IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 201
5519037

	BETWEEN	DION MARCUS HOKAI Applicant
	A N D	SHAREMILK LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	R Alspach, Advocate for Applicant J Waugh, Counsel for Respondent
Investigation Meeting:	27 May 2015 at Auckland
Submissions Received:	At the investigation meeting
Date of Oral Indication:	27 May 2015
Date of Determination:	3 July 2015

DETERMINATION OF THE AUTHORITY

A. **Pursuant to s81(3) Holidays Act 2003 I am satisfied that the respondent employer failed to comply with section 81 and that the failure prevented the applicant from bringing an accurate claim.**

B. **Dion Hokai was owed $8,188.81 gross wage arrears at the end of his employment.**

C. **Sharemilk Limited is entitled to deduct from the wage arrears $5,768.11 pursuant to clause 7.7 of the employment agreement.**

D. **Sharemilk Limited is ordered to pay $2,420.70 to Dion Hokai being wage arrears pursuant to s.131 of the Employment Relations Act 2000.**

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Dion Marcus Hokai seeks wage arrears comprising annual leave, underpayments for work on public holidays and alternative days owed. The respondent alleges it is entitled to deduct from wages owing child support paid on his behalf, vehicle repairs, unauthorised purchases and repairs and cleaning to employer provided accommodation.

Facts leading to dispute

[2] On 1 June 2009 Mr Hokai was employed as a farm manager of a dairy farm at 295 Settlement West Road, Tangowahine, Dargaville. The farm managers and owners were Janine and James Smith.

[3] His individual employment agreement provided remuneration as follows:

> *7.1*
>
> *The gross annual salary shall be $40,000/year plus the accommodation allowed at $5,200 ($200/fortnight). Details of this and Performance Bonus are found in Schedule 2. …*
>
> *7.3*
>
> *At termination of this Agreement the Employee will receive their final pay on the day following termination after the inspection of any Employer-provided accommodation.*
>
> *7.4*
>
> *The remuneration will be reviewed annually on or about 31 May each year. In no event will the Employer be obliged to increase the remuneration beyond this as a result of such a review.*

[4] Schedule 2 of the employment agreement set out a performance bonus that *"will be renegotiated annually"* and gave specific criteria for payment. The first criterion was milk quality ensuring each month the milk was "grade free" meaning there were no defects in the milk quality earning demerit points from the purchaser. An annual bonus of $1,200 was paid $100 per month where there are zero demerit points. The second criterion was cow survival rate. 3% deaths were allowed to receive an annual bonus of $2,800 reduced by $400 for each cow death above.

[5] Clause 8 provided for performance appraisals:

> *8. Performance Appraisals*
> *8.1*
> *The Employee agrees to participate fully in any formal performance appraisal programme that will be conducted by the Employer. The Employee also agrees to fully participate in various business strategies formulated by management to enhance the growth of the business through the generation of inquiries, conversion to sales and productivity. This may include the setting of goals for individual employees to help achieve such productivity.*
>
> *8.2*
> *The Employee's performance will be reviewed two monthly but with the first review after four weeks of employment.*

[6] The employment agreement also provided for deductions:

> *7.7*
>
> *In the event that the employee's employment is terminated or the employee resigns, the employee hereby authorises the employer to deduct from the employee's pay whatever monies the employer may be owed under the employment relationship (or otherwise) including sick leave or bereavement leave taken in advance.*

[7] Clause 9.1 provided for reimbursement of *"all reasonable travel, accommodation and other expenses that the Employee incurs in the exercise of duties."*

[8] Clauses 11 and 12 of the employment agreement provided four weeks' annual leave calculated in accordance with the provisions of the Holidays Act 2003 and payment for the work on a public holiday at time and a half and to receive a paid alternative holiday.

[9] On 1 May 2014, Mr Hokai resigned from his position. His last day of work was 31 May 2014.

[10] On 5 November 2014 Mr Hokai filed a statement of problem seeking $38,471.00 gross wages and interest of 6% from 1 June 2014.

[11] On 16 December 2014 the respondent filed a statement of reply. This included a letter dated 12 December 2014 alleging Mr Hokai owed money to it. This comprised child support payments of $2,474.50 plus PAYE, repairs $4,807.50,

unauthorised personal purchases of $9,396.68 and repairs and cleaning of accommodation totalling $2,931.95.

[12] The matter was unable to be resolved at mediation and was set down for a one day hearing in Whangarei.

[13] At the end the hearing I gave an oral indication of my preliminary findings on the law and facts pursuant to s174(b) of the Employment Relations Act 2000. The matter was adjourned for a written determination to issue.

Issues

[14] By way of Minute dated 4 May 2015 and after hearing the evidence, the following issues for determination were identified:

(a) Whether the applicant is owed wage arrears arising from:

- Holiday pay including days he worked which were statutory holidays;
- Child support which was deducted but not paid to Inland Revenue Department;
- Bonus payments in accordance with Schedule 2 of the individual employment agreement?

(b) Whether the respondent has breached its duty of good faith and/or clause 8 of the employment agreement by failing to turn its mind to payment of the performance bonus for the 2010 milking season onwards?

(c) Whether the respondent is entitled to recover from the applicant child support payments of $2,474.50 plus PAYE, repairs $4,807.50, unauthorised personal purchases of $9,396.68 and repairs and cleaning of accommodation totalling $2,931.95?

The Law

[15] Where the Holidays Act 2003 (the Act) applies, at the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.[1]

[16] If employment ends and an entitlement to holidays has arisen, an employee must pay for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—

> (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
>
> (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.[2]

[17] Employers must keep a holiday and leave record that complies with s81 of the Act. This record must include amongst other things:[3]

- the portion of any annual holidays that have been paid out in each entitlement year (if applicable);
- the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable);
- the dates of, and payments for, any public holiday on which the employee worked;
- the number of hours that the employee worked on any public holiday;
- the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable);
- the date on which the employee became entitled to any alternative holiday;
- the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay.

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1 Section 16 Holidays Act 2003.
2 Section 24 Holidays Act 2003.
3 Section 81(hb) to (l) Holidays Act 2003.

[18] If, after hearing the evidence, the Authority is satisfied that the employer failed to comply with section 81 and that the failure prevented the claimant from bringing an accurate claim, the Authority may make a finding to that effect. It may then accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay or leave pay actually paid to the employee and annual holidays and public holidays actually taken by the employee.[4]

[19] There is a substantial conflict of evidence between the parties. This requires express findings of credibility[5] upon evidence given by brief (signed and unsigned) and orally at hearing.

[20] Credibility can be assessed on two bases – the witness personally[6] and the story the witness tells. Some factors relevant to personal credibility are:

(a) Demeanour[7];

(b) Inconsistencies and contradictions of all kinds[8];

(c) Prevarication[9];

(d) Reasons to lie[10]

(e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence[11].

[21] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?[12]

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4 Section 83(3) and (4) Holidays Act 2003.

5 *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6.

6 *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69.

7 *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6.

8 *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252.

9 *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108].

10 See above at [109].

11 See above at [110].

12 See above at [111]; *Corbett* v *National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10.

[22] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.[13]

Is the applicant owed wage arrears arising from Holiday pay including days he worked which were statutory holidays?

[23] No wage record was produced which complied with s131 of the Employment Relations Act 2000. As a result, the wages paid to Mr Hokai each pay period are not documented.

[24] It is accepted there is no holiday and leave record that complies with s81 of the Holidays Act 2003. There is substantial conflict between the parties about holiday or leave taken and/or paid out to Mr Hokai. The respondent accepts Mr Hokai is owed holiday pay totalling $5,211.14. Mr Hokai alleges he is owed substantially more. The absence of a holiday and leave record has prevented Mr Hokai from making an accurate claim.

[25] Pursuant to s81(3) Holidays Act 2003 I am satisfied that the respondent employer failed to comply with section 81 and that the failure prevented the applicant from bringing an accurate claim. In absence of evidence to the contrary I may accept Mr Hokai's evidence about holiday and leave taken or paid.

[26] The respondent has produced gave oral evidence and produced payslips, emails, diary notes, supplier invoices and relief milker invoices it submits shows holidays were taken or paid out.

[27] Further complicating matters have been various agreements between the parties to "pay out" for holidays not taken. One payments was recorded on a payslip. The others were not recorded at all. The payments were made in cash and to third party creditors of Mr Hokai. These remaining payments have had to be recreated from accountant records and examination of the parties.

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[13] *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587. (LC), at 603

[28] Given the piecemeal state of the holiday and leave record, I intend determining firstly what holidays were taken; secondly what payment in lieu of holidays was made and thirdly the final amount of holiday leave owed.

2009/2010

Public Holidays

[29] Mr Hokai gave evidence he would normally work a 6 hour day on the statutory public holidays primarily doing morning and afternoon milkings. During mid-May to July, the cows would dry off and he would only be doing 1.5 hours' work doing general farm work. Queen's Birthday is the only public holiday he would be working 1.5 hours.

[30] Mr Hokai's first day of work fell on the Queen's Birthday holiday. He alleges he worked that afternoon for 1.5 hours. James Smith gave evidence he and his wife milked that day because Mr Hokai was moving into his house and took no active part in the farm. Mr Hokai states he moved in on 31 May 2009.

[31] The evidence about Mr and Mrs Smith working on Queen's Birthday was raised for the first time during hearing. There is no corroborating evidence. This evidence was not put to Mr Hokai in cross-examination to comment upon. There is evidence produced by the respondent contradicting Mr and Mrs Smith milked that day. A schedule headed "Dions Holidays" attached to Mr Smith's letter dated 11 July 2014 notes there were no cows on the property on Queens Birthday 2009. There would have been little if any need for the Smiths to milk that day.

[32] The payslip for this period records payment for 1 June for 6 hours at the ordinary hourly rate[14] but does not otherwise identify the payment was for a public holiday. Given the absence of a leave record and other evidence, I set the respondent's evidence aside and prefer Mr Hokai's evidence. Accordingly, Mr Hokai is owed an additional 2.25 hours but no alternative day.

[33] It is accepted Mr Hokai worked on Labour Day (26 October 2009) Christmas Day and Boxing Day (25 and 26 December 2009), New Year's Day and the following day (1 and 2 January 2010), Auckland Anniversary Day (1 February 2010) and

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[14] Dion Hokai Payslip period ended 10/07/09 annexed Statement in Reply received 15 December 2014.

Waitangi Day (6 February 2010), Good Friday (2 April 2010), Easter Monday (5 April 2010) and Anzac Day (Sunday, 25 April 2010). There are 10 public holidays Mr Hokai worked.

[34] From my perusal of the payslips, it appears he was paid at the ordinary time for those days. He is therefore entitled to payment of 2.25 hours for Queens Birthday 2009 but no alternate holiday, an extra 3 hours per day for 10 public holidays and 10 alternative paid holidays in lieu.

Annual Leave

[35] It is accepted that Mr Hokai took five days' leave due to the birth of his daughter, Katy, in July 2009. This is anticipated annual leave. His annual leave entitlement did not fall due until 1 June 2010.

[36] Mr Hokai denies he travelled as alleged by the respondent to Hamilton for five days' leave in April 2010. There is no evidence other than Mr Smith's belief this occurred because Mr Hokai talked about travelling to Hamilton to visit his ex-partner. Mr Hokai denied he went to Hamilton because his ex-partner had taken out a protection order against him and any contact would have incurred a criminal sanction. There is no evidence that a relief milker was employed for a five day period. No deduction will be made for this leave. Mr Hokai's evidence is preferred given the absence of the holiday and leave record or other evidence.

[37] Mr Hokai would not have been due any annual leave during this period. Therefore his annual leave balance would have been 5 days anticipated leave to be deducted off his annual leave when accrued at the anniversary of the start of his employment.

2010/2011

Public Holidays

[38] It is accepted he worked Queen's Birthday (7 June 2010), Labour Day (25 October 2010), Christmas Day and Boxing Day (25 and 26 December 2010), New Year's Day and the day after (1 and 2 January 2011), Auckland Anniversary Day (31 January 2011), Waitangi Day (6 February 2011), Good Friday (22 April 2011) and Easter Monday and Anzac Day (25 April 2011). From my perusal of the payslips,

it appears he was paid at the ordinary time for those days. He is therefore entitled to payment of 2.25 hours for Queens Birthday 2010 but no alternative holiday, an extra 3 hours per day for 9 public holidays (27 hours) and 9 alternative paid holidays in lieu.

Annual Leave

[39] Taking into account his 20 days leave accrued after 12 months and deducting his anticipated leave of 5 days, his annual leave balance at 1 June 2010 would have been 15 days.

[40] On 9 December 2010 it is alleged Mr Hokai took two days' annual leave because this is recorded in a payslip. Similarly the respondent further alleges that on 3 February 2011 six days' annual leave was taken because it is recorded in the payslips. The payslips had been recreated from its accountants MYOB programme based upon information they have recently supplied. They do not cover the entire period of his employment. Mr Hokai said he never received any payslips during his employment. The first time he saw this payslip was during the exchange of evidence prior to hearing. The payslips are not necessarily an accurate reflection of annual leave taken. There is again no evidence of any relief milker being employed during these periods. A family member may have covered milking during this period as suggested by Mr Smith but there is no evidence supporting this occurred other than mere submission.

[41] Mr Hokai said there was no reason for him to take annual leave. Mr Smith could also give no reason as to why Mr Hokai required leave either. Mr Hokai's evidence is preferred given the absence of the holiday and leave record or other evidence. No deduction shall be made.

[42] He accepts that on 4 May 2011 that he had one day's annual leave. This is evidenced by an invoice from Final Fuels showing that he was at a Mobil station in Eden Park, Auckland. He believes he was visiting his children at the time. Accordingly, one day's leave will be deducted.

[43] As at 31 May 2011 I determine his annual leave entitlement would have been 14 days.

2011/2012

Public Holidays

[44] There is no dispute that Mr Hokai worked on Queen's Birthday (6 June 2011), Labour Day (24 October 2011), Auckland Anniversary (30 January 2012), Waitangi Day (6 February 2012), Good Friday (6 April 2012), Easter Monday (9 April 2012), and Anzac Day (25 April 2012). From my perusal of the payslips, it appears he was paid at the ordinary time for those days. He is therefore entitled to payment of 2.25 hours for Queens Birthday 2011 but no alternative holiday, an extra 3 hours per day for 6 public holidays (18 hours) and 6 alternative paid holidays in lieu.

[45] There is evidence during the Christmas period of 2012 that Mr Hokai was paid at the ordinary time rate for the public holidays and relief workers were obtained. Mr Hokai accepts that a relief worker, Emma Smith, worked during the Christmas and New Year period for 2011/2012. Accordingly, I find Mr Hokai did not work on 25 and 26 December 2011 and 1 and 2 January 2012.

Annual Leave

[46] Taking into account outstanding leave from the previous year and 20 days leave accrued after 12 months, as at 1 June 2011 Mr Hokai's annual leave balance was 34 days.

[47] The respondent relied upon a payslips for the period ended 22 December 2012 and 19 January 2012 to show 3 days annual leave was taken. Mr Hokai denies he took annual leave on 22 December 2011 and 19 January 2012. There is no other corroborating evidence to show the leave was taken. Given my previous finding about the accuracy of these payslips and the absence of a leave record, I prefer the evidence of Mr Hokai and no further annual leave will be deducted.

