employment Relations Act 2000, I order Mr Rutten to pay Collin Cooper \$750.00 as arrears of wages.

[36] Costs are reserved.



Philip Cheyne
Member of Employment Relations Authority