

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 7/10
5280646

BETWEEN WILLIAM HERBERT
OFFICER
Applicant

AND MICHAEL ANTHONY
HALDER trading as HALDER
MARINE
Respondent

Member of Authority: Helen Doyle

Representatives: Lucia Vincent, Counsel for Applicant
Respondent was unrepresented

Investigation Meeting: On the papers and affidavit evidence of the applicant
sworn 16 November 2009

Determination: 18 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] William Officer says that he has two employment relationship problems. The first is a claim for recovery of unpaid wages including holiday pay in the sum of \$18,285.08 gross from his previous employer Michael Halder, and the second is a personal grievance that he was unjustifiably constructively dismissed. There is also a claim for penalties.

[2] This determination deals only with the first claim for recovery of unpaid wages and holiday pay.

[3] I am satisfied that the statement of problem was sent under cover of letter dated 17 September 2009 by a Support Officer of the Authority to Mr Halder at the business address of Halder Marine. A Support Officer spoke to Mr Halder by

telephone on 8 October 2009 to make inquiries of him as to why there had been no statement in reply lodged and served within the required 14 days. Mr Halder advised that he had not been to collect his mail from his mail box but would do so.

[4] The Support Officer then left messages with Mr Halder on his answerphone between 20 and 28 October 2009, but these messages were not returned.

[5] By letter dated 28 October 2009 a Support Officer of the Authority wrote to Mr Halder advising him that the Authority intended to convene a telephone conference call with the parties or their representatives on 5 November 2009 at 9.30am. The Support Officer advised in her letter of the phone number that she would call to connect Mr Halder to the conference call. This was the number that she had used when she had successfully managed to talk to him and the number she had left messages on. Mr Halder was advised that if he wished the conference call to be taken on a different telephone number, or, if he wished a representative to take the call with the Authority on his behalf then he should advise the Support Officer by no later than 4.00pm on 4 November 2009. Mr Halder was further advised in the letter that in his absence the Authority could make directions and therefore it was in his best interests to participate in the conference call.

[6] The Authority was at or about that time advised by Ms Vincent by email that Mr Officer requested urgency in terms of his wage claim because he intended to relocate to Perth with his family before the end of December 2009 and wanted the matter to be dealt with by way of affidavit evidence or an urgent hearing.

[7] Mr Halder did not make contact with the Authority prior to the telephone conference on 5 November 2009 and he was unable to be connected to the telephone call with the Authority despite attempts being made at the start of the conference call by the Support Officer.

[8] Ms Vincent attended the conference call with the Authority and the Authority proceeded to talk to her to make arrangements for dealing with the matter. The Authority indicated that, given its commitments leading up to the end of 2009, it was unlikely to be able to hold an investigation meeting in Invercargill before Mr Officer left New Zealand.

[9] The Authority was prepared in the circumstances to accord the application for recovery of wages and holiday pay priority and deal at least in the first instance

with the matter on the basis of affidavit evidence. The Authority duly scheduled a timetable for the lodging and serving of affidavits by Mr Officer and by Mr Halder and noted that in the event that there was an evidential dispute in terms of what was owed, this may need to be dealt with by way of investigation meeting at a later date in Invercargill. The Authority also made it clear in its notice of direction that the personal grievance and penalty application would be dealt with at an investigation meeting. The Authority directed that the applicant personally serve the notice of direction on the respondent and advise the Authority when that had been attended to.

[10] An affidavit of service was duly received on 18 November 2009 which deposed to Mr Halder having been personally served with the notice of direction and statement of problem at his business premises on 15 November 2009.

[11] Mr Officer lodged and served his affidavit in accordance with the timetable set by the Authority but there was no affidavit received from Mr Halder within the timeframe set in the notice of direction of 13 November 2009.

[12] Ms Vincent provided further information to the Authority in terms of service of the affidavit of Mr Officer on Mr Halder attaching the courier customer receipt record and track and trace record. I am satisfied that Mr Halder was served with a copy of Mr Officer's affidavit.

[13] The Authority is prepared in the circumstances of this case, where Mr Officer has relocated to Australia, to determine the application for recovery of wages and holiday pay on the basis of the affidavit of Mr Officer sworn 16 November 2009 in support of his application together with full copies of his bank statements provided from the date that Mr Officer deposes that he commenced work for Mr Halder until his final day and his own records from the time he commenced of hours worked each day and week.

Background to the claim for unpaid wages and holiday pay from the affidavit evidence of William Officer

[14] Mr Officer had previously undertaken flying duties for Mr Halder as a pilot for Mr Halder's helicopter during April/May 2004, 2005 and 2006. From the time however that he commenced work on 26 November 2007 he primarily undertook fitting and welding duties with engineering tasks and was mainly based in the Riverton workshop with regular trips to Mosgiel and Dunedin when necessary.

Mr Officer's skill were used by Mr Halder in constructing a deer processing plant and a mobile chiller unit in Mosgiel/Dunedin. He understood that flying duties would increase and engineering duties decrease upon completion of the fixed and mobile plant.

[15] Mr Officer deposes to an agreement that he had with Mr Halder that he was guaranteed at least nine weeks of full time work from 26 November 2007. That was the duration of Mr Officer's holidays from his full time position at the Southern Institute of Technology.

[16] Although there was no written employment agreement between Mr Officer and Mr Halder, Mr Officer deposes that he would work 40 hours per week at the rate of \$22.50 per hour which is \$1800 gross or \$1408 net for a fortnight. When Mr Officer was paid by cheque by Mr Halder it is this amount that is shown as a deposit into his bank account. Mr Halder supplied Mr Officer with overalls, a flight suit and paid for his biannual flight review.

[17] Mr Officer deposes in his affidavit that Mr Halder failed to pay him at all from the commencement of his employment on 26 November 2007 until a deposit was made into his bank account by Mr Halder of \$1408 for wages on 25 February 2008. The bank statements attached to the statement of problem covering the period from 26 November 2007 do not show a payment made by Mr Halder into Mr Officer's account until 25 February 2008 when an amount of \$1,408 was deposited.

[18] Mr Officer deposes that he was asked on or about 14 January 2008 to stay on because Mr Halder wanted to get the fixed and mobile plant finished and asked Mr Officer to undertake some additional hours to finish the project. Mr Officer deposes in paragraph 8 of his affidavit to discussing the matter with Mr Halder along with his workmate, Colin Winsloe (Swampy). Mr Officer deposes that it was agreed he would work overtime and that any overtime be paid at the rate of time and a half. Mr Officer deposes that Mr Halder told him that overtime would be paid monthly by way of cheque although wages would be paid fortnightly.

[19] Mr Officer was reluctant, given the outstanding wages that were already owing to him, to undertake the overtime. He deposes that he did agree because he held hopes that this may lead to a full time flying position which was something he

wanted. Mr Officer attached to his statement of problem the time records that he kept himself in terms of hours for the duration that he was employed by Mr Halder since 26 November 2007 and he has recorded hours in excess of 40 for some of the weeks within the period of employment. Attachment 4.3 is a written statement from Mr Winsloe recording his account of the agreement by Mr Halder to pay overtime at the rate of time and a half.

[20] On 30 May 2008 the cheque from Mr Halder for Mr Officer's wages was dishonoured. From that point cheques continued to be dishonoured. Cheques were dishonoured on 14 July 2008, 17 and 19 February 2009, 24 March 2009, 5, 8 and 12 May 2009, 3, 11 and 16 June 2009. The bank statement show that most of those cheques were honoured when represented or cash was paid. Mr Officer deposes to the fact that there is still money for ordinary hours outstanding in the sum of \$9,900 being 11 weeks wages for ordinary hours and deposes that Mr Halder never paid him for any overtime. He deposes that he often asked Mr Halder about payment for the overtime and that he would either promise to pay soon or would just brush the matter aside. From mid 2008 Mr Officer stopped doing any significant amount of overtime but still worked in excess of 40 hours per week on occasion. Mr Officer deposes that Mr Halder never gave him pay slips or other records about wages or leave.

[21] On 10 July 2009 Mr Officer told Mr Halder that he could not continue to work without being paid what he was owed, particularly with the situation of cheques being dishonoured. Mr Officer deposes going to the workshop in Riverton during smoko break to attempt to talk to Mr Halder and sort out the amount owed on at least eight occasions from 11 July 2009 to 5 August 2009. Mr Officer says that each time Mr Halder would make an excuse and promise to pay but that has not occurred.

[22] Mr Officer deposes that during the week of 27 July 2009 he approached Mr Halder and offered him an option of paying for his upcoming flight test, the initial nine weeks that he worked for which wages were still outstanding and for the most recent fortnight of wages owing and then to call it even. He understood that Mr Halder was happy with the arrangement but still Mr Halder did not pay him anything.

[23] On 4 August 2009 Mr Officer went to see Mr Halder to talk to him. Mr Officer deposes that Mr Halder told him he calculated that he thought he owed Mr Officer \$1,300 saying that he deducted the cost of the flight suit, biannual flight

review and the cost of the latest Roar helicopter trip. Mr Officer was not prepared to accept that and deposes to no agreement between him and Mr Halder that he would have to pay for the flight suit and the biannual flight review. He deposes to an agreement that he would not have to pay for the Roar trip and that Mr Halder would cover that. He further deposes that he knew he was owed a lot more than that by Mr Halder.

[24] By letter dated 12 August 2009 Mr Halder was written to formally by Ms Vincent and a request was made for outstanding wages, overtime and holiday pay. The records were also requested so that holiday pay could be calculated, but these were not provided. No response to that letter was received.

Determination

Wages for ordinary hours

[25] Mr Officer says in his affidavit that he is owed 11 weeks wages for ordinary hours of 40 per week and based on the hourly rate of \$22.50 per hour, he is entitled to \$9,900 gross wages. I have had regard to the absence of any payments reflected in the bank accounts for the period worked from 26 November 2007 until 25 February 2008. The bank records also show that three cheques 001350, 001366 and 001362 from Mr Halder paid to Mr Officer each in the sum of \$1408 were dishonoured and not successfully represented.

[26] Having considered the bank statements and Mr Officer's spreadsheet attached to his affidavit as annexure A, I accept that Mr Officer's calculation of wages owing is accurate and that he has not received payment of the wages despite request for the same. I record that the amount claimed varies from the statement of problem which sets out the sum owing as \$8,100 gross but that I accept the calculation of unpaid wages as set out in the affidavit is the correct calculation.

[27] I order Michael Anthony Halder to pay to William Herbert Officer the sum of \$9,900 gross which is based on 11 weeks wages based on the hourly rate of \$22.50 for a 40 hour week.

Wages for Overtime

[28] Mr Officer calculates that he is owed 181.5 hours of overtime. I have had regard in terms of the overtime to the timesheets provided, the affidavit evidence of

Mr Officer to the effect that there was an agreement that overtime be paid at the rate of time and a half and the bank statement in terms of amounts deposited. I am satisfied that no wages for overtime were ever paid. I accept the affidavit evidence to the extent that if Mr Officer was to work overtime he was to be paid for it at the rate of time and a half or \$33.75 per hour.

[29] I have carefully assessed the time records and I calculate that Mr Officer worked 160.5 hours overtime in 2008 and 21 hours overtime in 2009. That is a total of 181.5 hours of overtime.

[30] I am satisfied therefore on the basis of the time records kept by Mr Officer, and his affidavit evidence, that Mr Officer did work 181.5 hours of overtime for which he has not been paid as agreed at the rate of \$33.75. Despite making a request of Mr Halder for payment of same, no payment has been forthcoming.

[31] I order Michael Anthony Halder to pay to William Herbert Officer the sum of \$6,125.63 gross being payment at the rate of \$33.75 per hour for overtime worked between 14 January 2008 and July 2009.

Holiday pay

[32] Mr Officer has calculated that he is owed holiday pay and payment for working twice on Southland Anniversary day. He has provided two calculations, one without overtime included and the other with overtime included. Payment that should have been made for the overtime worked by Mr Officer should be included in the calculation both for holiday pay, a difference of \$56.70 and for the two public holidays worked a difference of \$6.75. Although Mr Officer had asked for leave and wage records they were not provided.

[33] Mr Officer deposes to having taken leave during his first year of employment of 22 days and has calculated his holiday pay from his second anniversary date 26 November 2008 and has deducted from the amount the 2 days taken in advance as below. Mr Officer has in his schedule attached to his affidavit wrongly referred to 2009 instead of 2008 but his affidavit is correct as to the period he has calculated holiday pay for.

Annual holidays taken 22 days
Gross earnings since 26 November 2008 \$30,408.75
8% of gross earnings since 26 November 2008 - \$2,432.70

Minus 2 days annual leave taken in advance - \$720
Total annual holiday pay outstanding - \$1,712.70 gross

[34] Mr Officer has also claimed for public holidays worked, being Southland Anniversary day on 21 January 2008 and 19 January 2009 at time and a half for each day at the half rate of \$90 and two alternative holidays at the relevant daily pay including overtime of \$366.75.

[35] I am satisfied that in the absence of any records being provided by Mr Halder, Mr Officer's calculations are reasonable in terms of what he is owed for holidays and for working on the Southland Anniversary public holiday twice.

[36] I order Michael Anthony Halder to pay to William Herbert Officer the sum of \$1712.70 gross for holiday pay and for two public holidays worked at time and a half and two alternative days at the relevant daily pay the sum of \$546.75 gross.

Costs

[37] This determination only deals with the application for recovery of unpaid wages and holiday pay.

[38] I reserve costs in terms of this matter. Whether there is an investigation meeting in terms of the personal grievance and penalties may well impact on whether costs are dealt with at this point in time or reserved until after the personal grievance application and penalty application are dealt with by way of an investigation meeting. Ms Vincent will need to advise the Authority as soon as possible of her client's intentions with respect to that matter.

Summary of orders made

[39] I have ordered Michael Halder to pay the following amounts to William Officer :

- The sum of \$9900 gross for unpaid ordinary wages for 11 weeks at 40 hours per week at the hourly rate of \$22.50.
- The sum of \$6,125.63 gross for unpaid overtime hours of 181.5 hours worked calculated at an agreed rate of time and a half being \$33.75.
- The sum of \$1712.70 gross for holiday pay.

- The sum of \$546.75 gross for time and a half for working on two public holidays and for payment for two alternative days at the relevant daily rate.
- I have reserved the issue of costs and when they are dealt with may depend on whether there is to be an investigation meeting in terms of the personal grievance and the penalty claim.

Helen Doyle
Member of the Employment Relations Authority