

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 173
5625511

BETWEEN SCOTT POWELL
 Applicant

AND GRAEME AND LORRAINE
 OLDING
 Respondent

Member of Authority: Vicki Campbell

Representatives: Shirley Trumper for Applicant
 Jessie Laphorne for Respondent

Investigation Meeting: 5 April 2017

Additional Information
Received: 6 April 2017 from Applicant
 11 April 2017 from Respondent

Submissions received: 8 June 2017 from both parties

Determination: 14 June 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Powell’s application for minimum wages and outstanding holiday pay is declined.**
- B. Mr Powell is ordered to pay costs amounting to \$3,800 within 28 days of the date of this determination.**

Employment relationship problem

[1] Mr Scott Powell claims he is owed arrears of wages under section 131 of the Employment Relations Act 2000 (the Act) including unpaid minimum wages and

holiday pay. Mr Graeme and Mrs Lorraine Olding (Mr and Mrs Olding) deny the claims.

[2] As permitted by section 174E of the Act this determination has not recorded all the evidence and submissions received from Mr Powell and Mr and Mrs Olding but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Mr and Mrs Olding are sharemilkers on a dairy farm situated in the Rotorua region. Mr and Mrs Olding have been sharemilking on this farm for ten years. Mr and Mrs Olding employed Mr Powell as an Assistant Farm Manager from 4 March 2013 until he was appointed Farm Manager, a position he held from 1 June 2014 to 31 May 2016.

[4] The terms and conditions of Mr Powell's employment were set out in a written employment agreement based on the Federated Farmers template document.

[5] On 30 April 2016 Mr Powell's employment ended by reason of redundancy. The ending of the employment relationship is not contested.

Arrears of Wages

[6] Mr Powell claims he worked 12 hours every day and that he worked 325 days each year. Mr Powell says he has not been paid at least the minimum wage for each hour worked and that he has not received his correct entitlements under the Holidays Act. He claims \$18,810.50 in unpaid minimum wages.

Minimum wage

[7] It was common ground that Mr Powell was paid a salary starting on \$47,000 per annum and moving to \$55,000 per annum following his appointment to the position of Farm Manager.

[8] In arrears of wages claims the applicant bears the onus of proof.¹ Despite the provision of wage and time records there was considerable dispute about the number

¹ Employment Law (online loose leaf ed, Brookers) ER 131.07(1) and Mazengarb's Employment Law (online ed, LexisNexis)ERA131.15.

of hours Mr Powell worked during his employment. During the investigation meeting the parties agreed that the following hours were worked by Mr Powell during his employment:

- a) 1 June to 31 July each year – 7 hours a day;
- b) 1 August to 30 November each year – 12.5 hours a day
- c) 30 November to 31 May each year – 12 hours a day.

[9] This makes a total of annual hours worked each year of 3,536.

[10] In determining the minimum wages payable to Mr Powell, Mr and Mrs Olding asked me to take into account section 7(1) of (the Minimum Wage Act 1983 the MWA). Section 7(1) of the MWA specifies that where a worker is provided with lodging by his employer and there is no agreement as to how this will affect wages a deduction may be made to the minimum wage amounting to not more than 5 percent.

[11] Mr Powell was provided free lodging at the farm. There was no agreement between the parties as to how this would be reflected in Mr Powell's rate of pay. Because the parties did not themselves fix or agree on any deduction to be made in respect of the lodgings I fix the deduction at 5%.

[12] For each year of Mr Powell's employment the applicable minimum wage was:

- a) 2013 - \$13.75 per hour. Allowing for a 5% deduction for lodgings the applicable minimum wage was \$13.06.
- b) 2014 - \$14.25 per hour. Allowing for a 5% deduction for lodgings the applicable minimum wage was \$13.54.
- c) 2015 – \$14.75 per hour. Allowing for a 5% deduction for lodgings the applicable minimum wage was \$14.01.

[13] Based on the applicable minimum wage rates for each year of employment Mr Powell should have been paid at least:

- a) 2013 - \$46,180.16 per annum. Mr Powell was paid a total of \$47,000 which is more than the minimum wage.
- b) 2014 - \$47,877.44 per annum. Mr Powell was paid a total of \$55,000 which is more than the minimum wage.
- c) 2015 - \$49,539.36 per annum. Mr Powell was paid a total of \$55,000 which is more than the minimum wage.

[14] Mr Powell has not established to my satisfaction that he was not paid at least the minimum wage for each hour he worked for Mr and Mrs Olding.

Holiday pay

[15] At the investigation meeting the parties disputed the number of annual holiday days owing to Mr Powell at the end of his employment. The parties also disputed the number of alternative holidays Mr Powell was entitled to receive payment for at termination. This is despite Mr and Mrs Olding producing the holiday and leave records maintained during Mr Powell's employment.

Annual holidays

[16] Mr Powell started work on 4 March 2013 and ended on 30 April 2016.

[17] The parties have agreed that on average Mr Powell would be entitled to 24 days annual leave for each completed year of service. At the end of his employment he was entitled to be paid for all annual leave to which he had become entitled but not taken, plus 8% of his gross earnings for the period 4 March to 30 April 2016.²

[18] Mr Powell says he only took three weeks holiday during the period of his employment. This is disputed by Mrs Olding who says he took 59 days annual leave. In her written evidence Mrs Olding accepts she had made a number of errors in accounting for Mr Powell's annual leave.

[19] Because of Mrs Olding's evidence, prior to the investigation meeting I undertook my own assessment of the days recorded as leave taken by Mr Powell during his employment. At the investigation meeting I took Mr Powell through my

² Holidays Act 2003 sections 24 and 23.

analysis in comparison with the days recorded in the holiday and leave record. As a result I am satisfied that on the date Mr Powell's employment ended he had an outstanding entitlement to five days annual leave in addition to a payment calculated at 8% of his gross earnings from 4 March to 30 April 2016.

[20] I am satisfied on the balance of probabilities that on 30 April 2016 Mr Powell had an outstanding entitlement of five days annual leave for which he was entitled to payment.

Public Holidays

[21] Mr Powell claims he is entitled to payment of 13 day's pay for alternative holidays for public holidays he worked.

[22] After taking Mr Powell through my analysis of the holidays and leave record relating to the public holidays he worked and the alternative holidays he took during his employment I am satisfied Mr Powell had an entitlement to four days alternative holidays at the time his employment ended on 30 April 2016.

Conclusion

[23] I am satisfied the holiday and leave records provided to the Authority accurately reflect the holidays taken by Mr Powell during his employment. On 30 April 2016 Mr Powell was entitled to be paid for five days annual leave plus four alternative holidays and 8% of his gross earnings for the period 4 March to 30 April 2016.

[24] Mr Powell was given notice on 11 March 2016 that his employment would end on 30 April 2016 by reason of redundancy. As mentioned earlier, Mr Powell does not dispute the ending of the employment relationship.

[25] In the letter dated 11 March 2016 Mr Powell was advised that even though his employment would end on 30 April 2016 he could stay in the lodgings without payment of rent and his salary would continue to be paid for the month of May to cover all of his accrued leave. It was later agreed that Mr Powell could finish work on 15 April 2016 and the remainder of the month of April would also be paid as accrued leave.

[26] Notwithstanding the payment made to Mr Powell from 15-30 April 2016 he was also paid a total of \$4,583.33 gross on 30 April 2016.

[27] Based on my findings I have calculated Mr Powell's final pay as at 30 April 2016 as follows. In calculating these amounts I have used the uncontested calculations of the daily rate used by Mr and Mrs Olding:

5 days annual leave	\$881.40
4 alternative holidays	\$705.12
8% of gross earnings for the period 4 March – 30 April 2016	\$676.92
Total	\$2,263.44

[28] Mr Powell was paid a total of \$4,230.76 at the end of his employment. This is \$1,967.32 more than his entitlement. I am satisfied Mr Powell has more than recovered payment for any outstanding annual leave and alternative holidays and no further amounts are owing.

Costs

[29] At the end of the investigation meeting I invited the parties to provide me with information about the costs incurred so that I could deal with costs in my determination.

[30] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

[31] The assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.³ As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁴ awards in the Authority will be modest taking into account conduct which increases costs unnecessarily.

³ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

⁴ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

[32] Mr and Mrs Olding were successful in their defence of Mr Powell's claims. They have been invoiced a total of \$20,700 for their legal costs associated with that defence.

[33] Mr Powell's application lodged with the Authority lacked specificity and failed to quantify his claims or show how his claims had been calculated. A request for further detailed information did not resolve this.

[34] I am satisfied the investigation meeting took longer than it would have taken if Mr Powell's claims were properly set out and calculated. I spent a number of hours taking Mr Powell through my own assessment of his outstanding leave and carefully clarifying the number of hours he actually worked each day. If the information had been provided when requested it is likely the investigation meeting would have taken less than ½ a day. On that basis costs would have been \$1,750.

[35] In contrast the information provided by Mr and Mrs Olding was very useful. The degree of preparation required to provide the level of detail delivered by the Oldings justifies an uplift in costs.

[36] The hearing took less than a full day. Taking all the circumstances into account, including the evidence I have received detailing Mr Powell's current financial circumstances, I consider it appropriate that Mr Powell contribute the amount of \$3,800 to Mr and Mrs Olding's costs and that this payment be made within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority