

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 431  
5351072

BETWEEN

JUSTIN HOWES  
Applicant

A N D

GOLDENFLOW TRUST  
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person  
Darren Foster, Counsel for Respondent

Investigation Meeting: 26 November 2012 at Whangarei

Date of Determination: 3 December 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Howes) alleges that he was unjustifiably dismissed from his employment, suffered physical and mental abuse, and was unable to obtain complete wage and time records in relation to his employment. Goldenflow Trust (the Trust) resist all of Mr Howes' claims.

[2] When the proceedings were filed in the Authority, Mr Howes named his employer as David Whitehead but for reasons that will become apparent shortly, the Authority recorded the employer as David Whitehead trading as Kauri Coast Honey. At the investigation meeting, it became apparent that Mr Whitehead was not the employer and that the employer was the Trust; Kauri Coast Honey and Nature's Buzz are brand names of the Trust.

[3] By consent then, the name of the employer is changed to Goldenflow Trust.

[4] Mr Howes was employed by the Trust in early September 2010 having found an advertisement on Trade Me for a beekeeping job with the Trust. Nothing in the

documentation put before the Authority indicates the legal nature of the employment contemplated by the Trust.

[5] In any event, Mr Howes was interviewed for the position and subsequently appointed. He says he understood the position to be permanent fulltime, while the Trust maintains that all he was ever offered was a seasonal position during the months that the bees were not hibernating, the understanding being that at the end of the bees period of activity, typically around March but sometimes later, the employment relationship would come to a natural end.

[6] The employment agreement signed by both parties is dated 6 September 2010 and, as the Authority observed during the course of the investigation meeting, does not comply with section 65 of the Employment Relations Act 2000 (the Act). Moreover, the terms of the employment agreement fail absolutely to offer any support to the Trust's contention that the work was seasonal in nature.

[7] As a precursor to being offered employment, Mr Howes was asked to indicate whether he had any criminal convictions. He says that he was absolutely explicit about the extent of his previous offending, while the Trust maintains that he was no more than selective. Worse than that, the Trust say that if Mr Howes had told them the full extent of his criminal offending before engagement, they would never have employed him. This is because the nature of beekeeping is that hives are maintained on the property of third parties and by necessity beekeepers must attend at those hives from time to time. The prospect of having a person in the team with, in particular, a history of dishonesty offences, would be problematic for continued access to a farmer's land.

[8] The initial period of the employment seems to have been relatively trouble free and even Mr Howes, in his evidence to the Authority, spoke positively about the employment relationship early on.

[9] However, there were a number of alleged incidents of violence against Mr Howes by Mr David Whitehead, the principal of the Trust. These claimed assaults and other examples of what amount to employer failures under the general banner of health and safety, are all hotly denied by the Trust whose witnesses all pointed to the complete absence of corroboration of the alleged assaults together with alternative explanations for the alleged health and safety failings.

[10] A personal grievance was raised by Mr Howes dated 31 May 2011 and in response, the solicitors acting for the Trust indicated to Mr Howes, in a letter dated 10 June 2011, that his “casual” employment relationship had now come to an end.

### **Issues**

[11] The Authority needs to determine the following questions:

- (a) What was the nature of the employment relationship between these parties?
- (b) Was there evidence of physical abuse?
- (c) Were there breaches of health and safety?
- (d) Were complete wage and time records kept?

### **What was the nature of the employment relationship?**

[12] While the principal question for the Authority to determine is the legal nature of the engagement, a subset of this aspect is the question of whether Mr Howes told the truth about his previous criminal offending. In that regard, the Authority has on the one hand, the evidence of Mr Howes himself, and on the other, the evidence of the two witnesses for the Trust who participated in the interview which resulted in Mr Howes being employed.

[13] While Mr Howes impressed the Authority as an articulate young man who, while acting for himself, did a workmanlike job in what must have been a reasonably foreign environment, it is nonetheless true that he has had a depressing criminal history for one so young. He did have the benefit of the support of his father at the investigation meeting and the Authority was pleased to establish from Mr Howes’ father that the relationship between the two of them had recently been restored (after apparently a lengthy breach) and that Mr Howes Senior was going to use his best endeavours to keep Mr Howes Junior out of the clutches of the criminal justice system.

[14] That said, it remains a fact that Mr Howes had a significant criminal history, much of which it seemed had featured reasonably prominently in local newspapers.

Certainly counsel for the Trust took considerable delight in quoting from local newspapers when cross-examining Mr Howes.

[15] Despite that extensive criminal history, Mr Howes was adamant that he had told the Trust the unvarnished truth when he was interviewed, giving them detail of all of the criminal offending for which he had been responsible. Conversely, the Trust's witnesses, Mr Whitehead himself and Mr Cates, who was the Trust's foreman denied they had been given the full picture. Mr Cates' evidence is that he understood from Mr Howes' interview that Mr Howes had no convictions at all. Mr Whitehead said that the only matter that Mr Howes referred to when asked about his offending, was a charge of receiving stolen geckos and Mr Howes allegedly indicated that he was performing a sentence of periodic detention because of unpaid fines relating to the absence of a warrant of fitness on a trailer.

[16] In elaboration, Mr Howes allegedly told the Trust that he could not pay the Court fines that were incurred by him as a consequence of the failure to have a warrant of fitness and he asked for the matter to be transferred to periodic detention. Mr Whitehead accepted that contention and also accepted the intimation that Mr Howes was charged with receiving stolen geckos and on that footing, employment was offered.

[17] In actual fact, his criminal history was far greater than the matters referred to by Mr Whitehead and even in relation to the geckos, on Mr Whitehead's recollection of events, Mr Howes did not tell the truth because the position was not that he was charged with receiving the geckos but rather that he was charged with stealing them. In fact he was convicted of the theft of the geckos.

[18] Given the Trust's evidence that they would not have employed Mr Howes if they had known the full extent of his criminal offending, and particularly the offending relating to dishonesty matters, it seems to the Authority more likely than not that Mr Howes was not truthful when he gave his interview for employment. If he had told the truth and admitted to offences including the offences of dishonesty, Mr Whitehead was clear that he would not have been employed because the nature of beekeeping requires a degree of integrity by virtue of the fact the beekeeper must enter another's property in order to care for the bees. On that footing then, the Authority concludes that Mr Howes was mistaken when he told the Authority that he

had revealed the full extent of his criminal offending to the employer prior to engagement.

[19] The Authority turns now to the central issue of the nature of the engagement. Mr Whitehead and the other witnesses for the Trust all made it abundantly clear that the work of beekeeping was in principle seasonal, that all of the Trust's staff at the level Mr Howes was employed at, were seasonal employees and even more senior staff employed by the Trust were effectively seasonal as well.

[20] Mr Whitehead explained to the Authority that the bees hibernate for sometimes up to half a year and while they are hibernating, there is typically very little to do. It follows that there was no employment offered during the "off season".

[21] That evidence was supported by other evidence given for the Trust by various of its employees. In summary, their evidence was first that the employment was seasonal, and secondly, that everybody (including Mr Howes) knew that the employment came to an end when the bees began their hibernation. Indeed, there was some evidence the Authority heard to the effect that Mr Howes had shared with various of his co-workers what he intended to do during the "off season". That, it was suggested, was testimony to the fact that Mr Howes knew perfectly well that the employment relationship was a seasonal one.

[22] But that is not what Mr Howes himself said; he was adamant that he was employed on a permanent fulltime basis and in that regard, he claimed to have been told by Mr Whitehead at interview that the latter would only employ someone if they were going to work for him for "at least five years".

[23] Furthermore, the employment agreement executed by the parties supports Mr Howes' contention. There is nothing whatever in the document which would enable one to conclude that a seasonal engagement was in prospect or even that a casual engagement was in prospect. The Trust's lawyers erroneously referred to the engagement as a casual one; there is nothing whatever to suggest that, either in the employment agreement itself or in the wage and time records that are available concerning Mr Howes' employment. He worked a regular number of hours each day of each week for many months averaging, on Mr Howes' calculation, 57 hours per week in employed time. There is nothing to suggest that he was called into work for particular periods of time in the way you would expect of a casual employee and

indeed all of the indices suggest that this was permanent employment of some sort rather than a casual engagement which of course typically begins with a summons from the employer for the employee to work a particular period of time and then conclude the employment before starting a fresh engagement after a further request from the employer.

[24] Here, as the Authority has just noted, it is plain that Mr Howes worked regular hours each week and there was no evidence that he was called in at particular times or on particular days. He was simply required to turn up for work at a regular start time each morning and conclude as required at the end of that day, continuing each work day thereafter.

[25] The Authority concludes then that this is not a casual employment relationship.

[26] However, the nature of the engagement could be a seasonal employment relationship operating over a particular span of weeks or months because of the particular requirements of the position. This is now what the Trust is saying is the nature of the engagement and while that view is supported by the evidence of other staff employed by the Trust, it is given no support at all by the employment agreement.

[27] The latter document makes no mention at all of the allegedly seasonal nature of the employment. Indeed, there are various references which appear to suggest open ended employment. For example, clause 3 in the first section reads as follows:

*After one year of employment the wage rate will increase ...*

[28] Further, at clause 9 in the second section of the employment agreement, the following provision occurs:

*If and when your employment ... finishes.*

[29] On the face of it then, the two provisions just referred to tend to support the interpretation that an open ended employment relationship is contemplated. If the relationship were seasonal, it is difficult to see why there would not have been mention of that in the employment agreement. Why, for instance, would the agreement refer to “one year of employment” and the prospect of a wage increase when we are told that by virtue of the seasonal nature of the industry, typically

beekeepers would only work for six months. Furthermore, the phrase “*if and when your employment ... finishes*” again suggests a long term relationship rather than a short term seasonal one. Surely, if this were a seasonal engagement that was in contemplation, the drafter of this agreement would have made reference to that and would not have used phrases which suggest a continuing relationship beyond the end of the season.

[30] While the Authority accepts the evidence before it that the nature of the beekeeping operation for this employer anyway was usually seasonal in nature, that reality is certainly not reflected in the employment agreement which, as the Authority has already made clear, as well as not conforming to the employer’s own apparent requirements for a seasonal engagement, also fails to comply with the law.

[31] The Authority made clear to the parties during the investigation meeting that that was the position and earnestly encouraged the Trust to get appropriate legal advice to have the employment agreement rectified before it caused more confusion.

#### **Was there evidence of physical abuse?**

[32] Mr Howes gave various examples of events where he says that he was hit by Mr Whitehead. One occasion he alleges Mr Whitehead kicked him up the bottom and he says:

*There were many times where David whacked me around the head with bits of wood and on one occasion with a bolt.*

[33] As the Trust made clear, these are serious allegations. The witnesses for the Trust were adamant that Mr Whitehead was not given to violence and none of the Trust’s witnesses could think of any occasion where he had offered violence to anyone.

[34] Mr Whitehead himself absolutely denied the allegations and pointed out that not one of the allegations had any corroborative support from other evidence available to the Authority. What is more, one of the allegations, namely that Mr Whitehead gave Mr Howes a clip round the ear with a top bar of a honey frame, is resisted by the Trust on the footing that if that had happened, Mr Howes would likely have needed medical assistance to stitch the ear up.

[35] The Authority inspected a top bar from a honey frame and reached the conclusion that in all likelihood, such an item would, at the very least, break the skin of the ear and cause bleeding as a consequence.

[36] The Authority's conclusion on the balance of probabilities, is that the assaults referred to did not happen. That conclusion is supported first by the absence of any corroboration of Mr Howes oral testimony, second by the fact that there had been no complaint at the time either to Mr Whitehead or indeed any mention of the alleged assaults to any member of staff. Nor was there any referral of any of the incidents to Police.

[37] It follows that there is no contemporaneous evidence to support the happening of these alleged events, nothing at all to demonstrate that they happened save for Mr Howes' bare testimony. In all the circumstances, the Authority must conclude that the weight of evidence supports the view that there were no assaults.

[38] A related issue is a claim by Mr Howes that Mr Whitehead engaged in racist abuse. This aspect is referred to, in amongst other places, in Mr Howes' personal grievance letter. Like the allegation of physical abuse, the claim of verbal abuse by Mr Whitehead is strongly denied. It is pointed out on behalf of the Trust that Mr Whitehead has extensive involvement with various local Maori incorporations, the wife of one of his other employees is Samoan, some of his sons-in-law are Maori and the partner of one of his daughters is Tongan so it seems difficult to conclude that Mr Howes' evidence on this point is to be preferred over the evidence of the Trust.

### **Were there breaches of health and safety?**

[39] There are two specific examples of these alleged breaches before the Authority. The first relates to a claim by Mr Howes that there were no gloves available to protect his hands when he was removing wax from an item called a queen excluder. The way in which these queen excluders were dealt with to remove wax was that they were dipped in very hot water. The operation was explained to the Authority as involving the use of a hooking device to ensure that the worker's hands did not come in contact with the very hot water. Gloves were also worn by the worker.



[40] While Mr Howes maintains that no gloves were available when he was doing the task, one of Mr Whitehead's daughters, Ms Tristan Whitehead was adamant that she was physically present when this issue arose and there were gloves available.

[41] On the basis of the evidence the Authority heard, it is not persuaded that this episode represents a failure by the Trust to provide a safe workplace in terms of the Health and Safety in Employment Act 1992 (the 1992 Act). The evidence the Authority heard from Ms Whitehead, supported by the evidence of other workers employed by the Trust, was that gloves were always available and in any event the process to be used by workers ought not to have placed their hands anywhere near the hot water.

[42] The other complaint raised by Mr Howes in relation to the 1992 Act is concerning asbestos. The Trust used a portion of an old dairy factory and some work was provided to Mr Howes stripping the old dairy factory out. Mr Howes formed the view that there was potentially asbestos in some of the lagging around pipes and through a third party, he raised the matter with the employer.

[43] The Trust's evidence on the point is that they had been advised by a local scrap metal dealer that the asbestos issue had been dealt with and that the site had been checked by the local District Council for asbestos and found to be free of it. However, the local District Council was unable to confirm that it had performed that test because it did not retain those records. Mr Whitehead maintained however, in his evidence to the Authority, that he assumed as a consequence of what he had been told by the scrap metal dealer that the site was clear.

[44] Either way, it is clear that there was asbestos at the site and it is common ground that Mr Howes raised that matter with the Trust. Where there is dispute is that while Mr Howes maintains that he was told to remove material which had asbestos in it, Mr Whitehead is adamant that he gave no such instruction and in fact told Mr Howes to stay well away from it because he had the specialist asbestos removal people contracted to come in and deal with it.

[45] In all the circumstances, the Authority is not persuaded that Mr Howes has demonstrated that the employer had breached its obligations under the 1992 Act in relation to the asbestos issue. For the avoidance of doubt, the Authority prefers the evidence of Mr Whitehead on this point to the effect that he specifically told

Mr Howes that he was to have nothing to do with the suspicious material because that was to be dealt with by a specialist contractor.

### **Were complete wage and time records kept?**

[46] A final matter that needs to be addressed is Mr Howes' claim that the wage and time records which he sought after the employment ended were not complete when they were provided to him.

[47] The Authority's investigation confirms that this was the position. The source material for the time keeping was effectively clock-in cards and while they were kept for a period, they were not retained long term. The Authority made clear to the employer that that was part of the wage and time record and needed to be retained as part of the company's statutory obligation to keep accurate wage and time records for all employees. The Trust understands that that is the position now and has given the Authority an assurance that that default will be remedied in future.

[48] However, for the purposes of Mr Howes' claim, he is absolutely correct that the evidence for his particular hours is not complete because the initial source material of the times that he worked has been destroyed.

### **Determination**

[49] The Authority is satisfied that, whatever the Trust might have thought it was doing when it engaged Mr Howes, the nature of the employment agreement offered was such as to confirm only an open ended kind of employment of the traditional sort with nothing whatever to suggest that the employment was seasonal in any way. Evidence of the practice of the employer is helpful but it is difficult to displace the words of the agreement which seem to contemplate a continuing relationship as Mr Howes maintained all along. That being the position, his dismissal via a letter from the Trust's lawyers dated 10 June 2011, is completely informal. Mr Howes has a personal grievance by reason of having been unjustifiably dismissed. Applying the test for justification, the Authority is satisfied that no reasonable employer could have concluded that it was available to it to dismiss Mr Howes via a letter from the employer's lawyers when the terms of the employment agreement seem to contemplate a continuing relationship rather than the seasonal one that the employer sought to rely upon: section 103A of the Act applied.

[50] However, having found the existence of a personal grievance by reason of unjustified dismissal, pursuant to section 124 of the Act, the Authority is required to consider whether the employee has contributed in any way to the circumstances giving rise to the personal grievance. If the Authority is satisfied there has been contributory behaviour by the employee, then the effect of section 124 is to require the reduction in any remedies that would otherwise apply.

[51] In the particular circumstances of this case, as the Authority has found that Mr Howes completely misled the employer such that, had he told the truth about his previous convictions, he would not have been employed, the Authority is satisfied that Mr Howes has materially contributed to the circumstances giving rise to the personal grievance. Indeed, the Authority's conclusion is that the nature of that contribution is 100% because of the clear evidence from the employer that they would not have employed Mr Howes at all if he had been honest about the extent of his offending. That being the position, Mr Howes would not have been put into the employment at all if he had told the truth and therefore there would have been no employment to be dismissed from. It follows that Mr Howes is not entitled to any remedies in respect to his personal grievance.

[52] Nor is the Authority satisfied that any of the other claims that Mr Howes made have any merit. The allegations around abuse of one sort or another have not been found to have any validity and the allegations of breaches of the health and safety requirements of the 1992 Act have also been rejected.

[53] While the Authority has agreed with Mr Howes that the wage and time records held by the employer were not complete in relation to his employment, the Authority is not proposing to take that matter any further given the frank admission made by the employer at the investigation meeting and the employer's commitment to deal with the matter appropriately in the future.

[54] The Authority notes that this was a case that both parties might regard as a teachable moment. As far as the employer was concerned, there were deficiencies in their record keeping which needs urgent rectification in order to ensure that similar cases do not have a similar result. The Authority is pleased with the assurance received from the Trust that they will attend to those matters.

[55] In relation to Mr Howes, the Authority can only express the hope that with the steadying influence of Mr Howes' father, Mr Howes can enjoy the rest of his life without being a participant in the criminal justice system.

### **Costs**

[56] In the particular circumstances of this case, although the matter was not specifically canvassed at the investigation meeting, the Authority's inclination is that costs should lie where they fall.

James Crichton  
Member of the Employment Relations Authority