

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 149
5583024

BETWEEN ANDRE FAIRCLOUGH
Applicant

AND MATAKITAKI DAIRY
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Craig O'Connor, Counsel for the Applicant
David Thurlow, Advocate for the Respondent

Investigation meeting: Held by teleconference on 2 September 2016

Submissions: By Memoranda for the Applicant on 7 July 2016 and 26
August 2016 and orally at the meeting.

Determination: 5 September 2016

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of this written determination, Matakítaki Dairy Limited must pay Andre Fairclough \$4,223.07 gross in wages and holiday pay.**
- B. Within 28 days of this written determination, Matakítaki Dairy Limited must pay \$1,145 towards Andre Fairclough's legal costs and \$71.56, the cost of Mr Fairclough lodging his application in the Authority.**
- C. Matakítaki Dairy Limited's claims are dismissed.**

Employment relationship problem

[1] At the end of the investigation meeting I held on 2 September 2016, by teleconference, I gave an oral determination. This is the written record of that determination.

[2] Andre Fairclough was employed to work on a farm owned by Matakītaki Dairy Limited (Matakītaki). He began work in December 2014 and finished work on 3 September 2015. He claims he was not paid his last two weeks of wages, or employer Kiwisaver contributions for those two weeks, and was not paid his final holiday pay.

[3] However, I note that Mr Fairclough has not claimed the employer contribution to Kiwisaver in his Statement of Problem. The issue came up when Mr O'Connor provided a copy of email advice Mr Fairclough received from an accountant about how much Matakītaki owed him. That advice was sought and received after the Statement of Problem was filed. Therefore, I will not be investigating that claim. The amount claimed is \$4,288.52 gross.

[4] In response, David Thurlow, a director and shareholder of Matakītaki, says that Mr Fairclough only worked 5 or 6 days of his fortnight's notice period. He agrees that Matakītaki has not paid Mr Fairclough his last pay or final holiday pay. However, he considers it was justified in withholding the money because he claims that Mr Fairclough owes Matakītaki money for "cleaning (no amount specified), damaged carpets (\$2,290 cost to replace all carpet in a two bedroom farm cottage), and replacing a broken windscreen on a truck (\$531.30)." Mr Fairclough denies liability for any of the claims.

[5] Mr Fairclough now works in the North Island. Matakītaki's farm is near Murchison. Because of the difficulty and cost of Mr Fairclough and his counsel attending an investigation meeting in Nelson, which is the closest town to Murchison that the Authority sits in, I decided that he and Mr O'Connor could appear by telephone conference at the investigation meeting.

[6] However, given the nature of Matakītaki's claims against Mr Fairclough, I decided I would hold an investigation meeting in Nelson on 1 September 2016. I directed Mr Thurlow to provide, in advance of the meeting, any and all documents he

would seek to rely on to prove Matakītaki's claim. The only documents provided to support the counter-claims are a quote to replace a truck windscreen and a quote to replace carpet in a two-bedroom cottage.

[7] On 13 May 2016, I directed Mr Thurlow to provide Matakītaki's wages and time records for Mr Fairclough by 20 May 2016. Matakītaki has not provided these.

[8] I directed Mr Thurlow to attend the investigation meeting in person, along with a witness he said he had, if he wished to continue with Matakītaki's counter-claims. I also asked him to indicate in advance whether he would attend the meeting in person.

[9] On 31 July 2016, Mr Thurlow indicated that he would not be able to attend the meeting in person because calving had started. He wrote:

We do not dispute that we owe Andre holiday pay and six days work at the most. Further Andre was never restructured or anything else. He quit, walked out of the shed halfway through milking. We do have a number of claims, but for those to be considered we have to attend in person, which is as I said impossible. Therefore you can only rule for Andre.

[10] On 2 August 2016, I notified the parties that I would hold the investigation meeting on 2 September 2016 at 1 p.m. by way of teleconference from the Authority's Christchurch office. Mr Thurlow was invited to take part.

[11] On 7 August 2016, Mr Thurlow notified the Authority officer of his phone number and wrote "best time is 4pm."

[12] Mr O'Connor provided two memoranda in advance of the investigation meeting, one including Mr Fairclough's payslips. Copies of the memoranda and attached documents have been sent to Mr Thurlow.

[13] By email on 29 August 2016, the Authority officer reminded Mr Thurlow that the investigation meeting would start at 1 pm. She wrote that he would be called at 1 pm on the number he had provided.

[14] On 2 September 2016 at just after 1 p.m., the Authority officer telephoned the number Mr Thurlow had given. The call went straight to voicemail. The Authority officer rang off and asked for my advice. I directed that he call Mr Thurlow one more

time and if the phone went to voicemail he should leave a message stating that we were calling to join him to the investigation meeting. The second call was met by the engaged tone and did not go to voicemail. The time was 1.10 pm. Mr Fairclough and Mr O'Connor were already connected to the teleconference.

[15] I am satisfied that Mr Thurlow was aware when the meeting was and what the consequences for Matakитaki could be if he did not appear. I decided to proceed with the meeting in his absence as s 173(2) of the Employment Relations Act 2000 enables me to do.

[16] I heard from Mr Fairclough who gave oral affirmed evidence and from Mr O'Connor who made some supplementary oral submissions in addition to his memoranda.

Issues

[17] I need to determine:

- (i) What were the circumstances surrounding Mr Fairclough's resignation?
- (ii) How many days' wages is Mr Fairclough owed?
- (iii) How much holiday pay is he owed?
- (iv) Should Matakитaki pay legal costs (\$1,144.90), the cost of accountancy advice (\$198.38) and the Authority filing fee (\$71.56) to Mr Fairclough?
- (v) Are any of Matakитaki's counter-claims made out?

What were the circumstances surrounding Mr Fairclough's dismissal?

[18] Mr Fairclough says that in early August 2015 he and another employee were given letters asking them to agree to a pay cut due to Matakитaki's difficult financial circumstances. Mr Fairclough did not agree to that. He says Mr Thurlow was aware he was looking for another job.

[19] Mr Fairclough says he gave notice on 23 August and that his last day of farm work was 3 September 2015. He says Mr Thurlow gave him the day to move out and clean the cottage on 4 September 2016. He says his partner's parents cleaned the carpets in the cottage. He asked Mr Thurlow if he wanted to come and check the cottage but Mr Thurlow declined to do so and said he was happy for Mr Fairclough to leave without him checking the cottage.

[20] Mr Fairclough says he left on 4 September and started his new job on 7 September 2015.

[21] I accept Mr Fairclough's evidence.

How many days' wages is Mr Fairclough owed?

[22] Mr Fairclough's payslips show he should have been paid fortnightly with the last day of the pay period being a Thursday. Mr Fairclough was not always paid fortnightly and did not always receive payslips and was paid variable amounts, sometimes in cash and sometimes into his bank account. The last payslip he has is for the period ended 9 July 2015.

[23] The 3rd of September is the end of a fortnightly period; four fortnights on from 9 July 2015.

[24] In the absence of wages and time records, and any evidence from Matakitaiki I could test by questioning, I accept that Mr Fairclough should have been paid for the fortnight ending 3 September 2016 and has not been.

[25] Once the value of the accommodation is deducted Mr Fairclough's salary was \$45,000 per annum. $\$45,000 \text{ divided by } 26 = \$1,730.76$. That means a fortnight's pay is \$1,730.76.

How much holiday pay is he owed?

[26] I find that outstanding holiday pay is \$2,492.31. I differ slightly from the accountant's calculations. Therefore, the total amount of wages and holiday pay owed is \$4,223.07 gross.

Matakitaiki's claims

[27] Matakitaiki was not entitled to withhold any of Mr Fairclough's final pay or holiday pay even if it considered he owed it money. In any event, Matakitaiki has chosen not to pursue its own counter-claims. Therefore, they are dismissed.

[28] I note that the Employment Relations Authority does not have jurisdiction over residential tenancies, even service tenancies such as this one. That jurisdiction is exclusively with the Tenancy Tribunal. Therefore, I could not have dealt with the claims for cleaning and replacement of carpet in any event.

Costs

[29] Mr Fairclough has had to lodge a claim in the Authority to recover what Matakítaki owes him. He lodged his claim on 15 March 2016 after direct approaches to Matakítaki did not result in him getting what he was owed. I consider it reasonable that Mr Fairclough engaged a lawyer to act for him in this case.

[30] Mr Fairclough has been entirely successful in his claims. Therefore, he can expect a reasonable contribution to his legal costs from Matakítaki. Despite Mr Thurlow's admission that Matakítaki owed Mr Fairclough wages and holiday pay and his acknowledgement that I would rule for Mr Fairclough Matakítaki has not paid Mr Fairclough what it believed was owed. Matakítaki disputed the amount owed. Therefore, the investigation meeting was necessary.

[31] The Authority usually awards costs on a nominal daily tariff basis of \$3,500 per day. In this case, I consider it reasonable for Matakítaki to pay \$1,145 towards Mr Fairclough's legal fees. That is because I have held two telephone directions conferences and an investigation meeting which Mr O'Connor has attended. Although the investigation meeting was short Mr O'Connor had to attend one more telephone directions conference than would usually be necessary and had to prepare to deal with counter-claims which were ultimately not pursued.

[32] Mr Fairclough has also claimed accountancy fees of \$198.38. This is a modest amount. However, I am not sure it was necessary as the calculations are not complex and I am certain Mr O'Connor could have done them. In any event, I consider that the fortnightly amount payable on \$45,000 per annum is \$1,730.76 and not the \$1,733 the accountant calculated. Matakítaki does not have to pay the accountancy fees claimed.

Christine Hickey
Member of the Employment Relations Authority