

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 78
3131637

BETWEEN

VINCENT BABE
Applicant

AND

SLD AGRICULTURE LIMITED
Respondent

Member of Authority: Claire English

Representatives: Deirdre Morgan, counsel for the Applicant
Gordon Paine, counsel for the Respondent

Investigation Meeting: 11 October 2021

Submissions received: 29 November and 14 December 2021 from Applicant
13 December 2021 from Respondent

Determination: 9 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Babe was employed as a farm worker by SLD Agriculture Limited for the dairy season commencing 1 June 2019 through to 31 May 2020.

[2] He complains of being repeatedly underpaid. SLD Agriculture Limited denies that he was underpaid, and says simply that he resigned.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from the applicant, and from Mr Scott Donaldson, the sole director and shareholder of SLD

Agriculture Limited (SLD). All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) What wages were owed to Mr Babe?
- (b) Was he paid these wages?
- (c) If not, what amounts are owing, including any holiday pay?
- (d) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, in respect of compensation under s123(1)(c)(i) of the Act?
- (e) Should either party contribute to the costs of representation of the other party?

Background

[6] Mr Babe worked for SLD for 2 years, on a work visa.

[7] There are no issues arising from Mr Babe's employment in the first year.

[8] In the second year, which was covered by the terms of a written individual employment agreement which ran from 1 June 2019 through to 31 May 2020, Mr Babe claims he was underpaid. He seeks to be paid the full amount of his contractual salary, which was \$64,000 gross without deduction. In addition, he seeks unpaid holiday pay. Finally, he claims wages for a total of six days that he says he worked, unpaid.

[9] In response, Mr Donaldson accepts that he, on behalf of SLD, signed an employment agreement with Mr Babe, requiring SLD to pay Mr Babe a salary of \$64,000 gross. The employment agreement also provided that Mr Babe would receive his minimum entitlements under the Holidays Act 2003, including annual leave.

[10] Mr Donaldson explained to the Authority that in fact, he never paid Mr Babe a salary of \$64,000. Instead, he paid Mr Babe a salary of \$48,000. He accepts that this falls well short of the salary that he promised to pay in the employment agreement. Mr Donaldson explains that when calculating the salary he paid to Mr Babe, he reduced the salary amount of \$64,000 stated in the individual employment agreement, by certain amounts he had in mind to account for rent, power, firewood, the provision of such things as wet weather gear and protective equipment, and by 8% to account for the cost of annual leave. What remained after taking the costs he allocated to all these matters into account, was \$48,000, which was the salary he paid to Mr Babe.

[11] Mr Babe has produced IRD records showing the payments made to him on a monthly basis, which are consistent with a salary of \$48,000, not \$64,000.

[12] Mr Donaldson accepted that he never explained to Mr Babe that he was making these deductions from the gross salary of \$64,000 promised in his employment agreement.

[13] Neither are any of these deductions recorded in the employment agreement or elsewhere.

[14] The employment agreement was a Federated Farmers template agreement. It contained a specific clause inviting the parties to specify monetary values for the market value of any accommodation to be deducted from salary. This was set out immediately below the box provided for the parties to insert the gross annual salary amount. Mr Donaldson filled in the part relating to salary at \$64,000, and left the space providing for the value of accommodation blank, indicating that no deductions for the market value of accommodation had been agreed.

[15] There were no other clauses in the agreement which set out the other deductions that Mr Donaldson made reducing Mr Babe's gross salary. For completeness, no other documents were provided to the Authority setting out such deductions either.

[16] In addition to paying Mr Babe at a gross salary of \$48,000 per annum as opposed to the contractual salary rate of \$64,000 per annum, Mr Donaldson also accepted (as demonstrated by Mr Babe's IRD records) that Mr Babe (who was effectively paid monthly in

arrears) was simply not paid at all for the months of April, May, and June, eg the last three months of his employment. This was due to SLD and Mr Donaldson experiencing cash flow problems.

[17] Instead, Mr Donaldson's parents made two payments direct to Mr Babe during these three months, in April and May, but with no payment for June.

[18] Finally, it is submitted for the respondent in relation to Mr Babe's claim for six days of unpaid work, that it is:

highly unlikely that the minimum wage would have been breached, that only comes into account on the mathematical calculation.¹

[19] In respect of such a calculation, Mr Donaldson and SLD did not keep wage and time records for Mr Babe, nor did he keep holiday and leave records.

Findings

[20] In the relevant year, Mr Babe worked for SLD from 1 June 2019, being the start date set out in the employment agreement, through to 29 May 2020. This is two days short of a full year as per the relevant employment agreement.

[21] Mr Babe gave evidence that he was on the farm from 1 June, however, there was not a lot of work immediately as it was winter. Mr Donaldson accepted that the start date of employment was 1 June, and that Mr Babe was on farm, however, Mr Donaldson's view was that Mr Babe did very little work during the first couple of weeks, and therefore didn't need to be paid for this time.

[22] In considering if Mr Babe worked, I refer here to the comments of the Employment Court in *Salad Bowl Ltd v Howe-Thornley*², and adopt the Court's definition of "work", at paragraph [27]:

Although the economic or other business or operational benefit to the employer may not have been optimal at that point ...the defendant was nevertheless performing work for the plaintiff and contributing to its business.

¹ Legal submissions for the respondent, at paragraph 8.

² [2013] NZEmpC 152.

[23] I find that Mr Babe was employed, and did work, from 1 June 2019 to 29 May 2020. This is two days short of a full year.

[24] Mr Babe should therefore have been paid a year's salary, minus an allowance for those two days.

[25] Section 4 of the Wages Protection Act 1983 provides that:

an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[26] The Wages Protection Act 1983 forms part of the employment standards that must be applied to all employment relationships, and its protections form part of New Zealand's minimum entitlement provisions³. This means that the requirements of the Wages Protection Act are mandatory in all circumstances, and cannot be contracted out of. In particular, an employer is unable to "set off" the value of items it says are owed by the employee against wages owed⁴, and all wages must be paid in money⁵:

Wages have to be paid in money and not partly in money and partly by discharging debts which seem valid to the employer...

[27] It is not open to Mr Donaldson to reduce Mr Babe's salary by deducting from it, or otherwise taking into account, notional sums for items such as accommodation, power, annual leave, and so on.

[28] Not only does this breach the provisions of the Wages Protection Act (by being both an unauthorised deduction and an attempt to pay the employee in something other than money), but it is also contrary to the specific terms of the contract that Mr Babe and Mr Donaldson both signed.

[29] Mr Babe's contractual salary is \$64,000. This must be accounted for in full and in money.

³ See section 5 of the Employment Relations Act 2000.

⁴ See for example, *Gyles v Holmes Consulting Group* EmpT Wellington WT77/92, 23 October 1992.

⁵ *Amaltal Fishing Co Ltd v Morunga* [2002] 1 ERNZ 692 (EmpC).

[30] In the relevant year, Mr Babe worked for two days short of a year. Therefore, it is necessary to ascertain what amount he should have been paid in accordance with his employment agreement. Mr Babe's salary amounts to \$175.34 gross per day, and \$350.68 for two days. The value of these two days needs to be deducted from the yearly amount owing to Mr Babe, to take into account the actual length of his employment.

[31] Accordingly, once the value of these two days is deducted from his annual salary of \$64,000, Mr Babe had an entitlement to be paid \$63,649.32 gross, over the course of his employment, being a year less two days, which was the time period up to the last day of Mr Babe's employment with SLD.

[32] In fact, IRD records and bank records from Mr Donaldson's parents show he was paid a total of \$41,709.80, being \$35,009.80 from SLD, plus \$6,700 from Mr Donaldson's parents.

[33] Deducting the amount Mr Babe was in fact paid from the amount he should have been paid leaves a shortfall in salary payments of \$21,939.52 gross.

[34] Mr Donaldson does not dispute that money is owed, he simply refers to a combination of cash flow problems, and his own deliberate and unilateral decision to pay Mr Babe a salary that was significantly less than what was stated in the employment agreement.

[35] Accordingly, I find that the respondent is to pay to Mr Babe the sum of \$21,939.52 gross in unpaid salary.

[36] Holiday pay is also owed to Mr Babe, in addition to salary. Mr Babe gave evidence that he did not take any paid holidays in that year. Mr Donaldson accepts this. In the absence of any holiday and leave records kept by the employer, I accept as proved the claim for holiday pay made by Mr Babe, in accordance with section 132 of the Act, and section 83 of the Holidays Act 2003.

[37] As the relevant period of employment was for less than 12 months, section 23 of the Holidays Act 2003 applies, which provides that annual holiday pay must be calculated at the rate of 8% of the employee's gross earnings. Mr Babe's gross earnings were properly \$63,649.32, and 8% of this is \$5,091.95.

[38] Accordingly, I find that the respondent is to pay to Mr Babe the sum of \$5,091.95 gross in holiday pay.

[39] In addition, Mr Babe claims that during the busy season, he worked for an extended period of 42 days without a day off.

[40] Mr Babe states that he was supposed to have one day off per week, but for this six week period he worked continuously, thus he now claims for payment for these additional six days worked, which he says are effectively unpaid.

[41] The employment agreement provides that Mr Babe will be paid a salary, which is to cover all hours worked, and excludes the payment of overtime.

[42] Mr Babe therefore cannot advance his claim on a contractual basis, as the payment of his salary (at the correct contractual rate) compensates him for the work done on those six days.

[43] However, Mr Babe's claim is that for this period when he worked continuously without a break, for 13 hours per day, he was remunerated at a rate that was less than the minimum wage rate, and that therefore, these six days need to be paid to him at minimum wage rates, in addition to his salary payments.

[44] SLD makes a number of responses to this claim. The first is that it is accepted that the respondent has breached its obligations to keep wage and time records. This is a sensible concession given the complete absence of such records. For completeness, I note that after the investigation meeting was held, the respondent attempted to introduce a document that appeared to contain a partial and hand-written record of hours of work relating to another employee. This employee did not appear at the investigation meeting to produce this information or be questioned on it, and in any event, this has no relevance to Mr Babe's hours of work, so I have not placed any weight upon it.

[45] The second is the submission already referred to, that "it would be highly unlikely that the minimum wage would have been breached, that only comes into account on the mathematical calculation."

[46] And:

There is a conflict of evidence with the hours worked which respectfully cannot be concluded on a mathematical analysis as the applicant has done⁶.

[47] It appears that this is a submission to the effect that the respondent accepts there were, or could have been, periods of time when the applicant's working hours were sufficiently long that they resulted in a breach of the relevant minimum wage requirements, but that the Authority should not hold the respondent to account by performing a "mathematical analysis" of the hours of work in the absence of contemporaneous wage and time records.

[48] Section 130 of the Act provides that:

Every employer must at all times keep a record (called the wages and time record) showing, in the case of each employee employed by that employer,... the number of hours worked each day in a pay period and the pay for those hours; [and] the wages paid to the employee each pay period and the method of calculation.

[49] This obligation is a mandatory one, shown by the use of the words "must" and "at all times". It applies to all employers for all their employees, shown by the use of the words "every employer" and "each employee".

[50] If an employer does not keep a wages and time record, then the logical result may be that there is confusion, or a lack of clarity, as to the hours worked by an employee and the wages paid to that employee. This is what has occurred here. Mr Babe has given evidence as to the days and hours he says he worked. Mr Donaldson on behalf of SLD has given evidence that Mr Babe worked less hours each day, although he admits he was not always present to see the hours that Mr Babe in fact worked.

[51] In such a case, section 132 of the Act sets out what the effect of the employer's failure to keep or produce records is.

⁶ Legal submissions for the respondent, at paragraph 10.

[52] That section provides:

- (1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—
 - (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
 - (b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.
- (2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—
 - (a) the wages actually paid to the employee;
 - (b) the hours, days, and time worked by the employee.

[53] In my view, there is no doubt that SLD's failure to keep wage and time records has prejudiced Mr Babe's ability to bring an accurate claim for wages that might potentially be owed to him in accordance with the Minimum Wage Act 1983, and for potential entitlements under the Holidays Act 2003, particularly in respect of various entitlements in relation to public holidays that might have been owed to him⁷.

[54] I also need to consider the evidence given by both Mr Babe and Mr Donaldson as to the hours per day that Mr Babe may have worked.

[55] Both Mr Babe and Mr Donaldson agree that there was a period of some 6 to 8 weeks each year where long hours were required, during the calving season and immediately following it. Mr Babe says that during this time, he started work at 4.30 am, and would work through to 6.00 pm, being a 13 and a half hour working day. Mr Babe states that he took a short break for lunch, leaving a true working day of 13 hours.

[56] Mr Donaldson says that during the calving period, the day would start at 4.30 am, and would finish at around 6.00 pm. The difference is that he states that Mr Babe took a one hour break for breakfast, and a one hour break for lunch each day, as specified in the employment

⁷ For completeness, I note that section 83 of the Holidays Act 2003 makes a similar provision allowing the Authority to accept as proven an employee's statements as to payments and leave taken, in the absence of holiday and leave records required to be kept by the employer under that act.

agreement. Once an allowance of two hours is made, Mr Donaldson says that the working day was therefore 11 and a half hours, rather than the 13 hours Mr Babe claims.

[57] The difference between Mr Babe and Mr Donaldson is one and a half hours per day, and depends entirely on what breaks were taken during this busy time.

[58] On balance, I prefer Mr Babe's evidence. Mr Donaldson was not always present on farm, so he was not in a position to witness what breaks Mr Babe took. Mr Babe also stated that these long hours were specific to the busy season, and gave evidence that he took more time for breaks and worked shorter hours, at other times of the year.

[59] Although Mr Donaldson in fact referred to an eight week busy period, I note Mr Babe has claimed for a six week period, and in my view, this lower period is more appropriate.

[60] In the absence of wage and time records, I accept as proven Mr Babe's evidence that he worked 13 hours per day for a six-week period of time, and that as a result, he needs to be paid for an additional six days of work, at 13 hours per day, calculated at the minimum wage rate.

[61] An employee must be paid at least the minimum wage rate for each hour worked, even when that employee is paid a salary. The Act defines "wages" as including amounts paid to an employee in respect of services provided to an employer⁸, and the Employment Court has held that "wages" and "salary" are different descriptions of essentially the same thing and that an employee in receipt of a salary is still covered by the protections of the Minimum Wage Act 1983⁹.

[62] In the case of an employee who is paid a salary, it is possible for an employee to work sufficient hours that he or she effectively receives an hourly rate that is less than the minimum wage rate. If this should occur, the employer must remedy the breach. In this case, I note that the individual employment agreement signed by the parties explains this by saying that:

Employers must ensure that Employees are receiving at least the applicable minimum wage rate for the hours worked. This is the case even when employees are on salaries. This means that an Employee's pay may need to

⁸ At section 5 of the Employment Relations Act 2003.

⁹ *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

be “topped up” to ensure they are paid at least the applicable minimum wage for the hours worked. It is important to be vigilant with time and wage records¹⁰.

[63] In *South Canterbury District Health Board v Sanderson*¹¹, the Employment Court ruled that each employee was:

entitled to the minimum wage for each on-call hour, notwithstanding that they receive more than the minimum wage for other hours worked.¹²

[64] The Employment Court then went on to state that the process of averaging an employee’s earnings over even a short amount of time was “impermissible”¹³.

[65] Turning to the wages that need to be paid to Mr Babe in addition to his annual salary, at that time, being the second half of 2019, the relevant adult minimum wage rate was \$17.70 per hour. I have found that Mr Babe worked for six days on which he was effectively unpaid, taking into account the hours he worked and the impact of the minimum wage rate compared to his contractual salary.

[66] On those six unpaid days, he worked 13 hours per day. This amounts to 78 hours of work that were unpaid.

[67] Using the minimum wage rate applicable at that time, the amount owing to Mr Babe is \$1,380.60 (being 78 hours at \$17.70 per hour).

[68] Accordingly, I find that the respondent is to pay to Mr Babe the sum of \$1,380.60 in unpaid minimum wages.

[69] An allowance of 8% for holiday pay on this sum is also made, being \$110.45¹⁴.

Hurt and humiliation

[70] Mr Babe claims compensation for hurt and humiliation, in the sum of \$10,000.

¹⁰ At page vi of that agreement.

¹¹ [2017] NZEmpC 127, [2017] ERNZ 749.

¹² *Ibid*, at paragraph [166].

¹³ *Ibid*, at the same paragraph.

¹⁴ *Lawton v Steel Pencil Holdings Limited (in Liq)*, [2021] NZEmpC 199.

[71] Section 123 of the Act provides that, where the Authority determines that an employee has a personal grievance, it may provide for any one or more of the remedies set out in that section, including:

the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee.

[72] I have already found that the respondent failed to pay Mr Babe his wages in full when due, in breach of the Wages Protection Act 1983, and also in breach of Mr Babe's employment agreement. This action amounts to an unjustified disadvantage to Mr Babe, which is a personal grievance, as defined in section 103(1)(b) of the Act.

[73] Accordingly, I now need to consider if Mr Babe should receive a compensatory payment for humiliation, loss of dignity, and injury to feelings.

[74] Mr Babe states that he asked Mr Donaldson multiple times about his short pay, but never received any satisfactory response and he found it embarrassing to have to ask for his wages. He also says that he sends money back to the Philippines to support his family, being both his immediate family, and his disabled uncle, who relied on Mr Babe to support him. Mr Babe explained that the impact of being short paid was not just felt by him directly, and also that he himself found it embarrassing to try to explain to his family why he could not support them, and they in turn suffered hardship as a result.

[75] Mr Donaldson says generally that he and SLD were not able to pay Mr Babe in particular in the last 3 or 4 months of his employment, because the business was at that time in a poor financial position due to the impacts of mycoplasma bovis which had recently been detected in New Zealand.

[76] I accept that having to ask his employer to pay him correctly was embarrassing for Mr Babe, and it should not have been necessary. Mr Babe should have been able to rely on his employer to pay him as it had promised and in accordance with the law.

[77] I also accept that the short payment had an impact on Mr Babe's family in terms of the support (or perhaps, the reduction in the support) that Mr Babe was able to provide for them, and that explaining the situation to his family also caused Mr Babe some embarrassment.

[78] I take into account that some payments were provided to Mr Babe, including by Mr Donaldson's parents, who were not in a contractual relationship with Mr Babe, but "stepped up" to provide some financial assistance, even if it was not all that Mr Babe was entitled to.

[79] Taking all these matters into consideration, I find it is appropriate to award the sum of \$5,000 to Mr Babe, in compensation for hurt and humiliation.

Costs

[80] Mr Babe has sought an award of costs on a full reimbursement basis. This is on the grounds that extensive work and effort was required by Mr Babe's representative, to attempt to understand what Mr Babe's hours of work and pay were, given the absence of wage and time and holiday and leave records, and that the information that was provided in the employment agreement did not match up with the pay information Mr Babe was able to obtain himself from the Inland Revenue Department.

[81] In addition, at the investigation meeting, the respondent produced further evidence that Mr Donaldson's parents had made payments to Mr Babe, and this new evidence required counsel to re-do some of the wage calculations to take this into account at a late stage.

[82] The usual practice is for costs to be awarded in line with the daily tariff, which is currently \$4,500. The investigation meeting was for one day.

[83] In this matter, I find that Mr Babe and his counsel had to take additional steps beyond what would normally be required to attempt to work out what and how Mr Babe was actually paid. This was entirely the fault of the respondent, as the respondent failed in its statutory obligations to keep the relevant records, and even where the contractual wages were clear, the respondent calculated the actual wages paid to Mr Babe on a different basis, which added to the confusion.

[84] In short, if the respondent had met its statutory record-keeping obligations under the Employment Relations Act, Holidays Act, and Wages Protection Act, the underlying facts of the matter would have been clearer from the start.

[85] It is not appropriate to award full costs to the applicant on a solicitor-client basis. However, it is appropriate for there to be an uplift in the costs awarded to the applicant to recognise the additional work performed.

[86] The applicant is awarded costs in the sum of \$7,000, being the daily rate of \$4,500 in recognition of the one day investigation meeting, plus an additional sum of \$2,500 in recognition of the additional work required to fully set out the applicant's claims.

Orders

[87] The respondent is to pay to Mr Babe the following sums:

- a. \$21,939.52 gross in unpaid salary.
- b. \$5,091.95 gross in unpaid holiday pay.
- c. \$1,380.60 gross in unpaid minimum wages.
- d. \$110.45 gross in holiday pay on unpaid minimum wages.
- e. \$5,000 without deduction in compensation for hurt and humiliation.
- f. \$7,000 gross in costs.

Claire English
Member of the Employment Relations Authority