

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 66  
5424272

BETWEEN KEITH HILL  
Applicant

AND PETER SHAND  
Respondent

Member of Authority: Christine Hickey

Representatives: Nick Mason, Counsel for Applicant  
The Respondent is self-represented and appeared by  
telephone conference

Investigation Meeting: 18 February 2014 in Nelson  
Submissions received from Mr Mason at the meeting.  
Further evidence received from Mr Shand on 7 March  
2014 and from Mr Mason on 16 April and 17 April 2014

Determination: 29 April 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Keith Hill was unjustifiably dismissed.**
- B. Peter Shand is to pay Keith Hill:**
- (i) A total of \$69,561.25 gross in unpaid wages;**
  - (ii) \$15,120 gross in lost wages for the three months after his dismissal; and**
  - (iii) \$7,000 in compensation under s.123(c)(i) of the Employment Relations Act 2000.**
- C. Under section 123(2) and 131 of the Employment Relations Act 2000 the Authority may order payment of unpaid wages or other money ordered to be paid to the employee by instalments, but only if the financial position of the employer warrants it. Mr Shand has leave to apply to the Authority to make an order that Mr Hill's wages and other money owed is to be paid by**

**instalments. To support his application he will need to provide a detailed financial analysis of his income and his outgoings.**

### **Employment relationship problem**

[1] From 1 December 2010 Keith Hill was employed by Peter Shand as the manager of the Murchison camping ground. The terms of the lease meant that the camp had to be open 365 days of the year.

[2] There was no written employment agreement but a verbal arrangement was made whereby Mr Hill would be paid \$30,000 per year and would also be entitled to free accommodation in the house on site. His ability to live on site was not expressed to form part of his remuneration.

[3] The parties also agreed that when Mr Shand decided at some point in the future to end his lease of the camping ground Mr Hill would be entitled to a share of whatever profit had been made while he was the manager. However, the camping ground did not make a profit at least in the latter half of Mr Hill's employment.

[4] For periods of the time Mr Hill was employed he was not paid in full because there was insufficient income from the business. Often when he was paid his pay came from another business operated by Mr Shand and not out of camping ground income.

[5] In January 2013 Mr Shand gave Mr Hill notice that he was being dismissed with effect from 3 February 2013. At the investigation meeting Mr Shand confirmed that he had dismissed Mr Hill for serious misconduct<sup>1</sup> because Mr Shand considered that money was missing from the camp accounts and that Mr Hill had taken it.

### **The claims**

[6] Mr Hill claims unpaid wages. He says that he worked so many hours for 7 days a week that \$30,000 per annum he would have been paid at less than the applicable minimum wage rates.

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<sup>1</sup> Not for redundancy as the dismissal letter seemed to suggest

[7] Mr Hill also says that he was unjustifiably dismissed and claims compensation for humiliation, loss of dignity and injury to his feelings and lost wages from the date of his dismissal beyond the three months allowed for in s.128(2) of the Employment Relations Act 2000.

[8] Mr Shand does not agree that Mr Hill was unjustifiably dismissed and variously says that he had to dismiss him because the business could not afford a manager and because he considers Mr Hill was *skimming* money from the business. He also says he has *little or no money to pay the claim from Mr Hill*.

### **Issues**

[9] The Authority needs to determine:

- (i) How much money is owed by way of unpaid wages? This includes a consideration of whether an amount of more than \$30,000 per year is owed to ensure that Mr Hill was paid at least the minimum wage for every hour worked.
- (ii) Whether Mr Hill was unjustifiably dismissed.
- (iii) If Mr Hill was unjustifiably dismissed what remedies he is entitled to, including a consideration of whether he contributed in any way to the situation leading to his personal grievance.

### **How much money is owed by way of unpaid wages?**

[10] Mr Shand attended the investigation meeting by way of teleconference. He does not deny that he owes Mr Hill some wages. His main point made in the lead up to the investigation meeting and repeated at the meeting was an allegation of Mr Hill's financial mismanagement, at best, and at worst dishonesty. Mr Shand's main argument is that he cannot afford to pay Mr Hill any more money. He made no submissions about the claim that Mr Hill is owed more than \$30,000 per year by way of wages.

[11] It is an employer's obligation to ensure wages and time records are kept for employees<sup>2</sup>. Section 131 of the Act gives the Authority power to order payment of wages or other money owed to an employee if an employer is in default of payment. Section 131(1)(b) of the Act specifies that the power to award such payments includes situations where any payment has been made at a rate lower than that legally payable.

[12] Mr Mason submits that Mr Hill was not only not paid all of the \$30,000 per annum he should have received for the time he worked for Mr Shand but that the long hours he worked meant that even if he is paid \$30,000 per annum then he will have received less than the minimum wage for the hours worked.

[13] In the absence of wages and time records s.132 of the Act provides an employee may give evidence that the employer's failure to keep adequate wages and time records prejudiced the employee's ability to bring an accurate claim under s.131. The employer may give evidence to the contrary to prove the employee's claims are incorrect. However, s.132 empowers the Authority to accept as proved all claims made by the employee of wages actually paid and of the hours, days and time worked by the employee.

[14] There were no wages and time records kept. Mr Shand has not given any evidence proving that Mr Hill's claims of wages paid or of time worked are incorrect. Therefore, I accept Mr Hill's claim<sup>3</sup> that he was paid:

- \$18,456 for the period 1 April 2010 to 31 March 2011 (worked 1 December 201 to 31 March 2011).
- \$20,610 for the period 1 April 2011 to 31 March 2012.
- \$5,779 for the period 1 April 2012 to 31 March 2013.

However, I need to determine on what basis it is reasonable to calculate the amount of wages still owed to Mr Hill.

[15] Mr Mason submits that there are four different ways of working out how much Mr Hill is owed by way of wages. His primary submission is that I should apply the

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<sup>2</sup> Section 130 Employment Relations Act 2000

<sup>3</sup> Based on his IRD summaries of earnings.

*Idea Services Limited v Dickson* cases<sup>4</sup> to find that Mr Hill was entitled to have been paid the minimum wage<sup>5</sup> for working 24 hours per day for 7 days a week during the peak season<sup>6</sup> and 8 hours per day for 7 days a week for the rest of the year.

[16] Mr Hill's evidence, which was supported by affidavit evidence from Kagan Nottle<sup>7</sup>, and not disputed by Mr Shand, is that:

- Particularly in the peak season but also occasionally during the rest of the year Mr Hill had to be available up to as late as midnight to check in pre-booked campers.
- At times there were campers wanting to check in throughout the night not having prebooked and he would have to be available to check them in even if he had been sleeping.
- In addition he had to be alert throughout the night to any vehicle arrivals as some campers used to come in late and attempt to leave early and use the facilities without checking in and without paying any camp fees.
- He had to be alert throughout the night to ensure that campers did not make so much noise as to disturb other campers and to ensure no unsafe or offensive behaviour by campers.
- He had to be alert throughout the night to noises that might alert him to risks of damage to camp property and buildings by campers or any people who were not authorised to be in the camping ground.
- He had to remain alert to any risk to campers' safety or to camp property and buildings by or from extreme weather. He also had to be ready to take whatever measures were necessary to ensure the safety of campers and camp property and buildings.

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<sup>4</sup> [2009] ERNZ 116 (No. 1) and [2009] ERNZ 372 (No. 2). The Employment Court's approach was upheld by the Court of Appeal in *Idea Services Ltd v Dickson* [2011] ERNZ 192

<sup>5</sup> Applicable at the relevant times.

<sup>6</sup> Which I accept from evidence given is from 1 December to 31 March.

<sup>7</sup> Mr Hill's partner who lived at the camp from November 2012 until his dismissal.

- He had to deal with incidents from the use of drugs and/or alcohol from large groups of young people who frequently stayed at the camp.
- He did a walk around the whole camp for a security check at about 11pm every night.
- He left the camp once a week at about 9am to go into Nelson to buy supplies and to see to any other camp business. He had to be back by late afternoon or 5pm at the latest as he did not consider it prudent to leave the camp unattended because of break-ins and people using the facilities without paying.
- A work day started at 7am by opening the office and receiving returned keys, providing change for the showers and information about travel and tourist activities.
- He worked on average 15 hours a day from 7am to 11pm in the peak season.
- His social life was constrained as he could not go out at night and leave the camp unattended and was required to live on site.
- He was constrained by the need to be constantly alert and available as to how much alcohol he could consume in the evenings in his home.

[17] I am satisfied that Mr Hill worked long days in the peak season and for fewer hours the rest of the year from 1 April to 30 November. I am satisfied that he had constraints on his evenings and nights during the peak season almost every night and had to remain alert, even when asleep, to any work that needed to be done.

[18] I now consider the three elements set out by the Employment Court and endorsed by the Court of Appeal in the *Idea Services* cases. Three factors should be considered<sup>8</sup> when resolving whether an employee is working during rest/sleep time:

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<sup>8</sup> The Court of Appeal endorses this approach at paragraph 10 [2011] ERNZ 192. The Supreme Court granted leave to *Idea Services* to appeal the Court of Appeal decision on points of law but the appeal did not proceed.

- What constraints are placed on an employee's freedom he would otherwise have to do what he pleases?
- The nature and extent of an employee's responsibilities.
- What benefit there is to an employer by the employee performing the role?

[19] The hours in question here are those in the peak season after 11pm and before 7am.

#### *Constraints on Mr Hill's freedom*

[20] There were considerable constraints on Mr Hill's freedom during the evenings. However, his freedom was not constrained to the same extent as Mr Dickson's or those of the applicants in the Employment Court's recent decision in *Law and Colbert et al v Woodford House and Iona College Boards of Trustees*<sup>9</sup>. Mr Hill was free to have guests to visit and/or to stay in his home; indeed, Ms Nottle initially stayed from time to time and then lived there for some months. He could to a large degree carry on normal family life. Also, for example, there were no constraints on what Mr Hill could watch on television in the evenings. He could socialise with his friends if he wished to invite them to his home. Whilst he had to be relatively sober and quiet he did not have to be so to the same extent as in Mr Dickson and Ms Law and Ms Colbert's living situations. His privacy was not greatly compromised because he had a separate dwelling, unlike in the Dickson and Law/Colbert cases. He had separate kitchen and bathroom facilities away from the campers. Unlike in Mr Dickson's case he had a separate bedroom and did not have to sleep in the office.

#### *Mr Hill's responsibilities*

[21] Mr Hill's responsibilities after his last security check at around 11pm were occasional but important. After 11pm he had to react when necessary but I accept that his constant vigilance even while asleep<sup>10</sup> was necessary to care adequately for the camp itself and the campers. Also like in Mr Dickson's case any *disturbances are unpredictable in their frequency and timing*<sup>11</sup>.

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<sup>9</sup> [2014] NZEmpC 25

<sup>10</sup> Mr Hill described a heightened state of awareness to noise that meant he frequently woke during the night to check that all was well.

<sup>11</sup> Idea Services (No. 1), *ibid*, at paragraph [67].

[22] Mr Hill had considerable responsibilities. However, unlike in the Dickson and Low/Colbert cases the campers were not vulnerable people<sup>12</sup> for whose physical and emotional welfare Mr Hill had sole responsibility overnight. For example, Mr Hill was not *in loco parentis*. He had limited responsibility for the campers' welfare compared to a boarding school matron's or a residential care community service worker's responsibilities.

*The benefit to Mr Shand of Mr Hill's presence overnight*

[23] According to the Employment Court the greater the benefit to the employer of having the employee present and available for work overnight and the more critical the role is, the more likely the period in question should be regarded as 'work'<sup>13</sup>.

[24] There was some benefit to Mr Shand in having Mr Hill on site after 11pm and before 7am. If he was not there the camp would no doubt have missed out on some business, being those campers that arrived after 11pm and left prior to 7am, and perhaps there would have been some further damage to the café when the storm Mr Hill described as damaging its roof happened. Mr Hill was a dedicated worker. However, his overnight presence and readiness to work as necessary through the night was a bonus rather than a necessity of operating the camp. He could have been absent from the camp for some hours during the evening and the night some of the time if he had wished to. The business would have been able to continue to operate in his occasional absence.

*Conclusion on whether Mr Hill was working between 11pm and 7am*

[25] Considering all three elements above I find that Mr Hill was engaged in work during the peak season for 15-16 hours a day 7 days a week but cannot be said to have been engaged in work every night from 11pm until 7 am. Mr Hill's claim is that he worked 15 hours a day in the peak season and while I think he may have meant that he worked 16 hours a day I have used 15 hours a day as the figure for my calculations

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<sup>12</sup> By way of their young age or their disabilities.

<sup>13</sup> *Idea Services (No.1)* *ibid*, at paragraph [69].

as Mr Shand has not had an opportunity to make any submissions on the issue of whether or not Mr Hill worked 16 hours a day.

[26] I accept the evidence of Mr Hill and Ms Nottle that during the peak season meal and rest breaks were difficult to take and usually interrupted by the necessity to respond to some work needs, whether of campers or of camp staff who were managed by Mr Hill.

[27] I conclude that Mr Hill was entitled to be paid at not less than the prescribed minimum wage rate for 15 hours a day over the periods:

- 1 December 2010 to 31 March 2011;
- 1 December 2011 to 31 March 2012; and
- 1 December 2012 to 3 February 2013.

[28] My conclusion about the peak season is in line with Mr Mason's second preferred method of calculating Mr Hill's unpaid wages.

[29] For the remaining periods Mr Hill was liable to be paid at least the applicable minimum wage rate for 8 hours a day for 7 days a week.

[30] I conclude that even had Mr Hill been paid the full \$30,000 per annum payable under his employment agreement he would not have been paid the applicable minimum wage rate for each hour worked in any of the three tax years he was employed.

[31] There was no set or agreed pattern of how frequently Mr Hill was paid or indeed should have been paid, for example, whether weekly, fortnightly or monthly. Therefore I have used an hourly rate to calculate what he should have been paid.

[32] I am grateful to Mr Mason for his careful calculations, which I agree with.

[33] For the year ending 31 March 2011 Mr Hill worked 121 days during the peak season for 15 hours a day at \$12.75 per hour; a total of \$23,141.25. In the off-peak season he worked 61 days for 8 hours a day at \$12.75 per hour; a total of \$6,222. That is a total of \$29,363.25. Mr Hill was paid a total of \$9,228 in that year leaving a total of \$20,135.25 in wage arrears.

[34] For the year ending 31 March 2012 Mr Hill worked 122 days (leap year) in the peak season for 15 hours a day at \$13.00 per hour; a total of \$23,790. In the off-peak season he worked 244 days for 8 hours a day at \$13.00 per hour; a total of \$25,376. That is a total of \$49,166. Mr Hill was paid a total of \$20,610 in that year leaving a total of \$28,556 in wage arrears.

[35] For the year ending 31 March 2013 Mr Hill worked 65 days in the peak season for 15 hours a day at \$13.50 per hour; a total of \$13,162.50. In the off-peak season he worked 244 days for 8 hours a day at \$13.50 per hour; a total of \$26,352. That is a total of \$39,514.50. Mr Hill was paid a total of \$5,779.00 in that year leaving a total of \$33,735.50 in wage arrears, before consideration of the amount Mr Hill settled with Mr Shand set out below.

[36] Mr Hill has not claimed any unpaid holiday pay. I am satisfied by evidence supplied during and after the investigation meeting that in recognition of owing Mr Hill some unpaid holiday pay and unpaid wages Mr Shand paid Mr Hill three payments amounting to \$5,286 plus a Chevrolet Blazer truck which at the time was valued at \$5,000. Therefore, Mr Hill settled with Mr Shand for \$10,286 as holiday pay and three months unpaid wages<sup>14</sup>. He cannot and does not now claim that from the Authority. There will be no award for holiday pay. But I must also deduct three months of pay from the amount owed in the year ending 31 March 2013. I consider it fair that I deduct one month of pay during the peak season (December 2012 at 31 days x 15 hours a day x \$13.50 per hour = \$6,277.50) and two months in the off-peak season (being October and November 2012 at 61 days x 8 hours a day x \$13.50 per hour = \$6,588). Therefore the amount still owed by Mr Shand for the year ending 31 March 2013 is \$33,735.50 - \$12,865.50 = \$20,870.

