

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 116
5551158

BETWEEN DAVID O'SHEA, LABOUR
 INSPECTOR
 Applicant

A N D GILBERT ANDREW WATT
 Respondent

Member of Authority: Christine Hickey

Representatives: Catherine Milnes, Counsel for the Applicant
 Sue Watt, Advocate for the Respondent

Date of Investigation 7 August 2015
Meeting:

Oral determination 7 August 2015
delivered:

Written Determination 11 August 2015
Issued:

DETERMINATION OF THE AUTHORITY

[1] This determination is a written record of an oral determination delivered on 7 August 2015 in Invercargill.

Employment relationship problem

[2] The Labour Inspector, Mr O'Shea, visited Mr Watt's farm on 10 November 2014 as part of an audit of dairy farms carried out by the Labour Inspectorate. Mr O'Shea alleges that Mr Watt failed to keep a record of the hours and days worked as part of wages and time records required under s.8A of the Minimum Wage Act (the MW Act) 1983. He also alleges that Mr Watt failed to correctly keep a holiday and leave record and so was in breach of s.89 of the Holidays Act 2003 (the Holidays Act).

[3] Mr O'Shea acknowledges that since the issuing of an Improvement Notice on 19 December 2014, Mr Watt has complied with the necessary provisions and is now *maintaining satisfactory time and holiday recording practice*.

[4] However, Mr O'Shea seeks a penalty in the amount of \$1,000 for Mr Watt's historic failure to comply with s.8A of the MW Act and failure to maintain wages and time records.

Was there a breach of the MW Act?

[5] The first issue to be determined is whether I am satisfied there was a breach of s.8A of the MW Act.

[6] I am satisfied from seeing examples of the records kept, hearing from Mr O'Shea and hearing Mrs Watt's answers to cross-examination by Ms Milnes that Mr Watt's recordkeeping was in breach of both the MW Act and the Holidays Act requirements.

[7] The breach of the MW Act was specifically a breach of s.8A(1)(g) in that the hours between which the worker was employed on each day and the days of the worker's employment during each week were not adequately recorded.

Should a penalty be imposed? If so, how much should it be?

[8] A penalty should only be imposed for the purpose of punishment and should not be used as an alternative way of increasing compensation to parties who have been disadvantaged by the actions of the wrongdoing party¹. In this case, the issue is purely one of penalty.

[9] Section 10 of the MW Act provides that every person who fails to otherwise comply with the requirements of that Act is liable to a penalty recoverable by a Labour Inspector and imposed by the Employment Relations Authority under the Employment Relations Act 2000 (the Act).

[10] Section 135 of the Act provides that the maximum penalty for an individual is \$10,000 and the maximum penalty for a company or corporation is \$20,000. As at 1 April 2011, the maximum penalties for an individual under s.135 of the Act rose from \$5,000 to \$10,000. There are few decided cases on penalty for a breach of s.8A

¹ *Xu v McIntosh* [2004] 2 ERNZ 448 (Employment Court).

of the MW Act, mainly because few actions have been brought by the Labour Inspectorate. Today I am asked to determine another very similar case.

[11] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty and if it is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact if any on the employees, including considering the vulnerability of the employees,
- the need for deterrence,
- remorse shown by the party in breach, and
- the range of penalties imposed in other comparable cases², which is rather difficult to do in this case as there are so few cases.

[12] In relation to the seriousness of the breach, Ms Milnes submits, and Mr O'Shea agrees, that this is not a breach at the serious end of the scale. Mrs Watt submits that Mr Watt had no intention of breaching the legislation and once the breaches were pointed out to him, he changed his systems straightaway and proceeded correctly after that.

[13] Mr O'Shea submits it was a one-off breach.

[14] The impact on the employees needs to be examined. Ms Milnes submits that because of the state of the recordkeeping, no one could say with 100% certainty whether each employee was receiving their minimum entitlements. For example, today, Ms Milnes demonstrated under cross-examination how it was impossible to know from the time records whether a particular named employee had been paid time and a half for working on public holidays.

[15] There were no submissions on the issue of employee vulnerability. I do not consider that the employees were particularly vulnerable in this case other than the

² *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

overall effect of the lack of correct records on them, such as not being able to tell exactly how many hours were worked on a particular day.

[16] There is no need for specific deterrence of Mr Watt who is no longer employing workers on the farm. However, more generally deterrence is necessary for all employers, and specifically dairy farmers who have uniquely varying hours of work for workers over the year, to ensure that they keep accurate time and wages records as required by law. The keeping of accurate records is a protection for employees as well as employers as then both parties can be satisfied, and can prove, that all minimum entitlements have been paid.

[17] I accept that Mr Watt is remorseful for the breach.

[18] In this case, I consider the imposition of a penalty is appropriate in the amount of \$500. In the other similar matter I have been asked to determine today Mr O'Shea has sought a penalty of \$1,000 against a company. Mr Watt is an individual, not a company employer and Parliament has sent a signal that individual and company employers are to be treated differently and lower penalties are to be imposed on individuals.

[19] I will now read out the orders that I am making:

A. Within 28 days of this determination, Gilbert Andrew Watt must pay the Employment Relations Authority a \$500 penalty for breach of s.8A of the Minimum Wage Act 1983. That amount will be transferred by the Employment Relations Authority to the Crown account;

B. Within 28 days of this determination, Gilbert Andrew Watt must pay David O'Shea, the Labour Inspector, \$71.56 which is the filing fee paid to bring this claim.

Christine Hickey
Member of the Employment Relations Authority