

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 20/10
5165071 and 5289136

BETWEEN SUSAN RICHARDSON
 Applicant/Respondent

AND SHERENDEN STATION
 LIMITED
 Respondent/Applicant

Member of Authority: P R Stapp

Representatives: Mr H E S Hamilton for Susan Richardson
 Mark and Susan Levett for Sherenden Station Limited

Investigation Meeting: 19 January 2010 at Napier

Determination: 8 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Susan Richardson started work for Sherenden Station Limited (the company/employer) on 1 June 2008 as a dairy farm manager at the company's Wilford Road farm. The farm is a dairy conversion. Ms Richardson and the employer had an employment agreement. The terms included a salary of \$62,800 per annum, plus use of a house worth \$150 per week. Ms Richardson's hours were Monday to Friday 4.30am to 6.00pm on a 5 days on and 2 days off roster. A deduction of \$300 per fortnight was agreed for accommodation. In addition the agreement made provision for the seasonality of the hours of work and no overtime.

[2] Ms Richardson claims she had to work long hours without any give and take from her employer and that her problems with the hours she had to work were not properly addressed by either her manager or the owner. She says she had to work an extra 16 days outside the rosters and which should have been days off. She recorded

the time worked and has produced a summary to support her claim. That she raised her concerns with her employer is supported by an email produced. She became unwell, had to visit the doctor, took time off work with a medical certificate and then resigned effective 2 November 2008. Her resignation was accepted, and she says Mr Levett made no comment about the need for her to work out any notice when she offered to vacate the house. She moved out of the house on 5 November 2008.

[3] Susan Richardson has claimed that she is owed \$2,818.56 wages for 3.2 weeks (16 days) unpaid work, and \$2170.34 in holiday pay.

[4] The claim has been denied by Sherenden Station Limited. The directors are Susan and Mark Levett. On behalf of Sherenden Station Limited they have lodged a separate claim for compensation against Ms Richardson for failing to work out her notice, a refund for an overpayment of salary, a determination on the holiday pay entitlement and breaches of the employment agreement for damages for non performance of duties and costs. Ms Richardson has denied the claims, but accepted during the Authority's investigation meeting that the sum of the overpayment claimed by the company was correct (\$2,456.17). Ms Richardson claims that she should not have to pay it back.

[5] Both applications lodged in the Employment Relations Authority have been consolidated in the one investigation meeting because the facts overlap and the same witnesses are involved.

Issues

[6] Has Ms Richardson been properly paid? If not, how much is she owed? Has there been any overpayment, and if so, how much?

[7] Has Sherenden Station paid holiday pay? If not how much is owed and should it be off set against the employer's claims?

[8] Is there any basis to Sherenden Station Limited's claims against Ms Richardson? If so how should the claims be resolved?

The facts

[9] It was agreed that there has been an overpayment made in Ms Richardson's salary. The overpayment was made by mistake by the exclusion of components of her pay. The parties disagree on whether or not the sum of \$2,456.17 should be paid back by Ms Richardson.

[10] It was agreed that the holiday pay amounts to \$2,170.34. No holiday pay has been paid by the company to Ms Richardson. Ms Richardson wants the payment of that sum, but the respondent wants to offset it against the sums Ms Richardson owes. It relies on deductions clauses in the employment agreement.

[11] In regard to Ms Richardson's claim that she is owed \$2,818.56 for 16 days work not paid, the respondent claimed that Ms Richardson worked on a system of 'swings and roundabouts' and she would have received time in lieu if she had remained in her employment during the low time of the dairy season. Ms Richardson denied that claim. The employer claims this was contemplated and covered by the employment agreement with a seasonal variations clause.

[12] The respondent is still seeking compensation and damages from Ms Richardson for the following:

- She failed to work out her notice.
- The time involved in carrying milk when the milk pump broke.
- The costs for artificial insemination because Ms Richardson misrepresented her skills.
- The cost of lost and dead stock.

[13] During the investigation meeting the respondent tried to establish that Ms Richardson's credibility was an issue. In this regard a point about purchasing responsibilities was raised. However, I hold that credibility is not an issue and, thus, I have not pursued the point any further.

[14] For completeness the deductions clause in the employment agreement reads:

11.5 The Employee authorises the Employer to deduct any monies owed by the Employee to the Employer from any monies owing or accruing, to the Employee by the Employer.

