

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Frank Milton Kimber (Applicant)  
**AND** North Canterbury Salmon Farm Limited (Respondent)  
**REPRESENTATIVES** Dennis Standing, Counsel for Applicant  
Brian Nathan, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 2 March 2006 from the applicant  
None from the respondent  
**DATE OF DETERMINATION** 12 May 2006

DETERMINATION OF THE AUTHORITY ON COSTS AND REMEDIES

*History*

[1] By determination dated 30 November 2005, I made certain orders in respect of unpaid overtime and unpaid leave owed by the respondent (North Canterbury Salmon) to the applicant (Mr Kimber).

[2] Those orders were expressed to be on the footing that the calculation of the actual amounts was to be agreed between the parties and failing agreement the matter was to be referred back to the Authority for determination.

[3] That original determination also reserved the question of costs.

[4] The parties were unable to resolve either the issue of remedies or the matter of costs and accordingly those matters have been referred back to me for further determination.

[5] I convened a telephone conference on 17 February 2006 to progress the outstanding matters. In that conference, it was agreed that the applicant's counsel would advise the Authority by 3 March if the matter had been resolved and in the event there was no resolution, the applicant was to lodge and serve a memorandum on the outstanding remedies and on costs.

[6] The respondent's counsel had until 17 March 2006 to lodge and serve a memorandum in reply and the parties were given an opportunity of addressing me on their submissions should they wish to avail themselves of that opportunity.

[7] In the result, only submissions from the applicant's counsel were received and despite every effort by the Authority's support staff to obtain submissions in reply from North Canterbury Salmon, and the setting of a fresh deadline by the Authority, no submissions from North Canterbury Salmon were received.

*Issues*

- [8] The following issues require decision by the Authority:
- (a) The quantum of unpaid overtime due to Mr Kimber by North Canterbury Salmon;
  - (b) The quantum of unpaid leave due by North Canterbury Salmon to Mr Kimber;
  - (c) Costs.

*Unpaid overtime*

[9] In my determination of 30 November 2005, I decided that the effect of the employment agreement entered into between the parties on 1 October 2000 was, on a proper construction of that agreement, to entitle Mr Kimber to receive overtime at an overtime rate of time and a half for the hours that Mr Kimber worked overtime from 1 October 2000 down to the date of the termination of the parties' employment relationship, 8 August 2003.

[10] The difficulty in computing Mr Kimber's entitlement in respect of overtime is a function of the disjunct between North Canterbury Salmon's belief that Mr Kimber was paid an ordinary salary (thus avoiding the necessity to maintain overtime wage records), and the clear provision in the employment agreement between North Canterbury Salmon and Mr Kimber, the effect of which was that overtime was indeed payable.

[11] In my earlier determination, I held that the failure of Mr Kimber to maintain proper records of the overtime that he worked during his employment and his failure to present those records by way of a claim to the employer during the employment was the primary reason for the employer's failure to address the issue of payment of overtime.

[12] Having decided that the effect of the employment agreement entered into by the parties in 2000 was to create an obligation on the part of North Canterbury Salmon to pay Mr Kimber for overtime worked, and in the absence of any agreement between the parties, it now falls to me to try to identify the number of hours that Mr Kimber might reasonably have been expected to work as overtime during the relevant period and then apply a mathematical factor to achieve the sum due to Mr Kimber by North Canterbury Salmon.

[13] Mr Colin Notley, who gave evidence as an expert for North Canterbury Salmon said that he accepted the span of hours identified by Mr Kimber as being the average hours that he might work per week. The span of hours referred to by Mr Kimber was 52-53 hours per week, representing 12-13 hours of overtime for each and every week.

[14] Given that Mr Notley accepted that Mr Kimber's estimate of his hours was likely to be within the industry range, it seems to be safe for me to assume that a multiplier of 12 hours per week of overtime is reasonable.

[15] According to the 1 October 2000 employment agreement, Mr Kimber's salary was \$55,000 per annum. That gives an hourly rate of \$26.47 and a time and a half rate of \$39.71.

[16] The calculation of 12 hours overtime each week over the 140 weeks that elapsed from 1 October 2000 (the date the agreement came into effect) and 8 August 2003 produces a total figure of \$66,712.80 gross.

[17] North Canterbury Salmon are directed to pay that amount, \$66,712.80 gross, to Mr Kimber.

### *Unpaid annual leave*

[18] Mr Kimber, as the manager of the enterprise, maintained a leave book at the salmon farm. For reasons which are not clear, Mr Kimber's successor burned all of Mr Kimber's records including, presumably, the leave book. Certainly the leave book has never been found.

[19] In my determination of 30 November 2005, I decided that Mr Kimber was entitled to payment for annual leave for the period from 8 August 1997 to 8 August 2003. The destruction of what appears to have been the only record of Mr Kimber's annual leave of course makes it difficult to calculate Mr Kimber's entitlement, particularly in respect of appropriate deductions that ought to be made for leave that Mr Kimber actually took during the employment relationship.

[20] As I noted in my earlier determination, it seemed to be common ground that Mr Kimber took very little leave although there was a three week break at the end of the employment relationship to which both Mr Kimber and another witness refer.

[21] That other witness, Mr Peter Devine, also spoke of Mr Kimber taking the odd day off to go shooting. Mr Devine's evidence was that would only happen very occasionally and to quote directly from the earlier determination ... *he was lucky to do that (take time off to go shooting) three times a year.*

[22] A further difficulty in calculating annual leave is that it is not clear how much annual leave Mr Kimber actually was granted pursuant to his employment agreement. I have determined that Mr Kimber is entitled to annual leave from 8 August 1997 down to 8 August 2003. I had earlier decided that I was not satisfied that there was a written agreement covering the employment relationship for the period prior to 1 October 2000, or if there was, a copy of the document was not available to me and accordingly its terms were unable to be deduced.

[23] It is difficult then to be precise about what Mr Kimber's entitlement to annual leave was for the period from 8 August 1997 to 1 October 2003 although the period from 1 October down to 8 August 2003 is known because that agreement is in existence and plainly records four weeks' leave as being due to Mr Kimber.

[24] I do not accept the assertion made in the submissions on behalf of the applicant that Mr Kimber received four weeks' leave from his seventh year of service (1997) because it is inconsistent with Mr Kimber's own evidence and earlier documentation. Mr Kimber's own evidence was that the 2000 agreement had *three changes* to the employment agreement which Mr Kimber recalls applied before that date and that one of those three changes was *to do with the amount of annual leave ...*

[25] Given that the 2000 agreement provides for four weeks annual leave, it seems more rather than less likely that the previous arrangements, however documented (if at all), provided for less annual leave than four weeks.

[26] Further, in a facsimile from Mr Kimber's counsel to the then representative of North Canterbury Salmon sent on 23 September 2003, Mr Kimber's counsel said ...*he had an entitlement of 3 weeks per annum until 2000...* .

[27] In the absence of proper records, the Authority can only make a calculation based on the evidence that is before it and the reasonable inferences that can be drawn from that evidence.

[28] I have reached the conclusion that in respect to annual leave entitlement, it is proper to deduct one week's leave per year from the total entitlement that Mr Kimber would have accrued to take

account of the handful of days per year which the evidence suggests Mr Kimber would have taken as annual leave.

[29] I have also decided that it is more rather than less likely that Mr Kimber was only entitled to four weeks' annual leave from 1 October 2000 until the end of the employment relationship and that prior to that date, Mr Kimber would have been entitled to only three weeks' annual leave.

[30] I set this calculation out in the following tabular form:

Frank Kimber: Annual Leave Entitlement

Year	Entitlement	Leave used	Leave to be paid	Date	Subtotal
8 Aug 97-8 Aug 98	3 weeks	1 week	2 weeks	38,000	\$1,461
8 Aug 98-8 Aug 99	3 weeks	1 week	2 weeks	38,000	\$1,461
8 Aug 99-8 Aug 2000	3 weeks	1 week	2 weeks	38,000	\$1,461
8 Aug 2000-8 Aug 2001	4 weeks	1 week	3 weeks	55,000	\$3,173
8 Aug 2001-8 Aug 2002	4 weeks	1 week	3 weeks	55,000	\$3,173
8 Aug 2002-8 Aug 2003	4 weeks	4 weeks	Nil	55,000	
					<b>\$10,729</b>

Notes:

- 1 1 week has been deducted in each leave year to estimate the time Mr Kimber took shooting.
- 2 An additional 3 weeks has been deducted in the final year to account for annual leave actually taken.
- 3 The annual salary figure used for the first three years is based on Mr Kimber's oral evidence.

***Unpaid public holidays***

[31] Mr Kimber has a statutory entitlement pursuant to the Holidays Act for 11 public holidays per year and that entitlement is reiterated in the employment agreement that applies from 1 October 2000.

[32] The evidence of Mr Kimber taking this time off during the employment relationship is sketchy to say the least and the evidence from Mr Kimber's final pay suggests that no allowance was made for payment of statutory holidays at that time.

[33] Accordingly, based on the unsatisfactory information I have before me, I reach the conclusion that it is more rather than less likely that Mr Kimber may not have been paid for some public holidays and accordingly he is entitled to be paid for them.

[34] There is no way that I can make any proper judgment given the paucity of the evidence on just how many statutory holidays Mr Kimber may not have been paid for but I have reached the conclusion that the fairest approach is to apportion half of each year's entitlement as unpaid and on this basis a payment is due by North Canterbury Salmon to Mr Kimber of \$6,988.08.

### ***Application for costs***

[35] Mr Kimber applies for costs against North Canterbury Salmon. North Canterbury Salmon has not filed any memoranda in respect of costs.

[36] Mr Kimber seeks a greater than usual award on the footing that North Canterbury Salmon has consistently failed to deal with Mr Kimber's claim in a timely fashion and, it is said, failed to make any compromise offers in relation to the matter.

[37] In particular, Mr Kimber seeks *an award closer to full recovery on the basis that the claim was a wage arrears claim which included arrears of statutory entitlements pursuant to the Holidays Act.*

[38] Mr Kimber also says that his counsel had to prepare detailed legal argument to rebut North Canterbury Salmon's argument.

[39] On this basis, Mr Kimber claims reimbursement of his total legal costs which amount to \$13,720 being \$13,500 in legal fees and disbursements (exclusive of GST) together with a filing fee of \$70 and a hearing fee of \$150.

### ***Discussion***

[40] This matter was heard over two days and involved a reasonably challenging factual matrix as well as some uncommonly advanced legal precepts.

[41] However, it is in my judgment not entirely realistic of Mr Kimber to attribute all of the difficulties in progressing the claim to North Canterbury Salmon. In fact, Mr Kimber's own contribution to this matter and its resolution needs also to be reflected in the assessment of an appropriate award of costs.

[42] Applying the principles helpfully set out in the Full Bench of the Employment Court in the recent *Da Cruz* decision, my considered view is that an appropriate award of costs by North Canterbury Salmon to Mr Kimber is in the sum of \$8,000.

[43] I accept there is some force in the arguments advanced on Mr Kimber's behalf for a higher than usual award, but I do not consider that this is a case where in effect full solicitor/client costs ought to be awarded.

[44] Applying the usual principles enunciated in *Da Cruz*, an award of \$2,000 per day of hearing would result in a starting point of \$4,000.

[45] Added to that, I think it is appropriate to reflect, to some extent anyway, the difficulties that Mr Kimber has experienced in progressing his claim and the apparent unwillingness of North Canterbury Salmon to respond to Mr Kimber's claim in a timely way. In this regard, I am prepared to regard North Canterbury Salmon's apparent refusal to deal appropriately and expeditiously with Mr Kimber's claim, including as it does statutory entitlements which overlay the contractual provisions, in a way similar to the position had North Canterbury Salmon refused to attend mediation on the matter.

[46] There will be an order then for \$8,000 in legal costs together with the filing fee of \$70 and a hearing fee of \$150 making a total of \$8,220.

### ***Summary***

[47] North Canterbury Salmon Farm Limited is directed to pay Mr Kimber the following sums:

- (a) The sum of \$66,712.80 gross as unpaid overtime,
- (b) The sum of \$10,729 gross by way of unpaid annual leave,
- (c) The sum of \$6,988.08 gross by way of unpaid public holiday,
- (d) The sum of \$8,220 by way of a contribution to costs.

James Crichton  
Member of Employment Relations Authority