

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 116
5463636

BETWEEN AXEL CABIG
 Applicant

A N D WAITOHI DAIRY LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Jonathan Everist, Counsel for Applicant
 John Wayne Howell, Counsel for Respondent

Investigation Meeting: 18 May 2016 at Timaru

Submissions Received: Written submissions 27 May 2016 for Applicant
 Written submissions 26 May 2016 for Respondent
 Oral submissions 27 May 2016 for both parties

Date of Determination: 18 July 2016

DETERMINATION OF THE AUTHORITY

- A. There is no agreement for the provision of additional benefits being a performance bonus and return flights to the Philippines. I decline the applicant’s claim for breach of contract for failure to provide these benefits.**
- B. The respondent did not act in an unjustifiable manner causing disadvantage to the applicant in the course of negotiating the terms and conditions of employment or by failing to provide the alleged additional benefits. I decline the applicant’s grievance for unjustified action causing disadvantage.**

C. The respondent has failed to pay minimum wage for all of the hours worked by the applicant. I order the respondent to pay the applicant wage arrears of \$2,493.43 gross.

D. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] The applicant, Mr Cabig, claims he was entitled to additional benefits from the respondent, Waitohi Dairy Limited (Waitohi). Those benefits included a performance bonus, flights to the Philippines and a food allowance. Mr Cabig says Waitohi agreed to pay these additional benefits to him in the course of negotiating his employment with Waitohi. Mr Cabig alleges the failure to pay these benefits is a breach of the terms of his employment and he is entitled to damages being the monetary value of such benefits.

[2] Mr Cabig also says that Waitohi has acted in an unjustifiable manner causing disadvantage to his employment by failing to provide the agreed additional benefits of a performance bonus, return air flights to the Philippines and a food allowance. As an alternative, Mr Cabig argues that if there is no agreement as to the provision of these additional benefits, then he alleges that Waitohi acted unjustifiably causing disadvantage to his employment in negotiating the terms of his employment and leading him to believe he was entitled to such additional benefits.

[3] In the course of his employment, Mr Cabig worked a considerable number of hours and whilst he acknowledges that Waitohi paid him a salary that covered additional hours if required, he says that Waitohi should compensate him for some of those additional hours. This claim is a wage arrears claim arising out of the failure of Waitohi to pay the minimum wage for all of the hours Mr Cabig worked.

[4] Waitohi says quite simply there was never agreement for the provision of the additional benefits Mr Cabig seeks. It says:

- a. The person who negotiated the terms of Mr Cabig's employment did not discuss, let alone agree the payment of such benefits;
- b. Even if he had done so, this employee did not have authority to agree any additional benefits and could only have put it forward as a request

for additional benefits with the Board of Waitohi to consider, which he did not do;

- c. In any event, even if it agreed to provide the additional benefits (which it denies) this was not recorded in writing in the employment agreement or as an amendment to the employment agreement and based on the terms of the relevant employment agreement, this cannot be binding.

[5] In response to the personal grievance of unjustified action causing disadvantage, Waitohi says it did not act in an unjustifiable way; it did not agree the terms of the additional benefits and therefore its action of not paying those benefits are justified.

[6] In response to Mr Cabig's claim for wage arrears, Waitohi says it paid Mr Cabig a salary that covered any additional hours. Waitohi acknowledges that Mr Cabig worked additional hours but he did not work to such an extent that it meant his salary did not meet the minimum wage requirements.

The issues

Benefits

[7] The issues that arise in terms of the question of whether Mr Cabig is entitled to the additional benefits he claims are:

- (a) What, if anything, was agreed between the parties regarding the additional benefits;
- (b) If the provision of any additional benefits was agreed, what is the effect of the terms of the employment agreement between the parties, which includes an entire agreement clause, and a requirement that any amendment to the employment agreement be in writing?

Personal grievance

[8] The issues that arise in respect of Mr Cabig's personal grievance for unjustified action causing disadvantage are:

- (a) Is there an action by Waitohi that caused disadvantage to Mr Cabig's employment or a condition of his employment;
- (b) If so, is that action unjustified?

Wage arrears

[9] The issues that arise in respect of Mr Cabig's wage arrears claim are:

- (a) What hours did Mr Cabig work in the course of his employment;
- (b) Notwithstanding that Mr Cabig was in receipt of a salary, did Waitohi pay minimum wage for the hours actually worked?

Facts***Negotiations***

[10] In early 2013, Mr Cabig was working as a dairy farm assistant on a farm at Atiamuri when a friend of his, Esperato Garciano, told him of two vacancies on the Waitohi farm.

[11] Mr Cabig then spoke to another friend, Rolly Degamo, and together the two of them contacted Waitohi to discuss the two vacancies on offer.

[12] In May 2013, Ross McIlwee, a director of Waitohi and the Waitohi farm administrator, spoke to Mr Cabig and Mr Degamo in two separate telephone calls. In the course of those telephone calls, Mr McIlwee and Mr Cabig discussed the terms of possible employment for Mr Cabig and Mr Degamo.

Salary

[13] Mr Cabig and Mr McIlwee agreed a salary that was \$44,000 and an accommodation allowance of \$2,600.

Food allowance

[14] Mr Cabig says that additional benefits were also discussed in the telephone call including that Waitohi would pay a food allowance, and employees could use a car on the Waitohi farm to travel to town to purchase supplies and that there would be a cook onsite.

[15] Mr McIlwee says that during the negotiations he advised that Waitohi provided its workers some additional benefits but these were not terms of employment, rather the things were done out of goodwill to assist its employees in their day-to-day living expenses. These things included provision of a cook, free internet, free power and firewood and other such things. He agreed there was discussion about the provision of a vehicle for workers to use.

[16] Mr McIlwee says that Mr Cabig did request a meal allowance but he did not agree to the payment of a separate meal allowance. Rather, it was this request that led him to increase the salary to \$44,000. Mr McIlwee says that initially the positions on offer would have a salary of \$40,000 plus the additional accommodation allowance of \$2,600. In short, Mr McIlwee's evidence is that Waitohi did not agree to an additional food allowance but rather had agreed to an increase in salary that incorporated Mr Cabig's request for a meal allowance.

Production bonus and return airfares

[17] Mr Cabig says that during the course of negotiations he told Mr McIlwee that in his current employment, he had a production bonus and he would like Waitohi to give him the same bonus. He also said he was aware that Waitohi had previously provided return airfares to the Philippines for employees and he requested this as well.

[18] Mr McIlwee says that Mr Cabig did not raise these two additional matters. In fact, Mr McIlwee's evidence was that he was surprised about the suggestion that there might be a production bonus. He had no recollection of Mr Cabig raising this and he says that no one employed by Waitohi received a production bonus. Further, he says he had no authority to agree a production bonus and even if he had discussed this, he merely would have been able to put this request by Mr Cabig to the Board of Waitohi to approve. This did not happen and he is sure there was no discussion around a production bonus at all.

[19] In terms of the return airfares to the Philippines, Mr McIlwee accepts that Waitohi had previously paid for employees to have return flights to their home countries but he says that this was purely discretionary depending on the circumstances of individual employees and the circumstances of the Waitohi farm. As far as he was aware, any offer to pay for return airfares was not a term of any employee's employment and in any event was not a benefit he could offer and agree with Mr Cabig. As with the production bonus, if Mr Cabig had raised this he would have presented it to the Board of Waitohi. He did not do this and his recollection was that there was no discussion around the payment of return airfares at the end of the Waitohi farm season.

Employment agreement

[20] Both Mr Cabig and Mr McIlwee do agree that at the end of the two telephone calls to discuss the possible terms of employment, Mr McIlwee agreed to send an employment agreement setting out the terms of employment to Mr Cabig. Mr McIlwee signed the employment agreement on 16 May 2013 and forwarded a copy to Mr Cabig. He requested that Mr Cabig review the agreement and if acceptable sign and return it to him by 30 May 2013.

[21] Mr Cabig accepts that he received the employment agreement. He signed the employment agreement and returned it to Mr McIlwee.

[22] The individual employment agreement signed by Mr McIlwee on behalf of Waitohi and Mr Cabig (the Employment Agreement) included the following:

- (a) The position was Assistant Herd Manager and Mr Cabig was to report to the Farm Manager, Mr Kerry Hurst;
- (b) Mr Cabig was to commence work on 10 June 2013;
- (c) The hours of work were to be between 4am to 6pm on a roster of seven days on, two days off, a further seven days on two days off and then a period of seven days on and three days off. That is, Mr Cabig would work three weeks and have the equivalent of one week off in every four week period;
- (d) Mr Cabig was to have two one hour breaks during rostered shifts;

- (e) Mr Cabig's salary was \$44,000 per annum plus an accommodation allowance of \$2,600.

[23] The Employment Agreement did not include any of the additional benefits that Mr Cabig claims. It did not record an entitlement to a performance bonus, payment for airfares to the Philippines, nor the meal allowance. It also did not record the other matters discussed including such things as free internet, free firewood and use of the farm vehicle.

[24] The Employment Agreement also included the following clauses:

38. Entire agreement

38.1 The parties agree that this agreement contains everything the parties have agreed on in relation to the employment. Neither party can rely on an earlier document, or on anything said or done by another party, or by a director, officer, agent or employee of that party) before this agreement was signed.

39. Variation

39.1 The parties may only vary this agreement in writing.

Hours worked

[25] There was initially a delay in Mr Cabig receiving a valid work visa and he was not able to commence employment until 1 August 2013.

[26] In the course of Mr Cabig's employment, the number of hours he worked each week varied. Mr Hurst changed the roster during the course of Mr Cabig's employment to reflect changing workloads and a better pattern of shifts that would ensure better staffing on the Waitohi farm.

[27] There was varying evidence about the number of hours of work required by employees during different periods on the Waitohi Farm. Mr Cabig's evidence is that for August, September, October, November and December of 2013, he worked in excess of 130 hours a fortnight, which was essentially more than 12 hours per day.

[28] In contrast, Waitohi has no record of the hours worked by any of its employees. It kept records of the shifts worked but merely logged those shifts as 12 hours per shift and then deducted two hours for breaks so it made an allowance of 10 hours per day of actual work.

Other matters

[29] There was also evidence provided by Mr Cabig, other employees of Waitohi as well as Mr Hurst in relation to matters that occurred during Mr Cabig's employment at the Waitohi farm. I do not find that any of this additional evidence is relevant to the issues before me. I do not record the evidence nor do I make any finding of fact in relation to it, as it is not necessary for my determination.

Resignation

[30] Mr Cabig resigned in August 2014. He says he was dissatisfied with the number of hours he was working and because Waitohi had made it made clear to him that he would not receive the return airfares to the Philippines, nor would he receive the production bonus.

Discussion***Benefits***

[31] I am satisfied that Waitohi and Mr Cabig did discuss the provision of a meal allowance and Waitohi offered to increase Mr Cabig's salary to incorporate this. Mr Cabig accepted this offer.

[32] I am satisfied on the evidence that I have heard that the additional benefits of a production bonus and return airfares to the Philippines were not agreed terms of employment:

- a. There is insufficient evidence to show that Mr McIlwee and Mr Cabig discussed these additional benefits.
- b. Even if Mr Cabig and Mr McIlwee discussed these benefits, there was no evidence that Waitohi agreed that it would provide the benefits.
- c. Moreover, if they were agreed, there is no certainty around those terms to make them enforceable.

[33] I accept Mr McIlwee's evidence that he did not discuss the additional benefits and certainly did not agree them, as he did not have authority to do so without approval from the Board. I also accept it was not Waitohi's normal practice to provide these additional benefits. Whilst Waitohi may have provided airfares to

other employees in the past that was done as an act of discretion and this cannot be binding between Mr Cabig and Waitohi.

[34] These conclusions are supported by the fact that, had the additional benefits been discussed and agreed, then they should have been recorded in the Employment Agreement or as an amendment to the Employment Agreement in line with clauses 38 and 39.

[35] There was also no evidence of clarity or certainty around what Mr Cabig says was agreed. So for example, when I asked Mr Cabig at what level of production would Waitohi pay the production bonus and how much it would pay he was unable to provide any answer to this.

[36] Mr Cabig's claim of breach of contract for Waitohi's failure to provide the additional benefits of a production bonus and return airfares to the Philippines, fails.

Personal grievance

[37] On the basis that I have found that Waitohi did not agree the additional benefits sought by Mr Cabig as terms of Mr Cabig's employment, the failure to pay or provide those benefits cannot be an unjustified action causing disadvantage. There is no disadvantage nor is there any unjustified action.

[38] That leaves me with the issue of whether there was an action of inducing Mr Cabig to believe he was entitled to those additional benefits, either in the negotiations for the terms of employment or subsequently. I am not satisfied on the evidence that such an action occurred and therefore find there is no action in connection with that allegation that caused disadvantage to Mr Cabig's employment or a condition of it.

Wage arrears

[39] Mr Cabig's claim for wage arrears is essentially a claim that Waitohi did not pay him minimum wage for all of the hours that he worked.

[40] There is no doubt that Minimum Wage Orders made under the Minimum Wage Act 1983 (the MW Act) apply to employees in receipt of a salary.¹

¹ *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25

[41] The process of determining whether the requirements of the MW Act have been met for an employee who receives a salary is set out in *Law v Board of Trustees of Woodford House*.² This process rejects the use of averaging and is based on an assessment of actual hours worked and ensuring that the applicable minimum hourly rate is paid for each hour worked.³

[42] Therefore, I must determine how many hours Mr Cabig worked during his employment and then calculate if Waitohi has paid him the applicable minimum hourly rate for those hours.

[43] It is clear that Waitohi has failed to keep adequate wage and time records for its employees. It is incumbent upon employers who pay a salary to ensure that they record the correct number of hours so that an assessment can be made that those hours have been paid at the minimum wage entitlement.⁴ Waitohi failed to do this.

[44] In the absence of adequate wage and time records by Waitohi, I am entitled to rely on the records of Mr Cabig⁵.

[45] Whilst in the course of evidence, particularly cross-examination, there were some doubts raised about the accuracy of the contemporaneous records that Mr Cabig kept, I am satisfied that they are nonetheless an account of the hours that he worked. I do not accept that he recorded them every day, but I do accept that they are reasonably contemporaneous, i.e. recorded within a period of time when he recalled the hours he had actually worked. I am satisfied from the evidence and the questioning of Mr Cabig that there was a basis to support the record of hours worked and I do not accept what Waitohi was essentially suggesting, that he overstated the hours to support his claim. I believe Mr Cabig's records of the hours he worked are realistic and I am prepared to make a determination of payment based on the hours recorded by Mr Cabig.

[46] I have taken the hours worked by Mr Cabig in each fortnightly pay period and calculated the amount that Waitohi should have paid him for those hours based on the applicable minimum wage rate. I have added up any shortfall and reach the sum of \$2,493.43.

² [2014] NZEmpC 25

³ See also *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212

⁴ *O'Shea (Labour Inspector) v Pekanga O Te Awa Farms Ltd* [2016] NZEmpC 19

⁵ Section 132 of the Employment Relations Act 2000

[47] This means that Waitohi owes Mr Cabig the sum of \$2,493.43.

Determination

[48] There was no agreement between Mr Cabig and Waitohi for the provision of the additional benefits that he seeks. I decline Mr Cabig's claim for breach of contract relating to these additional benefits.

[49] Waitohi did not act in an unjustified manner which caused disadvantage to Mr Cabig, either in the course of negotiating the terms and conditions of employment or by failing to provide the alleged benefits. I decline Mr Cabig's personal grievance for unjustified action causing disadvantage.

[50] Waitohi has failed to pay minimum wage for all of the hours worked by Mr Cabig. I order Waitohi to pay Mr Cabig wage arrears of \$2,493.43 (gross).

Costs

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

[52] If they are not able to do so and a determination on costs is needed, any party seeking a contribution to their costs should serve and lodge a memorandum setting out what contribution they seek, and the basis for it, within 28 days of the date of this determination. The other party will then have a further 14 days within which to serve and lodge a reply.

Peter van Keulen
Member of the Employment Relations Authority