

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 3
3053873

BETWEEN BENJAMIN BREWSTER
Applicant

AND STRAY LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: John Burley, counsel for the Applicant
Brett Hudson for the Respondent

Investigation: On the papers

Determination: 14 January 2022

DETERMINATION OF THE AUTHORITY

A. Benjamin Brewster’s application for wage arrears orders against Stray Limited is declined.

B. Costs are reserved.

Employment Relationship Problem

[1] Benjamin Brewster worked as a driver guide for Stray Limited (Stray) from 27 September 2012 to 18 October 2014. Stray operates a national ‘hop on, hop off’ coach business providing tours targeted, at that time, at the backpacking tourist market.

[2] Mr Brewster’s pay for his work as a bus driver and guide for passengers comprised four elements – a daily rate, an allowance for food and away from home costs, a bonus payment for keeping to schedules and completing paperwork required for each trip and commission on the sale of tourist activities booked for passengers who were travelling from place to place on a Stray bus.

[3] Just under four years after Mr Brewster had resigned from his job with Stray he contacted the company with two queries about his pay. The first query concerned whether he should have been paid for a training trip he was on from 1 to 24 September 2012. The second query concerned whether he was paid at least the minimum wage for his work on tours during his employment from late September 2012 until October 2014.

[4] Mr Brewster and Stray representatives exchanged correspondence about those queries between 26 September and 15 October 2018. This did not resolve Mr Brewster's concerns. He lodged an application to the Authority on 13 March 2019 seeking wage arrears orders against Stray. Stray lodged a statement in reply denying any liability for wage arrears.

[5] The parties were referred to mediation, which they attended in late November 2019 without resolving the issue. Mr Brewster subsequently told the Authority he was continuing to seek to resolve the issue directly with Stray. Those discussions were delayed, in part, because Stray wanted to wait for the outcome of a Court of Appeal hearing involving a different bus tour company but also touching on how some statutory entitlements were to be calculated and paid to driver guides. After the court issued its decision in January 2021 Mr Brewster advised the Authority that he and Stray had still not been able to resolve his issue and asked the Authority to proceed with an investigation of his claim.

The Authority's investigation

[6] At a case management conference held by telephone in June 2021 the parties agreed the Authority could investigate and determine Mr Brewster's claim 'on the papers'. Those papers comprised his statement of problem, Stray's statement in reply, pay and other employment-related documents lodged by the parties along with written submissions. A timetable for lodging those submissions was set.

[7] Those timetable directions were extended several times. Initially this was because the parties asked for more time to talk about resolving the matter between themselves. Later it was because Covid-19 emergency restrictions in place at various times in 2021 hampered Stray's ability to prepare its submissions. Mr Brewster's submissions were lodged on 16 July 2021, Stray's submissions were lodged on 29 September 2021 and reply submissions from Mr Brewster were then lodged on 14 October 2021.

[8] As agreed in the case management conference the Authority could not consider Mr Brewster's claim regarding pay for a training trip completed in September 2012. Such a claim was subject to a six-year limitation period, which had ended in September 2018.¹ Similarly Mr Brewster's claim regarding his pay once he had begun employment with Stray, which was from 27 September 2012, could reach back only six years from the date he commenced an action in the Authority about it. He lodged his statement of problem against Stray on 13 March 2019. This meant his wages claim could run from no earlier than 13 March 2013. The relevant period was therefore from that date until his resignation and end of employment on 18 October 2014.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified any orders made. It has not recorded all evidence and submissions received. The parties' submissions and all other papers lodged have however been carefully considered in preparing this determination.

[10] Evidence is assessed and conclusions reached by applying the civil standard of proof, that is, on the balance of probabilities. This considers what is more likely than not to have happened. Findings of fact made after considering the accounts of events proffered by the parties often rely on whether other evidence can corroborate what they have said about what happened. This corroborating evidence may include what is apparent or can reasonably be inferred from reliable records made at or around relevant times and what is reliably established about how the parties acted at those times. For reasons set out later in this determination, this assessment was particularly important in reaching factual findings in this case.

The issues

[11] The following issues were identified as open for determination:

- (a) In the period from 13 March 2013 to 18 October 2014:
 - (i) What hours did Mr Brewster work; and
 - (ii) Was payment of a daily rate made for his work sufficient to meet the requirements of the Minimum Wage Act 1983 (the MWA); and

¹ Employment Relations Act 2000, s 142.

- (iii) Were any commissions earned during those days, but paid to Mr Brewster at a later date, to be included in the assessment of whether payments made met the MWA requirements?
- (b) In light of the answers to the questions in (a), did payments of a daily rate and commissions paid to Mr Brewster on completion of a trip meet the requirements of the MWA and, if not, is Mr Brewster due an award of arrears of wages?
- (c) Should either party contribute to any costs of representation of the other party?

Legal framework

[12] Mr Brewster's claim was founded on Stray's statutory obligation under s 6 of the MWA to ensure he received "payment for his work at not less than [the] minimum rate" of wages prescribed under the MWA.

[13] Stray's employment agreement with Mr Brewster included the following provisions on remuneration:

9.1 Wages shall be paid at the daily rate set out in Schedule B attached to this agreement.

Schedule B

4.1 The employee shall be paid a daily rate for each driving day in accordance to the trip payment listing below. ...

4.2 The employer pays this remuneration to the employee in full payment and satisfaction for all hours worked by the employee pursuant to this employment agreement.

[14] The daily driving rate for a national circuit set in the employment agreement, at that time, was \$105 along with an additional payment of \$14 a day as "a tax-free contribution towards food and away from home costs" for days where the trip ended in a town different from where the day's driving started.

[15] For the relevant periods of employment, the MWA required Mr Brewster to be paid no less than the following daily rates:

- From 13 March to 31 March 2013 - \$108 a day and an additional \$13.50 for each hour exceeding eight hours;
- From 1 April 2013 to 31 March 2014 - \$110 a day and an additional \$13.75 for each hour exceeding eight hours;

- From 1 April 2014 to 18 October 2014 - \$114 a day and an additional \$14.25 for each hour exceeding eight hours.

[16] The MWA does not define the “work” for which payment must be made. Each case where failure to make minimum payments is alleged turns on a factual inquiry as to what an employer required of an employee and whether that activity then constituted “work” for the purposes of s 6 of the MWA.² Factors for assessment in making that factual inquiry about what activities are work include considering the degree of constraint on the employee, the extent of the employee’s responsibility in carrying out those activities and the benefit that the employer derives from them. The greater the degree of such constraints, responsibilities and benefits, the more likely those activities are likely to be regarded as work for which at least the minimum wage must be paid.³

[17] While Stray said it had paid Mr Brewster at least the minimum wage at the daily rate for each day worked, along with extra pay for any additional hours worked on any day, it also submitted any shortfall would be covered by commissions paid to him. However commissions were paid some days or weeks after each bus trip was completed. Those payments were not directly related to the unit of time, in the case the daily rate, for which the minimum wage had to be paid. As commissions were not attached to the specific daily pay period, MWA requirements for each such day could not be satisfied by the later payment of commissions.⁴

[18] The Court of Appeal decision referred to earlier concerned the circumstances where commissions comprised a regular part of an employee’s pay. It involved driver guides employed in a ‘hop on, hop off’ bus tour business similar to the one operated by Stray. However that decision, along with a subsequent decision of the Supreme Court on the same matter, was not directly relevant to the issues in Mr Brewster’s minimum wage claim.⁵ The appellate courts had closely considered a provision of the Holidays Act which expressly referred to circumstances where commissions comprised part of the ordinary weekly pay used to calculate the value of annual leave entitlements. The MWA has no similar express provision. Rather, the meaning of MWA provisions, and any application to whether or when commissions might form part of the payment of

² *Idea Services Ltd v Dickson* [2009] ERNZ 116 at [63].

³ *Dickson*, above n 2, at [69].

⁴ *A Labour Inspector v Smiths City Group Ltd* [2018] NZEmpC 43 at [77]-[81].

⁵ *Tourism Holdings Limited v A Labour Inspector* [2021] NZSC 157.

minimum entitlements, had to be ascertained from the text of the MWA and in the light of its purpose and its context.⁶

What hours were worked?

[19] The first factual issue concerned Mr Brewster's contention that he worked many more hours than Stray paid him for. His statement of problem said his hours of work ranged from eight to 14 a day but Stray had encouraged him to log only his driving hours and not any other work required for the role. He said that additional work included vehicle maintenance, customer service activities such as organising group events and entertainment, and sales to passengers of third-party tourist activities on which he earned commission. While Mr Brewster said most of his working hours were spent on driving and were recorded in his log book, he said he also spent three to four hours a day on those other non-driving duties. He set out a seven-page account of the different trips provided by Stray through the North and South Islands and what he did on days he worked as a driver guide on one or other of those trips.

[20] Stray agreed time Mr Brewster spent in addition to his driving activities on sales, meal preparation and customer service activities formed part of his "work" for the purposes of s 6 of the MWA. However Stray said its calculation of work hours already took those tasks into account. It denied Mr Brewster had or was required to work longer than the hours he recorded in his log book. It said the log book was expected "to capture all hours worked by driver guides", not solely driving hours.

[21] It said any additional planned activities were paid for and guides were also provided with private rooms away from clients in order to have rest time. It said Mr Brewster's claim of 12-hour days did not reflect the expectations or requirements set out in his employment agreement, position description or other paperwork. Its view was Mr Brewster had decided on his own volition to spend time above scheduled hours socialising with clients after his day's work was completed. It said those hours were beyond Stray's expectations and incorrectly categorised as "customer service activity" by Mr Brewster.

⁶ Legislation Act 2019, s 10.

[22] The employment agreement had the following provisions relevant to the contentions of each party regarding what was required of Mr Brewster and what hours were counted as work:

7.1 The employee's hours of work are determined by the rosters that are assigned in accordance with the itineraries set by the employer. The employee must devote the whole of their time during rostered hours to the duties of their position and such additional hours as are necessary to enable the employee to perform their duties effectively. The employee is employed in a position that is integral to the seven-day operation of the employer's business. Employees are required to be available throughout their assigned trips.

13.1 The employee acts as a sales representative for approved industry operators. In this capacity the employee will sell activities specified by the employer to passengers on a referral basis. ...

Schedule A: Position description

...

Trip delivery

- To ensure the itineraries set by the company are adhered to including activities, attractions, supermarket stops and walks.
- ...
- To assist passengers with questions and queries throughout the trip route.

Customer service

- To ensure all passengers are made to feel welcome, special and at ease throughout their journey.
- To strive to exceed passengers expectations in all aspects of trip delivery and passenger interaction.
- ...
- To organise group social events, meals and entertainment

Sales

- To on-sell activities to passengers at various attractions en-route in keeping with the preferred relationships set out by the company
- ...
- To maximise opportunities to up-sell and on-sell Stray product to passengers

[23] Mr Brewster's seven-page account of what he said was expected on each trip route he worked said cleaning activities, socialising with passengers and organising group meals and drinks meant he worked more hours than he was paid for.

[24] This included extensive references to socialising with passengers after trips for the day had ended, including joining them for dinner and drinks. He said drivers "were encouraged to socialise with pax to build up trust, rapport".

[25] He also submitted that his account of events was confirmed as being industry practice for tour driving. The evidence he offered in support of that proposition was an email exchange with two other drivers who said they agreed with his description of what was done on the various trips.

[26] The difficulty with Mr Brewster's evidence, while there was no reason to doubt its sincerity, was whether it was sufficient to cross the necessary threshold of being more probable than not as an accurate description of what happened. For the following reasons I concluded it did not.

[27] Firstly, Mr Brewster's claim was based solely on his assertion of hours worked, put together some four or so years after he had finished working for Stray. In an email Mr Brewster exchanged with two other drivers in 2019 he described his account as a "version of the hours that I think we worked" and said only that he was "pretty sure I have remembered correctly what was involved". Mr Brewster's account was not accompanied by any records that he had made at the time of doing that work in 2013 and 2014, noting any additional hours of work or tasks that were not covered by his paid hours. In other cases where workers have successfully pursued wage arrears claims, even when made years later, they have provided some corroborating evidence from the time they were working, such as notebooks or diaries where they have made notes of their hours of work or tasks done or text messages and emails which refer to their work hours or tasks. Mr Brewster provided no such evidence.

[28] Driver expense forms and commission claim forms Mr Brewster submitted to Stray during those years were among the documents in evidence. Those documents showed he diligently recorded and sought payment for his expenses and sales work. There was nothing to indicate from those or other documents that he had raised any concern, at that time, that he was doing additional tasks requiring more hours of work than he was paid for.

[29] Secondly, this was not a situation of the type envisaged by s 132 of the Act where an employer's failure to keep or produce wage records has prejudiced an employee's ability to bring an accurate wage arrears claim. In those situations the Authority may accept an employee's claim about the wages paid and the hours work. In this case, however, Stray had full wage records of payments made to Mr Brewster

for the hours recorded in his log book along with allowances and commission for selling tour activities to passengers.

[30] Thirdly, accepting Mr Brewster spent time with passengers after trips ended for the day, he had not established that extended socialising with them was an activity Stray required of him. The terms in his employment agreement, including his position description, did not require contact with passengers outside his scheduled hours. The practical reality of staying overnight in smaller towns on tourist routes meant he often encountered those passengers while off-duty but this was not a requirement by Stray which then generated an entitlement to payment of additional hours.

[31] Weighing all the evidence on the balance of probabilities, Mr Brewster's account was not sufficiently compelling to establish Stray had required him to work for longer than the hours he recorded in his log book, which was expected to include all driving and other non-driving work. Rather, as submitted by Stray, Mr Brewster's claim of being required to work 12-hour days did not reflect its expectations, the terms of his employment agreement or the contemporaneous paperwork about what was done.

Did the daily rate paid to Mr Brewster meet MWA requirements?

[32] In light of the finding that Mr Brewster was not required to work more hours than he was paid for, and accepting instead Stray's calculation of his hours, the evidence from Stray's pay records showed Mr Brewster was paid in accordance with the relevant minimum daily rates during his employment.

[33] This conclusion accepts Stray's submission that its calculation includes the \$14 allowance paid on some days for food and other out of town expenses. Mr Brewster submitted it should not be included as it was only paid for days where the trip ended in a different town and should be regarded as a reimbursement of an expense rather than part of his wages. However the allowance was paid when the requirements set for it were met, that was being out of town, rather than being reimbursement of expenses. His expenses were claimed and accounted for separately. Accordingly I accept that allowance formed part of the remuneration paid for each of those particular days and was relevant to the assessment of whether the minimum rate for the day had been paid.

Did commissions paid count towards the minimum entitlement?

[34] Stray submitted, as an alternative argument, commission payments should be taken into account when considering whether Mr Brewster was paid the minimum daily rates if the Authority found he had worked for more hours than its records showed Mr Brewster was paid for.

[35] In light of findings already made, it was not necessary to reach any finding on that alternative submission. If a conclusion had been necessary, it seemed commissions paid to Mr Brewster would not properly form part of the payments to be taken into account when considering whether he was paid at least the minimum wage for each day of work.

[36] The commissions were earned on sales of activities with third-party tourist companies, such as whale watching, kayaking, sky-diving and such like. Those transactions were conducted with passengers on a daily basis but their volume and value varied considerably from trip to trip. During his employment Mr Brewster earned more than \$22,000 in commissions but those payments were made on a more or less monthly basis after completion of paperwork after the trips. Their value varied from as little as \$276 in September 2014 to as much as \$2,668 in February 2014.

[37] However the requirement to pay the minimum wage relates to a specific period, that is an hour, a day or a week, depending on the terms in the particular employment agreement. Payment in full is required for each of those periods at the time pay is due, such as in the weekly or fortnightly pay. A payment of commission made some weeks later does not fulfil the requirement.⁷

No wage arrears due

[38] For the reasons given, no wage arrears are due to Mr Brewster for his work for Stray.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁷ *Smiths City Group Ltd*, above n 4, at [77]-[81].

[40] If they are not able to do so and an Authority determination on costs is needed Stray may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Brewster would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Robin Arthur
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].