

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry William McVicar (Applicant)
AND Donald McKenzie Harcourt (Respondent)
REPRESENTATIVES David Beck, Counsel for Applicant
Donald McKenzie Harcourt, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 19 July 2005
DATE OF DETERMINATION 5 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kerry McVicar lodged a statement of problem in which he described his problem as *Arrears in Pay, No pay documentation and No Individual Employment Agreement*. To remedy the problem, he asked for back-pay of \$4,688.00, time and a half for working on public holidays, pay documentation and an individual employment agreement. At that time, Mr McVicar was still employed fulltime by Donald Harcourt to work on his farm.

[2] Through a representative, Mr Harcourt lodged a reply and admitted owing \$1,443.16 in wages and statutory holiday pay. Mr Harcourt said he was not aware of the requirement for a written employment agreement. Despite the admission about arrears, no payment was made to Mr McVicar.

[3] Mr McVicar and Mr Harcourt participated in mediation but were not able to resolve their differences.

[4] During the investigation meeting, it became apparent that there is only one important factual difference between Mr McVicar and Mr Harcourt but it is necessary to set out other matters to give context to the disagreement that must be resolved.

Employment arrangements

[5] There were several discussions between the two men around March 2004 about employment. The discussions culminated in an agreement for Mr McVicar to work on the farm at a salary of \$43,030 per annum together with accommodation, power and a beast supplied, all quite standard extras for such employment. That reflects a diary note on 29 March 2004 made by Mr McVicar as follows: *Talked to Don again: weekly pay \$642.00 in the Hand ...*

[6] Mr McVicar says that he moved into the farm accommodation in April 2004 but Mr Harcourt believes it was somewhat later. It is not necessary to resolve that. Mr McVicar says that he worked voluntarily for two weeks commencing 17 May 2004 before commencing paid employment. However, he also says that he makes no claim prior to his first pay which it is agreed he received on 25 June 2004. Mr McVicar received fortnightly pays of \$700.00 (net) from then until about 13 October 2004 when the rate increased to \$1,286.00 (net) per fortnight.

[7] Both men say that they agreed that Mr McVicar would be paid \$700.00 (net) per fortnight until the cows started milking, thereafter for the pay to be \$1,286.00 (net) per fortnight. The difference between them is that Mr McVicar says it was agreed that he would be backpaid the balance of the salary to make it up to \$43,030 pa once the cows started milking while Mr Harcourt says there was no agreement about back-pay.

[8] It is agreed that Mr McVicar's partner (Julie Gardner) wrote out the wages cheques and presented them to Mr Harcourt for his signature. Both men also agree that the date the cows started milking was 16 August 2004. However, Ms Gardner continued to prepare the cheques at the lower rate of \$700.00 per fortnight until about 13 October 2004 when the first cheque for \$1,286.00 was prepared for Mr Harcourt's signature.

[9] Around July 2004, Mr McVicar lent Mr Harcourt about \$18,600.00. Problems arose with the loan so that by 1 January 2005, Mr McVicar has recorded in his diary *Sat down with Don & Julie to discuss loan & wages: Promised by Don to address it by Fri: Legal action taken after close of business on the 14-1-05: Lawyer: & E.R.S.* However, the problems must have arisen a little earlier as Mr McVicar commenced something of a work to rule on about 17 December 2004 by only doing milking work and not doing other farm work. Ms Gardner's evidence (which I accept) is that they discussed their money problems with Mr Harcourt sometime after the end of October 2004 when he made promises that it would be addressed.

[10] All that culminated in a letter of demand for wages arrears of \$4,688.00 from Mr McVicar's solicitor dated 25 January 2005 and the present proceedings lodged on 31 January 2005.

[11] It is common ground that Mr McVicar was certified unfit for work in early February 2005. That relates to an accident that apparently occurred sometime in 2004. Mr McVicar remained on ACC until June 2005. He never resumed working for Mr Harcourt.

Agreement for back-pay?

[12] Mr Harcourt says that their original agreement called for Mr McVicar to start the job at the beginning of August, that they asked to and did move into the supplied accommodation earlier than had been anticipated, that Mr McVicar then asked to start work earlier but Mr Harcourt said that he could not afford that, following which he agreed to Mr McVicar's offer to work earlier at the lower rate of \$700.00 net per week until milking started. On Mr Harcourt's account, there was no discussion or agreement about any back-pay. The only difference of any significance in Mr McVicar's account is that it was agreed that there would be back pay.

[13] Mr Harcourt has operated the mixed diary/cattle farm for some time. He is well aware of the labour requirements and I accept his evidence that the rate initially agreed with Mr McVicar was higher than he had paid any previous employee. He agreed to the higher rate because of Mr McVicar's ability to do other work around the farm such as some engineering work. I find it more probable than not that he told Mr McVicar that he could not afford the higher salary when Mr McVicar sought to start earlier than originally discussed. Either Mr Harcourt agreed to defer liability for the higher salary or agreed to engage Mr McVicar for the earlier period at a lower

salary. I find that the latter is more probable. Accordingly, I reject Mr McVicar's claim for back-pay for the period from 25 June 2004 to early October 2004.

Arrears

[14] As already mentioned, it is common ground that milking started on 16 August 2004. Pays on or after that date should have been at the rate of \$1,655.00 (gross) rather than \$827.50 (gross), a difference of \$827.50. There were four fortnightly pays at the wrong rate until it was increased on or about 13 October 2004. Accordingly, Mr McVicar has been underpaid \$3310.00.

[15] Counsel for Mr McVicar submitted at the meeting and later that section 132 of the Employment Relations Act 2000 applied so that Mr Harcourt had the burden of disproving Mr McVicar claims, specifically that there had been an agreement to back-pay as discussed above. I find that section 132 does not apply. Mr McVicar suffered no prejudice in his ability to bring an accurate claim. Indeed he can be commended for the precise way in which his claim was expressed in the statement of problem. The only significant point of disagreement between the two men was about what they had agreed over the back-pay point. That is what this part of the problem is about, not the situation addressed by section 132. Put another way, Mr Harcourt's failure to keep time and wage records did not prejudice Mr McVicar's ability to bring an accurate claim based on his view of what had been agreed nor the Authority's ability to accurately calculate the arrears owing, once the dispute about the terms of employment was resolved.

Holiday pay

[16] Mr McVicar's employment must be regarded as terminated although I should not be taken as indicating any view about who initiated that. He is therefore entitled to his holiday pay in accordance with section 23 of the Holidays Act 2003, more of which shortly.

[17] One issue that section 132 may assist in resolving is pay for Mr McVicar's work on statutory holidays. Mr McVicar says and I accept that he worked half days on six statutory holidays. He was not paid half-time extra for the time actually worked on each statutory holiday. Mr McVicar generally worked 12 days on, 2 days off every fortnight. His daily rate of pay was therefore \$137.92 (gross). While there was some dispute in evidence about how long Mr McVicar would have actually worked on each statutory holiday, I apply section 132 and accept his evidence about working half a day. He must therefore be paid an extra \$413.76 for his work on these six statutory holidays.

[18] During the employment, Mr McVicar was paid \$15,888.00 (gross). My findings above are that he should have been paid a further \$3723.76 (gross) so his total gross earnings for the purposes of section 23 of the Holidays Act 2003 are \$19,611.76. He must now be paid holiday pay of 6% on that figure, a sum of \$1,176.71.

[19] There were eight statutory holidays during the employment on which Mr McVicar worked or which fell on his rostered days off and must be transferred to the following Monday or Tuesday which he then worked. Mr McVicar never received any alternative holiday or relevant payment during his employment. He is entitled to payment pursuant to section 60 (2) (b) of the Holidays Act 2003. His relevant daily pay at the end of the employment was \$137.92. He must now be paid \$1,103.36 in respect of these alternative holidays. The statutory holidays are those from Queen's Birthday to Waitangi Day (inclusive).

Penalties

[20] Counsel for Mr McVicar asked the Authority to *consider a discretionary penalty action* against Mr Harcourt for the various breaches of the Employment Relations Act 2000 and the employment agreement. The request was made near the end of the investigation meeting. Mr McVicar had made no earlier claim for a penalty to be imposed. Section 135 of the Employment Relations Act 2000 provides for an action for the recovery of a penalty to be brought by a party to the employment agreement, by a person in relation to whom a breach of the Act is alleged to have taken place or (in specified circumstances) by a Labour Inspector.

[21] At best, Mr Harcourt turned a blind eye to his obligations as an employer, for example by not keeping time and wage records and by failing to provide a written employment agreement. If there had been a timely claim by the applicant for the imposition of a penalty, one might very well have been imposed in the circumstances disclosed by my investigation. However, by the time the issue was raised, it was too late for Mr Harcourt to bring further evidence or to attempt to resolve the problem in the light of the risk that a penalty might be imposed. In those circumstances, I was not prepared to entertain an action to recover a penalty.

[22] In the submissions sent to the Authority after the investigation meeting, counsel argued for a penalty to be imposed for a breach of section 4A of the Employment Relations Act 2000 and reference was made to *the respondent breaching a general obligation of failing to maintain trust and confidence and fair dealing and failing to maintain a productive employment relationship by his deliberate, serious and sustained actions that undermined the employment relationship*. Section 4A provides for a penalty for certain breaches of the duty of good faith. It came into force on 1 December 2004 and does not apply retrospectively: see sections 2 & 73 (1) of the Employment Relations Amendment Act (No 2) 2004. The quoted words appear to refer to both the implied contractual duty and the statutory good faith obligations.

[23] This submission suffers from the same difficulty as the earlier submission. The Authority must comply with the principles of natural justice: see section 157 (2). It would be inconsistent with that requirement to allow the applicant to initiate an action for the recovery of a penalty against Mr Harcourt at such a late stage in the investigation.

ACC

[24] In early February 2005, Mr McVicar was certified unfit for work as a result of an accident. However, he actually worked on the 6th, 7th and 8th of February after Mr Harcourt asked him to do the milking. The matter was not referred to in the statement of problem but was discussed during the investigation meeting. That discussion indicates that there is a dispute about whether the accident some time earlier was a work accident. ACC apparently accepted it as a work accident but never gave Mr Harcourt advice of that decision or an opportunity to dispute that it was a work accident. During the investigation meeting, I was asked to order Mr Harcourt to pay the first week's wages on the basis of the work accident. However, I do not intend to make any order until it is first resolved through ACC that the accident was a work accident. If it is properly classified as a work accident, I would expect Mr Harcourt to make any payment in accordance with his statutory obligations. If it is not a work accident, Mr Harcourt will still need to pay Mr McVicar for his work as an employee on 6th, 7th and 8th of February. In the meantime, I will reserve the point and Mr McVicar may come back to the Authority if need be.

Costs

[25] In a submission lodged and served after the investigation meeting, counsel for Mr McVicar claimed *full legal costs* and helpfully provided an itemised breakdown. Mr Harcourt should have an opportunity to respond in writing on the claim for costs. He should send any comment to the Authority within 21 days and also send a copy to Mr McVicar's solicitor at the same time.

Summary

[26] Mr Harcourt is to pay Mr McVicar arrears of wages amounting to \$3,310.00.

[27] Mr Harcourt is to pay Mr McVicar arrears of holiday pay (including statutory holidays) amounting to \$2,693.83.

[28] Mr Harcourt is to pay Mr McVicar interest on both sums at the rate of 9% commencing on 6 February 2005 until the arrears are paid in full.

[29] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority