

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 100  
5550345

BETWEEN            MONIQUE WILLIAMS  
                                 (LABOUR INSPECTOR)  
                                 Applicant

AND                    ALLAN MARX as trustee of  
                                 Vintage Farm Trust  
                                 First Respondent

AND                    PAUL ROBERTS as trustee of  
                                 Vintage Farm Trust  
                                 Second Respondent

Member of Authority:    M B Loftus

Representatives:        Catherine Milnes, Counsel for Applicant  
                                 Susan Hughes QC, Counsel for Respondent

Investigation Meeting:    21 September 2015 at New Plymouth

Submissions Received:    16 October and 13 November 2015 from Applicant  
                                 4 November 2015 from Respondent

Determination:            15 August 2016

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**DETERMINATION OF THE AUTHORITY**

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[1] The applicant, Monique Williams (a Labour Inspector employed by the Ministry of Business, Innovation and Employment), claims the respondents, Mr Marx and Mr Roberts acting as trustees for the Vintage Farm Trust (Vintage Farm), have:

- a. Failed to retain copies of staff employment agreements contrary to the requirements of s 64 of the Employment Relations Act 2000 (the Act);
- b. Failed to provide written employment agreements contrary to the requirements of s 65 of the Act;

- c. Failed to record the hours and days their employees worked contrary to the requirements of s 8A(1)(g) of the Minimum Wage Act 1983;
- d. Failed to maintain a holiday and leave record as required by s 81 of the Holidays Act 2003; and
- e. Failed to pay minimum wages as required by s 6 of the Minimum Wage Act 1983.

[2] Vintage Farm acknowledges it failed to keep the required records. It attributes the omissions to ignorance as opposed to a deliberate effort to avoid or flout the law. It says it has now engaged legal and financial advisors to ensure these issues are addressed and there is future compliance.

[3] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided that exceptional circumstances, or more correctly a serious thereof, existed to allow a written determination of findings at a later date.

### **Background**

[4] Vintage Farm operates a couple of farms in South Taranaki. The Labour Inspectorate, as part of its National Dairy Sector Strategy, planned visits to various dairy farms to ascertain whether or not there were *systemic breaches of minimum employment standards with a focus on ensuring full compliance is achieved.*<sup>1</sup>

[5] As part of this programme Ms Williams visited one of Vintage Farms properties on 11 November 2014. She interviewed Mr Marx, all five employees and examined such records as were available.

[6] When asked, Mr Marx was unable to produce written employment records for any of the five extant staff though he thought three of them had their own copy but had failed to return the employers copy to him. Two of the employees accept they were given a joint agreement and claim to have returned a copy. Here it should be noted the joint agreement saw the two sharing a single salary with this arrangement being said to minimise the obligations of one in respect to child support payments.

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<sup>1</sup> Paragraph 2.6 of the Statement of Problem

The third employee accepted she had not returned a signed copy of an agreement she had received.

[7] The time and wage records Ms Williams inspected were deficient in that they failed to record the actual hours worked by each employee and Mr Marx was unable to produce holiday records as they were not kept.

[8] Having interviewing the staff Ms Williams formed a view the hours they reported indicted a failure to pay the minimum wage. Her view was reinforced when two of the employees, Brian and Karyn Cook, produced personal diaries which purported to record the hours they worked. The responses given by all five also led Ms Williams to conclude there were various failures in respect to the granting of, and payment for, annual holidays. Similarly she concluded there were failures in respect of time and a half payments for working public holidays and the granting of days in lieu.<sup>2</sup> It appears there was a practice of paying a loading of fifty dollars for work on public holidays irrespective of time worked but a day in lieu was not granted.

[9] At the end of her preliminary investigation Ms Williams advised Mr Marx she had concerns and would be making further inquiries. It is claimed this resulted in Mr Marx making various threats to staff including, it is alleged, telling two they would no longer get a salary but revert to an hourly rate and then reducing the hours available to one of those. It is also alleged some staff were reluctant to assist Ms Williams as they feared doing so would detrimentally affect their employment. It also appears written employment agreements were quickly distributed though there were queries about their adequacy.

[10] Ms Williams continued her investigation over the following months and gathered additional information, particularly about the hours being worked. On 6 March 2015 she sent her draft report to Mr Marx along with advice of her conclusion there had been significant non-compliance. She also advised an intention to both issue an Improvement Notice<sup>3</sup> to ensure future compliance and seek rectification of past breaches through the Authority. Mr Marx did not avail himself of an opportunity to respond and the report was finalised on 17 March. Mr Marx was personally served a copy on the 19<sup>th</sup> along with an Improvement Notice.

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<sup>2</sup> Sections 50 and 56 of the Holidays Act 2003

<sup>3</sup> Section 223D of the Employment Relations Act 2000

[11] Here it should be noted Ms Williams investigations led to further claims in respect of ex-employee and these were added to those relating to the staff of Vintage Farms Ms Williams interviewed on 11 November 2014.

[12] On 9 April Ms Williams received a text message from Ms Cook saying she and Mr Cook had been bullied and pressured into signing an agreement their claims be settled for \$8,500. Five days later Ms Williams was advised Mr Marx had told the Cook's the payment would not be made as he probably owed a greater sum but he had, in the interim, paid \$6,528 into each of their bank accounts.

[13] Further correspondence and payments occurred which has seen changes to the amounts claimed. Indeed these changes continued on the morning of the investigation. The remaining claims, and those to which the investigation was now confined relate to Mr and Mrs Cook. On their behalf Ms Williams now seeks a total of \$70,595.11<sup>4</sup> with the amount being reduced from that originally claimed by virtue of various payments Vintage Farm has made to the Cook's since this matter first arose.

[14] Vintage Farms, while conceding money is owing to the Cooks, has chosen to defend the claims in the belief they rely on documents which have been created retrospectively and are grossly inflated.<sup>5</sup>

### **Determination**

[15] As already said Ms Williams claims Vintage Farms has failed to maintain records required by various employment related statutes and failed to pay either the minimum wage or adequate holiday pay to Mr and Mrs Cook. She seeks penalties, payment of arrears plus interest and costs (limited to reimbursement of the Authority's filing fee).

[16] Vintage Farms admits the alleged failures in respect to record keeping but says it should not be penalised given subsequent remedial action and the fact its failures were the result of ignorance. It denies it owes the Cooks' the amounts claim accepts some monies remain payable.

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<sup>4</sup> Refer paragraph [4] of Ms Milnes closing submissions

<sup>5</sup> Refer letter between Counsel (Hughes to Graeme) dated 26 June 2015

[17] Addressing the arrears. Ms Williams, when questioned by Ms Hughes, conceded that in the absence of reliable time and wage records her assessment of the amount owing to the Cooks relied on the diaries Mrs Cook provided.

[18] That raises section 132 of the Act. Section 132 provides that where there is a claim for the recovery of monies the employee (in this case represented by the Labour Inspector) may call evidence to show the failure to comply with s.130 and that it prejudiced his or her ability to accurately quantify the claim (s.132(1)). There is no argument there is no time and wage record. Its absence clearly impeded Ms Williams.

[19] Section 132 goes on to provide that in such circumstances I may accept the claim as valid unless the respondent can prove it is inaccurate (s.132(2)). Therein lies the issue here.

[20] The Cook's claim Mr Cook's hours never dropped below 42 a week and Mrs Cook worked full time for some four years though her hours reduced once another employee commenced. They say their hours were recorded in Mrs Cook's diaries and she says she made the entries within a day or two of the time being worked.

[21] It is the applicants submission I should accept this evidence and s 132 therefore allows the claims acceptance in full. In support *it is submitted that on an interpretational basis unless the employer proves all the employees claims about wages paid and hours / days worked are incorrect, the Authority may accept all the claims as proved.*<sup>6</sup>

[22] The submission results from concessions Ms Hughes elicited from the Cooks that various entries in the diaries are, in fact, incorrect. My notes record a couple of such admissions from Mrs Cook but the same cannot be said of Mr Cook. He made a number of concessions regarding inaccuracies in the diaries and accepted he was unable to explain them. He also accepted he did not tell his wife what hours he had worked which raises further question over the diaries accuracy. Add to that his concession some of Mrs Cook's work was not required or performed though he tried to justify her claims (which largely revolved around Mrs Cook's participation in morning milking) as a situation similar to that of a *fireman – there if needed*.

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<sup>6</sup> Paragraph [13] of Ms Milnes closing submissions

[23] In submission Ms Milnes likens this to a sleepover type of arrangement. Her duties and the employment arrangement with Vintage Farms were such her freedom was curtailed and she would remain available to assist as required. That said the evidence did not support a finding the all-encompassing type of constraint present in the sleepover cases existed here.

[24] The response is this is a credibility call and the Cook's claims are *contrived, ... unreliable and exaggerated*. It is submitted these allegations are confirmed by Mr Cook's various concessions along with other points which raise doubts about the Cook's credibility.

[25] In support of her submissions Ms Hughes cites the following:

- a. Repeated refusal of Mr Marx's request he be allowed to view the diaries and comment on them and the fact even at the hearing some remain undisclosed;
- b. The fact the Cook's did not advise Ms Williams of the diaries existence at the time of her initial investigation. It is submitted this takes on a greater importance when it is considered Ms Williams asked Mrs Cook to *construct* a record. Why would she have to do so if the record already existed;
- c. The fact the diaries were asserted to be completely accurate while it is now conceded that is not the case;
- d. The fact the records were, on a daily basis, almost identical which in this environment and given admissions by Mr Cook is unbelievable;
- e. The fact there would have been no need for Mrs Cook to work anything close to the hours she claims when Mr Marx was full time on the farm from 2012 and covered by a new employee when absent from March 2014 to March 2015;
- f. That I am being asked to conclude Mr Marx did nothing when on the farm necessitating the performance of work by Mrs Cook when clearly that is not the case;

- g. Mrs Cook claimed she performed various duties such as the repair of machinery yet accepted she had none of the requisite skills and the claim was misleading; and
- h. The way in which the Cook's resiled from claims the April 2015 agreement was forced from them by threats and bullying.

[26] There were other examples and it is submitted that taking the above into account, and recognising Mr Marx's willingness to concede his failures rather than having inconsistencies wrung out of him by cross examination, I prefer his blanket denial the Cook's worked the hours claimed over their questionable assertions they did.

[27] The submission, the evidence and the way it came out leads me to accept the view Mr Marx's evidence is the more compelling. That means, I prefer his evidence over what was required of the Cook's and what they did over their assertions.

[28] Even if this were not the case I do not believe this is a situation in which I could simply accept the claim pursuant to s 132. Section 132(2) says unless the defendant proves those claims (ie: those for arrears under s132(1)) are incorrect I may accept the all claims. It does not say prove all claims are incorrect with the word all not appearing till later in the section.

[29] The same problem flows into the holidays claim, especially as various sums have been paid since Ms Williams commenced her investigation. I have no idea if these relate to wages for time worked, holidays or both but in any event a portion of the holiday claim is generated by applying 8% to the wage claim I have not accepted.

[30] Finally I note Mr Marx accepts further payments are owing. I suggest the parties continue their discussions and try to resolve the issue of how much should now be paid. In the event they fail to do so I will accept further submission in an attempt to determine a figure but the parties should be well aware from the above findings that this is likely to favour Vintage Farms' views.

[31] Turning to the penalty claims. Six penalties are sought with one for each of the following breaches:

- a. Failure to comply with s 65(4) of the Act;

- b. Failure to retain copies of the written employment agreements (s 64(4) of the Act);
- c. Failure to maintain time and wage records (s 8A(1)(g) of the Minimum Wage Act 1983 – now repealed);
- d. Failure to pay minimum wages (s 10 of the Minimum Wage Act 1983);
- e. Failure to keep time and wage records;
- f. Failure to pay alternate holidays (s 60(2)(b) of the Holidays Act 2003).

[32] That these failures occurred has, as already said, been conceded including the issue in contention; namely a failure to pay minimum wages. That is conceded for employees other than the Cook's and for them though not to the extent claimed. The issue is whether or not the conduct warrants the imposition of penalties.

[33] Ms Milnes says yes and suggest a reasonably high penalty given the serious failures which occurred here. In doing so she cites *Tan v Yang*<sup>7</sup> and the principles which should be applied. As already said she notes the seriousness of the breaches, the fact they were repeated in that they were not addressed over a lengthy period and applied to a multiplicity of employees, the effect on the employees in that they were deprived of monies to which they were entitled and the need for deterrence.

[34] Ms Hughes argues a contrary position. In doing so she says Vintage Farms moved to resolve these issues when they were brought to its notice and exhibited a commitment to resolving its employees' claims when they were aired.

[35] On this I prefer Ms Milnes' position. While Vintage Farms has moved to rectify its deficiencies the fact remains the absence of appropriate records impeded Ms Williams. Had records been available the parties would not have been forced to embark on a messy credibility argument.

[36] This is a case that highlights the need for accurate records which meet legislative requirement. In respect to the two claims regarding the lack of records, and having considered the evidence and submissions, I consider a penalty of \$5,000 for each appropriate.

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<sup>7</sup> [2014] NZEmpC 65

[37] Turning to the failure to produce and keep employment agreements. This is not, in my view and given the evidence, as serious at least in this instance. The evidence is two of the four were actually written and the offence is either a failure to properly store the returned agreement or a failure to pursue its and another's whereabouts. Additionally there is little evidence as to how this affected the applicant's clients. Having considered the evidence I consider a single penalty of \$3,000 appropriate for these two claims.

[38] Finally there is the failure to pay monies due - the minimum wage and alternate holidays. This is serious. It clearly affects those who did not receive their money when due and deprives them of the use thereof. This is also a matter where deterrence is also important. Again, and given the evidence and submissions I consider each warrants a penalty of \$5,000.

[39] Ms Williams also seeks costs though her claim is limited to the Authority's filing fee of \$71.56. Given her success this is a given.

### **Conclusions**

[40] The claim Mr and Mrs Cook are owed a total of \$70,595.11 has not been made out and proven inaccuracies in the way it has been calculated means I do not consider myself capable of applying s 132(2) and accepting it. Given Vintage Farms concedes further moneys are payable the parties are encouraged to continue discussions and try to agree an amount but should they fail to do so they may return to the Authority for a determination.

[41] Allan Marx and Paul Roberts, as trustees of Vintage Farm Trust are jointly and severally responsible for paying penalties totalling \$23,000 (twenty three thousand dollars). Payment is to be made to the Crown via the Authority.

[42] Allan Marx and Paul Roberts are also to pay a further \$71.56 (seventy one dollars and fifty six cents) as a contribution towards the Ministry of Business, Innovation and Employment costs. Payment is to be made to the Ministry.