

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Terence and Patricia Sheridan (Applicant)
AND Arthur and Beverley Maxwell (Respondent)
REPRESENTATIVES Terence Sheridan in person
Arthur Maxwell in person
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 13 April 2005
DATE OF DETERMINATION 22 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Terence Sheridan and his wife, Mrs Patricia Sheridan (Mr and Mrs Sheridan) allege that they inadvertently overpaid wages to their former employees, Mr Arthur Maxwell and his wife Mrs Beverley Maxwell in the sum of \$1,060.39 for each of Mr and Mrs Maxwell being a total of \$2,120.78.

[2] Mr and Mrs Maxwell claim in response that the overpayment reimburses them for income short-paid during the employment although there was no evidence to quantify that loss.

[3] The parties went to mediation but were unsuccessful in resolving their employment relationship problem.

[4] Mr and Mrs Sheridan are dairy farmers near Hokitika. They employed Mr and Mrs Maxwell as workers on their farm commencing on 1 June 2003 and ending on 14 November 2004.

[5] The arrangement entered into between the parties was for the payment to each of the Maxwells of a salary of \$35,000 together with a variety of other benefits of the employment. These other benefits included the provision of things such as milk for domestic use, meat and the occasional pig.

[6] Of more importance though for the dispute is the provision in respect of housing. Mr and Mrs Sheridan provided Mr and Mrs Maxwell with a near new house property which was on their farm, in which Mr and Mrs Maxwell could live. At the time Mr and Mrs Maxwell entered into possession of the house property, it had only been occupied for six months and was then just 12 months old.

[7] Mr and Mrs Sheridan accounted for this house property as an employment benefit in the nature of an increase in basic remuneration as their accountant, Mr Molloy, indicated the tax legislation required.

[8] The effect of this arrangement was that when Mr and Mrs Maxwell got a wage slip it provided for the appropriate gross payment of salary for the period, then an allowance for the rental of the house at \$40 per week and then deduction of PAYE **and** then the deduction of \$40 for the house rental.

[9] The effect of this accounting treatment is to ensure that tax is paid on the rental (because it is an employment benefit) but the rental is in reality neither charged by the employer nor paid by the employee.

[10] Mr and Mrs Sheridan gave me clear evidence in the investigation meeting that they were certain that Mr and Mrs Maxwell understood that this was the arrangement when they conducted their initial recruitment interview.

[11] Mr Maxwell, when he gave his evidence (Mrs Maxwell gave no separate evidence), was equally clear that he had no understanding of this arrangement when he was interviewed and critically, the arrangement in respect of the rental that I have just described was not actually put into place until Mr and Mrs Maxwell had been employed for about a year.

[12] So what happened for the first year was that despite what Mr and Mrs Sheridan and their accountant thought was the system, in fact no rental was included in the Maxwells' remuneration.

[13] This error was discovered by the Sheridans' accountant, Mr Molloy and once discovered, he set about correcting it. In a wage slip for the period 3 September 2004 (presumably the period ending that date), Mrs Maxwell (who it will be recalled was paid a like amount to her husband), had 52 weeks' rental applied to that pay period.

[14] It seemed to be accepted by both parties that there was no advance warning of this action being taken. Its effect was to create a tax bill of significant proportions on that one pay period.

[15] Mr Molloy, the Sheridans' accountant, made the point quite correctly that Mr and Mrs Maxwell could ask the Inland Revenue Department for a summary of earnings at the end of May this year and that that might enable them to process an application for a tax refund.

[16] Further, Mr and Mrs Sheridan argued that this was effectively a paper transaction and that no actual loss can have accrued to Mr and Mrs Maxwell.

[17] Mr and Mrs Sheridan also said that they could not understand why, if Mr and Mrs Maxwell were so unhappy about the 12 months' rental in one wage slip situation, they did not take the matter up at the time with their employers, Mr and Mrs Sheridan.

[18] This would have meant that the matter was raised and dealt with in September 2004 rather than that the matter was left to fester over the balance of the employment.

[19] Mr and Mrs Maxwell told me that they had in fact tried to raise the matter with Mr Sheridan and they produced a letter that they had written at the time which complained about the deduction. Mr Maxwell gave me evidence on oath that he had given this letter to Mr Sheridan but Mr Sheridan has no recollection of having received it.

What was the arrangement between the parties in respect of rental?

[20] Clearly there was an initial interview between Mr and Mrs Maxwell and Mr and Mrs Sheridan. All of the evidence I heard confirmed that everybody who was present remembered the discussion about salary and about all the other normal incidences of farm employment, including the provision of meat and milk and wet weather gear.

[21] Mr and Mrs Sheridan both gave evidence to say that they were both present at the interview with Mr and Mrs Maxwell and that the arrangement in respect of the provision of a house property for Mr and Mrs Maxwell to live in and the treatment of that for rental purposes was discussed with the Maxwells.

[22] Mr Sheridan put it to Mr Maxwell that Mr Maxwell had agreed to the rental arrangement at that initial interview and Mr Maxwell denied that. Mr Maxwell's evidence was that he did not recall any discussion about the rent but he would not have had a problem if he had known about it.

[23] Mr Maxwell felt that his view of what he was told at the initial interview was rather confirmed by the fact that for more than one year of his employment, that is to say for the period from 1 June 2003 down to 3 September 2004, no rental was included at all.

[24] Both Mr and Mrs Sheridan, in giving their evidence, made it clear that they could not understand how Mr Maxwell could contend that there was no arrangement in respect of accommodation made at the initial interview. What they said in effect was that Mr and Mrs Maxwell expected to be accommodated and presumably expected that there would be a financial consequence of that so they argued that it was unlikely that the matter was not covered at the initial meeting as Mr and Mrs Sheridan maintain.

[25] I think it more rather than less likely that Mr and Mrs Sheridan's recollection of the matter is the correct one and accordingly I find that the arrangement I have described in respect of the rent of the provided house property was in fact covered in the initial interview.

What was the nature of the relationship between the parties?

[26] It is clear that the relationship between the parties was troubled. Although plainly this was an employment relationship, there was no written employment agreement as is required by law.

[27] Mr Molloy, the Sheridans' accountant, indicated it was usually his job to prepare the employment agreements for Mr and Mrs Sheridan but that he had no recollection of providing an agreement for Mr and Mrs Maxwell when they started. That appears to be accepted by Mr and Mrs Maxwell and by Mr and Mrs Sheridan.

[28] It is the case that the Sheridans presented a draft employment agreement for Mr and Mrs Maxwell to consider for the commencement of their second year in employment, but for a variety of reasons that document was never signed. Mr Maxwell said in his evidence the employment agreement was not signed because it was not complete and that the dates were wrong. He says that he returned it to Mr Sheridan. Mr Sheridan denies ever having received it back.

[29] Clearly there was an employment relationship between the parties with Mr and Mrs Sheridan as employer and both Mr and Mrs Maxwell as employees, but neither of those separate employment relationships was the subject of a written employment agreement as the law requires.

Was the rental calculation imposed on Mr and Mrs Maxwell on 3 September 2004 fair and reasonable?

[30] It seems clear that as soon as the error was discovered concerning the failure to account for rental in respect of the property occupied by Mr and Mrs Maxwell, Mr Molloy, acting for Mr and Mrs Sheridan, immediately did a calculation to apply a year's calculation to the next salary payment due to the Maxwells. It is also clear that Mr and Mrs Maxwell got no warning of that, and that in itself must have created some embarrassment or difficulty for them.

[31] Given my finding that it is more rather than less likely that the matter of rental must have been discussed at the initial meeting and that Mr and Mrs Maxwell must have had some notion that they would eventually have to account for the accommodation that they had been using for over 12 months, it seems to me that it is not unreasonable for the employer to put right the error that had been made.

[32] However, the employers themselves admitted that the manner in which the issue was put right was unsatisfactory and I agree with them. Clearly, Mr and Mrs Maxwell ought to have been given advance warning of what was to happen and they ought to have had the opportunity of influencing the way in which it happened. Because of the precipitate way in which the mistake (for a mistake it was) was rectified, Mr and Mrs Maxwell no doubt suffered significant stress and anxiety.

Did Mr and Mrs Maxwell raise their concerns with Mr and Mrs Sheridan?

[33] Mr Maxwell showed me a letter dated 1 October 2004 in which he and his wife set out their objection to what had happened on the wages slip for the period 3 September 2004. The letter is addressed to Mr and Mrs Sheridan and Mr Maxwell gave me evidence that he had personally handed that letter (or the original of it) to Mr Sheridan.

[34] For his part, Mr Sheridan said that he had never seen the letter before and certainly had no recollection of having received it and Mrs Sheridan said that she had not seen it either. Mr Molloy, the Sheridans' accountant, said that he also had not seen the letter.

[35] On this point, I am inclined to prefer the evidence of Mr Maxwell and believe that he not only produced the letter at the time that it is dated but that he gave a copy of it to Mr Sheridan and that because of the arguments that were then going on between the two men, Mr Sheridan failed to deal with the matter appropriately and forgot that he had received the letter.

[36] It follows that I think it more rather than less likely that Mr and Mrs Maxwell did in fact endeavour to engage with Mr and Mrs Sheridan in respect of the problems that they experienced with the sudden imposition of a year's rental on their wage calculation.

Was there an overpayment of wages to Mr and Mrs Maxwell?

[37] It is clear that there was an overpayment of wages from Mr and Mrs Sheridan to Mr and Mrs Maxwell and that that amounted to the sum of \$2,120.78.

[38] It is equally clear that this overpayment was inadvertent, being a consequence of a mistake made by Mr and Mrs Sheridan's accountant who neglected to cancel an automatic payment in favour of Mr and Mrs Maxwell such that each of Mr and Mrs Maxwell received one full pay additional to what they ought to have received.

[39] When Mr and Mrs Maxwell received what ought to have been their final pay which is described for the period 11 November 2004, they both signed the wages slip to indicate that the payment was a full and final payment and represented the cessation of the employment relationship.

Can Mr and Mrs Sheridan legally recover the overpayment?

[40] Section 6 of the Wages Protection Act 1983 is the appropriate statutory provision. I have considered the provisions of the law and reached the conclusion that it is legally available to Mr and Mrs Sheridan to recover the overpaid wages.

Determination

[41] Given my finding that it is legally possible for Mr and Mrs Sheridan to recover the overpaid wages from Mr and Mrs Maxwell, it is available to me to order that Mr and Mrs Maxwell pay the overpayment back to Mr and Mrs Sheridan.

[42] However, that does not seem to me to do justice as between the parties. It is clear that there was no written employment agreement between the parties as the law requires, and it is equally clear that a calculation in respect of rental was imposed on Mr and Mrs Maxwell without notification and for a 12 month period.

[43] Mr and Mrs Maxwell say that that imposition was illegal because it constituted a deduction from wages and was therefore itself in breach of the Wages Protection Act 1983. I do not accept that submission because it seems to me that:

- (a) The calculation made was analogous to a payment that would be made in respect of accounting for tax; and
- (b) Perhaps more importantly, there was no evidence before me that Mr and Mrs Maxwell had actually lost money as a consequence of what was actually a paper transaction to effect appropriate tax treatment for both parties.

[44] However, it is plain that Mr and Mrs Maxwell were seriously inconvenienced by the mistake made by Mr and Mrs Sheridan's adviser, particularly in the absence of any notification whatever of the sudden imposition of the rental situation.

[45] In those circumstances, I have reached the conclusion that it would be unjust and unfair to require Mr and Mrs Maxwell to return all of the improperly overpaid moneys to Mr and Mrs Sheridan but that it would be appropriate for them to return half of the total amount overpaid to them by Mr and Mrs Sheridan. I so order. Mr and Mrs Maxwell are to pay Mr and Mrs Sheridan the sum of \$1,060.39.

[46] As both parties were unrepresented before the Authority, costs are to lie where they fall.

James Crichton
Member of Employment Relations Authority