These monies include, but are not limited to;

- *Monies owed under clause 10.6 [accommodation], 10.10 [animals], 10.12 [occupants], 11.6 [ACC payments], 11.7 [recovery of ACC payments], 21.2 [notice], 21.3 [return of property and equipment] and/or 21.5 [final wages and holiday pay].*
- *Monies owing in respect of accounts paid by the Employer on behalf of the Employee including, but not limited to, private toll calls, power and charge accounts.*
- *Monies to repair or replace damage or loss to the Employer's equipment, caused by wilful or careless action or inaction, misuse or abuse.*

Determination

[15] It is my determination that Ms Richardson was overpaid \$2,456.17. This is now accepted by Ms Richardson. I have reserved making a decision on the repayment of this sum to enable Ms Richardson and Sherenden to have the opportunity to read a Judgment when it is issued by the Employment Court in regard to an opinion requested by the Authority on a similar issue of recovery when a mistake has been made¹. This will enable Ms Richardson and Sherenden to have an opportunity to read, consider and make any submissions on that Judgment as it may apply to the facts of this employment relationship problem.

[16] Sherenden Station Limited owes Ms Richardson the sum of \$2,170.34 holiday pay. Sherenden Station is required to pay this sum despite a deductions authority in the employment agreement. The parties are not able to contract out of the Holidays Act (s 6 of the Act) and which requires the payment of holiday pay to be made when the employment ends (s 27 of the Act). These provisions are not affected by the Wages Protection Act because the definition of wages does not include holiday pay.

¹ *New Zealand Fire Service Commission and Warner and Ors*-Employment Relations Authority (unreported) 4 November 2009 WA 171/09.

[17] Usually there would be agreement between the parties on any amounts that may be off set, and sensibly that is done, but the difference here is that there is no agreement.

[18] Sherenden Station does not owe Ms Richardson 16 days she worked and was not paid, totalling \$2,818.56. It was entirely reasonable for the employer to rely on the individual employment agreement. She was paid under the terms of her employment agreement for the hours and days she worked on the basis of her salary and the seasonal variation of hours as time in lieu. In the employment agreement there was a provision for seasonal variations on the hours of work and that Ms Richardson would be paid by annual salary, but there was no provision for off setting days worked and any time in lieu for overtime. The employer is not obliged to pay the extra hours worked because there was no provision for such a payment and it is not open to me to set new terms.

[19] I now turn to each of the employer's other claims for damages and compensation.

Notice

[20] Ms Richardson did not work out notice. I am satisfied that Ms Richardson was sick at the time she resigned, and would have been entitled to time off, even although it would have been without pay because she was not entitled to any sick leave. The medical evidence supports her being sick. I am satisfied that there has been some genuine confusion about her sickness because there was an accident to her wrist and it involved an ACC report and a medical certificate. That confusion can be put down to the handling of the medical certificates and the involvement of two doctors. Her sickness was entirely supported by the medical evidence, including her doctor's evidence, which I have no good reason to doubt. Thus, it is open to consider her sickness was separate to her wrist injury.

[21] Also the Levetts accepted Ms Richardson's resignation at the time with out any arrangement being put in place for Ms Richardson to pay out her notice period.

The cost of time for the broken milk pump

[22] There was a broken milk pump and Susan Levett was put to the time and inconvenience of having to bucket milk. This was a performance issue at the time Ms Richardson was working for Sherenden. There is no basis for the claim. There was insufficient evidence supporting any claim that Ms Richardson deliberately and wilfully or even negligently caused any damage resulting in the cost of the time and effort incurred when the milk pump was broken. Indeed there was no claim made against Ms Richardson for the cost of the new pump.

Cost of time for artificial insemination

[23] The Levetts say that Ms Richardson failed to undertake the work involving artificial insemination that she was employed for. I have to give the benefit of any doubt to Ms Richardson because the employment agreement and job description made no provision for her to undertake artificial insemination. She accepted that the issue was raised with her before she started employment. The employer took a risk that in assessing Ms Richardson for appointment that she would be a benefit to the farm with her skills and assumed she would carry out the role, but did not cover it off with any written terms. She took appropriate responsible action to inform her employer of her difficulties and despite any inconvenience to her employer she avoided any further costs to her employer at the time.

Stock losses and deaths

[24] The Levetts have complained that during Ms Richardson's employment she did not keep records and has failed to account for missing and dead stock. There is simply no basis to this claim. There is no evidence to support the claim against Ms Richardson that she caused any deliberate wilful or negligent damage to stock. There were others involved on the farm. There is no evidence of this matter being taken up with her at the time and before any of these proceedings.

Orders of the Authority

[25] I have reserved the matter of the recovery of wages of \$2,456.17, and the parties can return to the Authority in a reasonable time to get closure on this issue.

[26] Sherenden Station Limited is to pay Susan Richardson \$2,170.34 holiday pay as required under the Holidays Act.

[27] The counter claims made by Sherenden Station Limited are dismissed.

[28] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority