IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 7
5420389

	BETWEEN	MURRAY IAN BARRON Applicant
	AND	STEPHEN & SARAH JONES LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Murray Barron on his own behalf Stephen and Sarah Jones on their own behalf
Investigation Meeting:	12 November 2013 at Alexandra
Submissions received:	At the investigaiton meeting
Determination:	16 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Murray Barron, claims the respondent, Stephen and Sarah Jones Limited, failed to pay wages owing. In particular he claims he has not been paid an amount commensurate with the requirements of the Minimum Wage Act 1983.

[2] Originally he had a claim regarding Holiday pay and the requirement to pay time half additional for working statutory holidays. This has now been resolved, though a residual Holiday claim remains in respect of the 8% payable on any outstanding wages.

[3] Mr and Mrs Jones (Joneses) deny the claim has validity.

Background

[4] Mr Barron was engaged for a fixed period of three months as relief manager in a hotel the Joneses owned at Waipiata. Mr Barron says he entered into a verbal agreement under which he would manage the hotel with a brief to operate as if it were his own. He says the opening hours were to be determined by him. He also claims he asked for a written agreement but one was never provided.

[5] On this last point the Joneses disagree. They claim they reduced the essential elements of the arrangement to writing and forwarded it to Mr Barron for his signature. They claim it was returned, albeit unsigned, with one of the daily cash envelopes and they assumed that indicated acceptance.

[6] The document in question is short – approximately a third of a page. It is dated 26 February 2013 and headed *Confirmation of Employment – Murray Barron – Stephen & Sarah Jones*. It contains six bullet points included amidst which are:

> - *This is a 3month contract, beginning on the 11th of February 2013.*
> - *Remuneration package totals $1400. This is made of $700 monetary and an additional $100 per day or $700 per week which is by way of onsite Accommodation and all living expenses during the term of employment.*
> - *…*
> - *Hours of operation as negotiated and to be reviewed.*

[7] Mr Barron denies seeing, let alone returning, the document.

[8] With respect to remuneration, the Joneses say they simply asked Mr Barron *what amount to you want to be paid after taking into account the value of your board and lodging?*. They say the response was *$700 is reasonable*. The Joneses say Mr Barron was never offered free accommodation, nor led to believe it was free.

[9] Mr Barron accepts it was he who suggested $700 as a reasonable weekly salary but denies discussing the issue of accommodation or placing a value thereon.

[10] Mr Barron goes on to say (in his statement of problem):

> *To meet the demands of this 7 day per week job, which is sole charge with limited assistance provided for room make-up and busy bar periods, I worked a minimum of 95 hours per week. The only time off was for Bridge from 6.30-10 pm Wednesday and Golf 12.45 - 1715 hrs Saturday.*

> *Generally the Hotel Bar was open from 11 am to 10pm every day. If there was no House guests the 2hrs before opening and 30 mins after closing where utilized for cleaning, stocking ordering and end of day duties. This meant my minimum working day was from 9am to 10.30pm.*

[11] To that he adds *The requirement to prepare cooked breakfasts if there were house guests who required that* which, he says, occurred approximately 50% of the time.

[12] When Mr Barron became concerned about the number of hours he was working he approached the Department of Labour (now the Ministry of Business, Innovation and Employment). He says they advised he record his hours and this he did for a single week – 18 to 24 April 2013. The document shows various commencement times between 6.30am and 7.30am and cessation times ranging between 10.00pm and 1.00am the following morning. The document alleges a total of 100¼ hours were worked that week.

[13] The Joneses say the claim is ridiculous. They say there was no need to open prior to 11.00am and Mr Barron was instructed accordingly. They say he was also instructed not to provide cooked breakfasts and compliance with the instruction would negate the need to commence as early as he claims on each of the days in the week he recorded. With respect to closing time, they say he was instructed to close the bar when the last patron leaves which is, in this community, would inevitably be no later than 9.00pm and generally much earlier. Indeed till tapes presented at the hearing show occasions on which there were no patrons after about 5.30pm.

[14] To this they add various accusations that Mr Barron simply could not have been working when he claims. By way of example they:

a. Cite evidence he was assisting a neighbour build a patio when he alleges he was working;

b. Claim he was frequently in Ranfurly, which is some 50km away, in the late morning; and

c. Refer to one occasion when they received a call from a patron who had arrived at the hotel and phoned querying why it was open when no one was there. At the time of the call Mr Barron was with the Joneses at their establishment some 45km from Waipiata.

Determination

[15] As already said, Mr Barron claims the amount he was paid did not comply with the provisions of the Minimum Wage Act given the hours he was working. He has used, as the basis of his calculations, an assumption he worked 95 hours per week. He therefore calculates the shortfall, including holiday pay, is $8,344.28.

[16] It is normal an applicant has the onus of establishing a prima facie case for the respondent to then answer. There is, however, an exception with respect to wage arrears. An employer is required to keep a time and wage record for each employee (s.130 of the Employment Relations Act 2000). Section 132 then provides that where there is a claim for the recovery of monies the employee MAY (emphasis is mine) call evidence to (a) show the failure to comply with s.130 and (b) that it prejudiced his or her ability to accurately quantify the claim (s.132(1)). The section goes on to say where such evidence is tendered I may accept the claim as valid unless the respondent can prove it is inaccurate (s.132(2)).

[17] I conclude Mr Barron's claim faces some impediments when I consider the above provisions and particularly s.132. First, he made no attempt to introduce the evidence described in s.132(1).

[18] That said, it is, however, obvious there was no time and wage record though a question arises as to why and who was responsible. It is Mr Barron's evidence he is an experienced hotel manager and was aware of the various requirements. It is also his evidence he was in charge of the hotel and responsible for any resulting paperwork. This included time and wage records for the staff engaged therein, along with his own. The evidence is he did oversee completion of time and wage records for the staff and some were produced as evidence. He did not, however, complete his own, stating he could not bother. In other words he must take some responsibility for the lack of time and wage records, though not all as there is also no evidence the Joneses ever questioned their absence.

[19] More important is the fact Mr Barron did not suggest or claim the lack of the records prejudiced his ability to quantify the shortfall. Instead he proffered evidence about the hours he says he worked along with the record he prepared for the week 18 to 24 April as indicative support. I say indicative given Mr Barron's comments and the fact it recorded a week of 100.25 hours when the claim is 95.

[20] There is then the statutory comment about inaccuracy. The Joneses tendered reasons why the claim had to be inaccurate and had some success in doing so. Mr Barron accepted he was building a neighbours patio when he alleges he was working at the hotel and justifies that by saying he could see the hotel and return if a patron arrived. All I can say is it is difficult to do two jobs simultaneously. Similarly he conceded the incident referred to in 14(c) above and did not suggest his visit was required by the Joneses.

[21] Similarly he accepted he was regularly in Ranfurly when he claims to have been working but says he considered that work as he often used to trip to purchase milk. The Joneses responded (a) he also conducted private business (which Mr Barron conceded) and (b) he did not need to go to Ranfurly. The Joneses son visited the hotel most days. He could have delivered the milk and Mr Barron was told this. Mr Barron did not deny the last claim but simply said he did not think about it.

[22] In other words Mr Barron concedes instances when he claims to have been working when there are serious doubts about that or whether the functions being performed were required.

[23] There is one further crucial point. To be entitled to pay one must be working and required to do so. The Joneses say they advised Mr Barron there was no need to work before the 11.00am or after the departure of the last patron which would rarely be after 9.00pm and generally much earlier. They say they reiterated this by instructing Mr Barron accordingly and, in particular, told him not to provide cooked breakfasts. Clients would then help themselves to previsions putout the previous evening and Mr Barron need not be present in the morning as payment had been made on checking in.

[24] Mr Barron does not deny he got these instructions. He said, when answering questions, he could not recollect the instructions but accepted they may have been given and if so he chose to ignore them. He says he controlled the opening hours and chose to work as he did in the hope he might increase turnover and get a bonus. Here it should be noted there is evidence from one of the Joneses witnesses the hotel often displayed open signs before 11.00am when Mr Barron was there.

[25] The same answer (I cannot recollect) applied to an instruction the Joneses say they gave not to open on Good Friday. Mr Jones claims he went to Waipiata to

instruct Mr Barron to close when he heard the hotel was open on that day. Again Mr Barron does not recollect this but does not deny it.

[26] The evidence is that if Mr Barron was working excessive hours they were ones which (a) were not required and (b) being worked contrary to instruction. In such circumstances it is hard to conclude he is entitled to payment for them.

[27] The Joneses say the requirement was 11am to departure of the last patron. The evidence would suggest this would result in a maximum working week (after applying a deduction for the two periods Mr Barron says he had off) of no more than 63 hours but probably much less. For that he was paid a sum he not only agreed, he suggested. Putting aside the debate about whether or not there was an agreement about board and/or its value, I can add a further 15% Mr Barron accepted as a fair reflection of the board's value. That gives a total of $805 per week which would appear, given the evidence, to cover the required hours.

[28] Finally there was a discussion about being required to work overnight by virtue of sleeping on the premises. I take that no further for two reasons. First Mr Barron did not claim those hours and second the claim would face some challenges. The concept of being paid for sleeping was canvassed in *Idea Services Ltd v Dickson* [2011] ERNZ 192. There the conclusion Mr Dickson was working was based on three factors. They were:

a. the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

b. the nature and extent of the responsibilities placed on the employee; and

c. the benefit to the employer of having the employee perform the role.

[29] Here there were no constraints, no responsibilities beyond an arguable one stemming from Fire Service requirements which may have been capable of being met in other ways and no apparent benefit to the employer.

[30] For the above reasons I conclude Mr Barron is unable to establish his claim. He did not claim the lack of time and wages records prejudiced him and must, in any event, take partial responsibility for that. Parts of his claim were undermined by the

evidence and most importantly he does not deny he failed to comply with instructions he limit the hours he was working.

[31] The conclusion Mr Barron has been unable to establish his claim means I need not consider the actual value of the remuneration package and, beyond the comments in [27] above, whether or not board formed part of it. That said I suspect the Joneses would fail to convince me it was worth $700 per week. The onus is on them to establish that and the scrap of paper produced (6 above) fell well short of what was required.

Conclusion

[32] For the above reasons I conclude Mr Barron has been unable to establish his claim. It is therefore dismissed.

[33] Stephen and Sarah Jones Limited have successfully defended the claim and in the normal course of events would be entitled to a contribution toward the cost of doing so. However it was represented by officers of the company and there are no legal costs I am aware of. Recoverable costs, if any at all, are therefore negligible. Given a costs determination can be revisited and in order to avoid putting the parties to further effort and cost, I advise a view costs should lie where they fall.

M B Loftus
Member of the Employment Relations Authority