### **Was Mr Hill unjustifiably dismissed?**

[37] Mr Shand considers that he had no choice but to dismiss Mr Hill. However, I need to determine, by considering the matter objectively, whether a fair and reasonable employer could have made the decision to dismiss Mr Hill in all the circumstances at the time Mr Shand made that decision<sup>15</sup>.

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<sup>14</sup> See letter of offer from Mr Shand dated 14 January 2013.

<sup>15</sup> Section 103 of the Act.

[38] In applying that test I need to take into account whether Mr Shand complied with the minimum procedural requirements necessary, as set out in s.103A(3) of the Act before deciding to dismiss Mr Hill.

[39] Mr Shand did not comply with any of the basic four procedural requirements. He did not adequately investigate whether the dire financial situation in the business was due to wrongdoing on Mr Hill's part or to the downturn in the economy to which Mr Hill attributes the poor turnover. Since filing his Statement in Reply on 15 July 2013 Mr Shand has repeatedly said that he is having the accounts analysed by an accountant and that he would make them available to the Authority and to Mr Hill. However, no accounts have been produced even for the investigation meeting. Even taking into account the small size of the business Mr Shand's allegation of dishonesty against Mr Hill is so serious an investigation should have been undertaken before a decision to dismiss him was made. However insufficient investigation was carried out.

[40] Mr Shand did not put his allegation of dishonesty squarely to Mr Hill and therefore did not allow Mr Hill to give an explanation. However, I accept that Mr Shand and Mr Hill did have discussions about the poor financial state of the business and Mr Hill made some suggestions for improving business performance.

[41] Given that Mr Shand did not properly put his allegation of dishonesty to Mr Hill he could not have considered Mr Hill's explanation before making the decision to dismiss.

[42] The complete lack of procedural fairness renders the decision to dismiss unjustifiable. I also emphasise that there is not one shred of evidence of any substantive justification for dismissing Mr Hill for dishonesty. Mr Hill has a personal grievance of unjustified dismissal which leads to a consideration of remedies.

### **Contribution**

[43] Section 124 of the Act requires the Authority to consider whether Mr Hill contributed to any extent to the situation giving rise to his personal grievance. If he did I then have to consider reducing any remedies. However, Mr Hill in no way contributed to the situation that gave rise to his personal grievance.

### **Remedies for unjustified dismissal**

[44] Section 128 of the Act provides that having found a personal grievance by which Mr Hill has lost remuneration I must order Mr Shand to pay Mr Hill the lesser of a sum equal to Mr Hill's lost remuneration or 3 months ordinary time remuneration.

[45] Mr Hill also claims that Mr Shand should pay him further lost remuneration. However, I consider that in all the circumstances an award restricted to the 3 month period is reasonable.

[46] Mr Hill gave evidence of applying for a large number of jobs since his dismissal. He has adequately mitigated his loss. He had a stand-down of 12 weeks before he could get the unemployment benefit due to being dismissed and to Mr Shand telling WINZ he was dismissed for dishonesty.

[47] If Mr Hill had remained employed for thirteen weeks past 3 February 2013 he would have worked a further 56 days in the peak season (56 x 15 hours a day x \$13.50 per hour = \$11,340.00) and 35 days in the off-peak season (35 x 8 x \$13.50 = \$3,780). Mr Shand's ordinary time remuneration for 3 months after his dismissal would have been \$15,120. Over that time he did not earn any money. Therefore, Mr Shand must pay Mr Hill \$15,120 lost remuneration.

### **Compensation**

[48] Mr Hill says that quite apart from the shock of losing his job and consequently his home the allegation of dishonesty that Mr Shand has made to many people including the local police and to WINZ is *extremely distressing*. He says that the police involvement at first seemed laughable but he was *disgusted* by Mr Shand's allegations against him. He also believes that the allegations, although unfounded, have made it difficult for him to get work in the Murchison and Nelson areas.

[49] In all the circumstances I consider Mr Hill should be compensated \$7,000 for humiliation, loss of dignity and injury to his feelings.

**Costs**

[50] Costs are reserved. Mr Hill as the successful party is entitled to a reasonable contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Hill has 28 days within which to file a costs memorandum and Mr Shand has 14 days within which to respond.

[51] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The current daily tariff is \$3,500 per day. The investigation meeting took less than half a day.

Christine Hickey  
Member of the Employment Relations Authority