

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 217/10
5274800

BETWEEN LABOUR INSPECTOR (JO-
ANN DUFF)
Applicant

AND CLUTHA LICENSING TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Jo-Ann Duff, Counsel for Applicant
Mark Deacon, Counsel for Respondent

Investigation Meeting: 23 July 2010 at Balclutha

Submissions Received On the day

Determination: 30 November 2010

DETERMINATION OF THE AUTHORITY

The Authority's investigation

[1] The Labour Inspector says that four employees, Ngarita Unahi, Aaron Webster, Kenneth and Stephanie Chambers, are owed wages by the Clutha Licensing Trust under the Minimum Wage Act 1983 and holiday pay. The Labour Inspector also seeks the imposition of a penalty for non-compliance with minimum employment standards.

[2] The Labour Inspector says that the employees are owed the following amounts as wages and holiday pay:

Ngarita Unahi: \$7,393.15;

Aaron Webster: \$7,310.94;

Kenneth Chambers: \$1,609.06; and

Stephanie Chambers: \$10,218.06.

[3] Clutha Licensing Trust (the Trust) does not accept the amounts as calculated by the Labour Inspector.

[4] The Trust says that the amounts claimed by the Labour Inspector on the employees' behalf are overstated and do not take into account weeks when the employees were paid in excess of the minimum wage in circumstances where they were on a salary and working variable hours. The Trust also submits that the employees each received a bonus which was payable on a six monthly basis. The Trust says that this should have been taken into account and was not. There is a further issue as to whether there should be a deduction from the wages for board or lodgings 15% or 5%. Notwithstanding the different approaches The Trust's calculations show amounts owing to three of the four employees. The Trust's position is that payments to Mr Chambers complied with the Minimum Wage Act and Orders.

[5] The issues for the Authority to determine are as follows:

- What did the employment agreements between the employees and the Trust provide;
- Did the four employees receive board or lodging and what allowance should be made in that respect under s.7 of the Minimum Wage Act 1983;
- Did the payment made to the four employees after making an allowance for either board or lodgings comply with the Minimum Wage Act and Minimum Wage Orders;
- Has the Labour Inspector calculated any shortfall correctly where each employee worked variable hours on a salary and had an entitlement to an at risk bonus payment; and
- What amount is owing to each employee?

What did the employment agreements provide?

Ngarita Unahi and Aaron Webster

[6] Ms Unahi and Mr Webster signed individual employment agreements on 25 January 2008. Schedule A to both employment agreements contained a summary of the terms and conditions of employment. The work was described as that of a full time joint manager at the Bridge Tavern, Kaitangata. The date of commencement of employment was 18 February 2008. The wages were \$25,000 per annum gross plus an annual bonus to a maximum of \$10,000 (payable six monthly gross taxable inclusive of holiday pay allowance – as per attached schedule). There was also the use of a three bedroom manager's house inclusive of power and local phone usage.

[7] The management incentive programme was set out in some detail and a budget was set which set targets with respect to sales, gross profit margins, wage costs and controllable expenses against which any bonus payable was assessed.

[8] Ms Unahi and Mr Webster submitted timesheets weekly and were paid weekly. They usually worked in excess of 50 hours per week which was expressed in the job description attached to the employment agreement as the base hours required.

[9] Although the timesheets were submitted usually with hours each week in excess of 40 per week, Ms Unahi and Mr Webster were paid on the basis of a 40 hour week in accordance with their salary of \$25,000. The pay slips, therefore bear no resemblance to the timesheets and actual hours worked. An example of this is for the week ending 24 February 2008, Ms Unahi and Mr Webster submitted timesheets for 60 and 70 hours work respectively. They were, however, paid on the basis of 40 hours at a rate of \$12.01 per hour or \$480.77 gross.

[10] Ms Unahi and Mr Webster, whose employment ended during the week ending 14 December 2009, received a bonus of \$3,091.20 each in the week ending 28 September 2008.

[11] Although the employment agreement provided that authorisation was required if an employee was to work over 50 hours per week, the Trust did not take any issue with the hours submitted by Ms Unahi and Mr Webster on their timesheets.

Stephanie Chambers and Kelly Chambers

[12] Mr and Mrs Chambers were employed as joint managers of Catlins Inn Owaka. They both signed employment agreements on 11 November 2007 and their employment commenced on 19 November 2007.

[13] Mrs Chambers' individual employment agreement provided in Schedule A that she was employed as a joint manager on wages of \$25,000 per annum gross taxable. The hours of work were expressed in the job description as with Ms Unahi and Mr Webster as a minimum of 50-55 hours per week.

[14] Mr Chambers' individual employment agreement had a different Schedule A that provided as joint manager he would receive \$25,000 per annum gross taxable plus an annual bonus to a maximum of \$5,000 payable six monthly gross taxable and inclusive of holiday pay allowance plus the use of the manager's flat onsite inclusive of power and local phone usage.

[15] Mr and Mrs Chambers each received a bonus on 17 August 2008 of \$1,127.50.

[16] Mr and Mrs Chambers also submitted weekly timesheets and were paid weekly on the basis of \$25,000 per annum. The paid hours also did not bear any resemblance to the hours they worked.

Did the four employees receive board or lodgings and what allowances should be made in that respect?

[17] Ms Unahi and Mr Webster gave evidence that they did not have meals at the hotel. They explained that they had children to feed and therefore cooked food at home that was healthy and not of a fried nature. If on the odd occasion they had a toasted sandwich, they wrote that down in a book to reflect the consumption of food. Ms Unahi and Mr Webster said they purchased groceries for their personal consumption.

[18] Mr and Mrs Chambers said that the one night that they might take something from the hotel was a Friday and that they did have the odd toasted sandwich during the day for lunch. Mr Chambers said that he wanted a proper meal with vegetables and therefore cooked that at home. Mr Chambers explained that stock purchased for the hotel was separate to that purchased for the flat and he said he spent about \$200 per week on groceries.

[19] Section 7 (1) of the Minimum Wage Act 1983 provides for deductions for board or lodgings or time lost as follows:

In any case where a worker is provided with board or lodgings by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the

appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, ... determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage (as so calculated) by more than 15% for board or by more than 5% for lodgings

[20] There was no dispute between Ms Duff and Mr Deacon about the definitions of *board* and *lodgings*. It was agreed board refers to the provision of meals and lodgings and lodgings is the provision of accommodation or a dwelling place.

[21] David Kenny is the general manager of the Trust. Mr Kenny said in his evidence that he understood that, although not a written term or condition of the employment agreement, the managers were allowed to have free meals whilst on duty. He accepted he did not know whether they took advantage of this.

[22] Having heard the evidence, I am not satisfied that the four employees did eat regularly at the hotels so as to conclude they were provided with meals during their shifts.

[23] I accept Ms Duff's submission that s.7, in terms of board, contemplates something more than the odd snack here and there and something more than simply a meal whilst on duty.

[24] I find that the evidence falls well short of supporting that the employees were provided with board.

[25] Mr Deacon in his submission said it was really a matter of fairness in terms of what deductions should be made. 5% for power and telephone as well as accommodation fell he submitted rather on the light side. Particularly so he submitted when there was at least the ability to have a meal whilst on duty.

[26] I find however in terms of s.7 of the Minimum Wage Act 1983 that the Labour Inspector has made an appropriate deduction of 5% for lodgings from the calculated wages.

Did the payment made to the four employees, after making an allowance for lodgings, comply with the Minimum Wage Act 1983 and the Minimum Wage Orders that were applicable in 2007 and 2008?

[27] The Minimum Wage Orders that apply to the four employees were the Minimum Wage Order 2007 and the Minimum Wage Order 2008. The relevant clauses in both of those orders is clause 4.

[28] In the 2007 order, clause 4 provided the following rates for the following rates as the minimum rates for wages payable to an adult worker:

- (a) *For an adult worker paid by the hour or by piecework, \$11.25 per hour;*
- (b) *For an adult worker paid by the day, -*
 - (i) *\$90 per day; and*
 - (ii) *\$11.25 per hour for each hour exceeding 8 hours worked by a worker on a day;*
- (c) *In all other cases, -*
 - (i) *\$450 per week; and*
 - (ii) *\$11.25 per hour for each hour exceeding 40 worked by a worker worked in a week.*

[29] In the 2008, clause 4 provided:

- (a) *For an adult worker paid by the hour or by piecework, \$12 per hour;*
- (b) *For an adult worker paid by the day, -*
 - (i) *\$96 per day; and*
 - (ii) *\$12 per hour for each hour exceeding 8 hours worked by a worker on a day;*
- (c) *In all other cases, -*
 - (i) *\$480 per week; and*

- (ii) *\$12 per hour for each hour exceeding 40 worked by a worker worked in a week.*

[30] The Minimum Wage Act 1983 provides at s6:

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[31] The Labour Inspector, in making her calculation, had timesheets for each week of the employee's employment setting out the hours that they worked. Ms Duff took the hours worked by each employee and applied the minimum adult rate in clause 4(c) as set out in the respective Orders to arrive at a minimum wage for each weekly period.

[32] From that minimum wage as calculated for the weekly period, the Labour Inspector then deducted 5% for lodging. Mr Deacon, in providing his alternative workings, deducted 5% from the adult rate under the Minimum Wage Order that applied. I consider the Labour Inspector's approach to be the proper way to make such a deduction and in accordance with s.7 of the Minimum Wage Act 1983.

[33] The Labour Inspector then set out what should have been received after the deduction of 5% for lodgings, compared that with what was actually received, and set out the difference for each week. There were some weeks when the four employees received more than the minimum wage for the hours they undertook. The Labour Inspector's approach was not to take this into account as she assessed the difference on a weekly basis.

[34] The Labour Inspector submitted that this approach was in accordance with the Full Court's judgment in *Idea Services Ltd v. Dickson* (2010) 9 NZELC 93,403 where the Full Court by a majority rejected an argument that under s.6 of the Minimum Wage Act and the Minimum Wage Order, the hourly rates that the employees received during each pay period should be averaged out over the pay period of a fortnight.

[35] Mr Deacon submits that there should be an averaging out over the entire period of employment to take into account where payments received in a particular week were in excess of the minimum wage and taking into account the six monthly bonuses paid.

[36] Mr Deacon relies on *Sealord Group v. NZ Fishing Guild* [2005] ERNZ 535. In that case, the Full Court of the Employment Court held there was not a breach of the Minimum Wage Act 1983 where fishing crew received at least the minimum wage for hours worked even though some fortnightly payments during the cycle of voyages were less than the minimum wage but were later supplemented by a share of the catch at the end of each voyage.

[37] Significantly in that case, the Full Court accepted an argument by Sealord that the remuneration received by each employer for hours worked comprised three components, being fortnightly payments, payment at the end of each voyage and payment at the end of each voyage cycle.

[38] The Full Court in *Sealord* concluded that neither the Act nor the Order dealt with the timing of the payment and that, provided the total amount paid in respect of the work to which it related was not less than the amount payable under the minimum wage legislation, the requirements of that legislation were met.

[39] In *Idea Services*, however, the Court said that the amount of wages payable to the workers was never in issue in *Sealord* and accordingly there was no discussion about how such amounts were to be calculated.

[40] The starting point in terms of an assessment as to when remuneration is paid is the employment agreements.

[41] The hours and days of work provision in clause 6 is the same in all four employment agreements and provides that the ordinary hours of work should not exceed 40 in any one week. Where however the employee and employer agree, the ordinary hours of work may be spread over six or seven days of the week and/or exceed 40 hours provided that no more than 50 hours was worked in any one week without agreement between the parties.

[42] The four employees were salaried employees and there was a provision that provided the salary payment specified in the agreement was deemed to cover payment

for the overall performance of the job and overtime would not be payable unless stated otherwise in Schedule A (with the exception of clause 9.3 (1.8 – public holidays)).

[43] The employment agreements all defined ordinary weekly pay as *this includes everything an employee is normally paid weekly, including regular allowances and regular overtimes applicable. Intermittent or discretionary payments are not included.*

[44] I find that the employment agreements signed by the four employees, together with the payment of wages themselves, clearly provide for payment on a weekly basis. I accept therefore that the Labour Inspector's assessment of compliance with the Minimum Wage Act 1983 and the Minimum Wage Orders with respect to each weekly pay received by the employees is the correct assessment.

[45] I do not find that the Labour Inspector is required, as Mr Deacon submits, to assess or average weekly payments made over the entire period of the employment by taking into account weeks where more than the minimum wage was paid.

[46] Whilst I accept the Labour Inspector's approach in terms of compliance assessed weekly, I have formed a different view in terms of the bonuses that were received.

[47] Ms Duff simply took the bonus payment made to each of the employees and recorded that in terms of the week that it was made and obviously there was no shortfall in that week. The employment agreements referred to a salary plus an annual bonus payable 6 monthly. There are two options. To simply assess a shortfall and disregard the bonus except to the extent of a one week period or take it into account to reduce the shortfall as a result of a failure to comply with Minimum Wage legislation.

[48] I find that the correct way to apply that bonus is over the six monthly period to which it applied as was intended by the employment agreements. I have some reservation in terms of Mrs Chambers because there was no reference in her employment agreement to a bonus at all. Nevertheless, it was not argued in front of me that she would not receive a bonus on exactly the same terms as her husband and indeed that is what followed.

[49] Six months will be the period in terms of Ms Unahi and Mr Webster's employment from 18 February 2007 to 18 August 2008. The Authority then has a difficulty because the bonus for the balance of the year is still to be assessed. Mr Kenny said that would depend on the findings made by the Authority. The Trust should now consider the issue of a bonus and if paid this would be deducted from the shortfall in wages from 18 August 2008.

[50] In terms of Mr and Mrs Chambers, the employment was for a period from 19 November 2007 until on or about 9 November 2008. As with the other employees, the bonus paid should be deducted from the shortfall for the first six months ending 19 May 2008. The bonus payment is not part of the ordinary weekly pay period which falls to be assessed separately, but is a payment the parties agreed would be assessed and, if appropriate, paid on a six monthly basis.

[51] Such a payment is regarded in the Holiday's Act 2003 as part of gross earnings although it was paid inclusive to employees of holiday pay so that sum should be deducted before taking the balance from the shortfall.

Determination

[52] I accept the Labour Inspector's calculations in terms of each of the four employees with respect to a deduction of 5% for lodgings.

[53] I accept the Labour Inspector's assessment as to whether there was compliance with the Minimum Wage Act and Orders over a weekly period for all the employees.

[54] I do not, however, agree with the assessment of the bonus payment. I find that the bonus payment should be credited against the shortfall for the first six months for each employee. If there is a subsequent bonus to be paid for the balance of the employment period, then that payment can be taken into account for the remaining period of employment. If there is to be no further bonus payment, then the wages outstanding is based on the Labour Inspector's assessment for the shortfall for that remaining period.

[55] I am of the view that, given there will have to be some reassessment, it is better I leave the final calculations to the parties in the first instance, but reserve leave for either party to return to the Authority in the event that further assistance is

required. I record that there will be holiday payable on any amounts owing and interest payable from the date the employment ended.

Penalty

[58] I am not satisfied in the circumstances where there was a genuine difference in the method of calculation that there should be a penalty awarded.

Costs

[56] I reserve the issue of costs. The Labour Inspector has had some success and I find is entitled to reimbursement of the filing fee of \$70.

Helen Doyle
Member of the Employment Relations Authority