[48] The respondent alleges Mr Hokai took 5 day's leave on 21 January 2012 for his son's school camp. Mr Hokai denies this. There is no corresponding payslip or record of a relief milker being engaged. I accept Mr Hokai's evidence that the school term would not have started by 21 January 2012 and it is unlikely he would not take his son camping because it is an activity he does not enjoy. Given the lack of

evidence and holiday and leave record I prefer the evidence of Mr Hokai and no deduction will be made.

[49] Mr Hokai accepts on 16 February 2012 he took a one day bus trip with his son to the Kai Iwi Lakes. Accordingly, one day's annual leave is to be deducted.

[50] As at 31 May 2012 I determine his annual leave entitlement would have been 33 days.

2012/2013

Public Holidays

[51] It is accepted he worked Queen's Birthday (4 June 2012), Labour Day (22 October 2012), New Year's Day and the day after (1 and 2 January 2013), Auckland Anniversary (28 January 2013), Waitangi Day (6 February 2013), Good Friday (29 March 2013), Easter Monday (1 April 2013) and Anzac Day (25 April 2013).

[52] Mr Hokai accepts that Kate and Steve Smith milked on Christmas Day and the morning of Boxing Day 2013. He submits that he milked the afternoon of Boxing Day 2013 (3 hours). No evidence was produced to show Kate and Steve Smith did the afternoon milking. The Schedule attached to Mr Smith's letter dated 11 July 2014 is insufficient. There is no corresponding payslip for this period but Mr Hokai does not dispute that he would have been paid at the ordinary rate for his work. He is therefore entitled to a further payment of 1.5 hours for Boxing day but no alternative holiday.

[53] From my perusal of the payslips, it appears he was paid at the ordinary time rate for those days. He is therefore entitled to a further payment of 4.5 hours for Queens Birthday 2012 and Boxing Day 2013 but no alternative holiday, 3 hours for eight public holidays (24 hours) and 8 alternative paid holidays in lieu.

Annual Leave

[54] Taking into account outstanding leave from the previous year and 20 days leave accrued after 12 months, as at 1 June 2012 Mr Hokai's annual leave balance was 53 days.

[55] Mr Hokai denies he took one day's annual on 16 November 2012. There is no corroborating evidence. In the absence of a holiday and leave record or other evidence, Mr Hokai's evidence is preferred.

[56] On 30 November 2012, it is alleged that Mr Hokai took one day's annual leave. Mr Hokai disputes this. There is no other corroborating evidence and in the absence of a holiday and leave record or other evidence, Mr Hokai's evidence is preferred.

[57] On 17 December 2012, it is alleged Mr Hokai took five days' annual leave. There is an invoice from V Chant showing she worked 60 hours during this period. I accept there was no need for Mr Hokai to work in the circumstances and 5 days' annual leave will be deducted.

[58] There is a dispute whether Mr Hokai took five days' annual leave from 21 January 2013. There is an invoice from T & M Tiller dated 2 February 2013 for relief milking on 21 and 22 January 2013 for 18 hours work. This appears to relate to the 6 hour milkings over a three day period. I accept Mr and Mrs Smith or their family covered the remaining two days milkings. Five days' annual leave shall be deducted.

[59] As at 31 May 2013 I determine his annual leave entitlement would have been 43 days.

2013/2014

Public Holidays

[60] It is accepted Mr Hokai worked Queen's Birthday (3 June 2013), Labour Day (28 October 2013), Christmas and New Year period for 2013/2014. From my perusal of the payslips, it appears he was paid at the ordinary time for those days. He is entitled to a further payment of 2.25 hours for Queen's Birthday 2013 but no alternative holiday, 3 hours for three public holidays (9 hours) and three alternative paid holidays in lieu.

Annual Leave

[61] Taking into account outstanding leave from the previous year and 20 days leave accrued after 12 months, as at 1 June 2013 Mr Hokai's annual leave balance was 63 days.

[62] Mr Hokai accepts that on 8 September 2013 he took a day off for his birthday. Accordingly, 1 day will be deducted.

[63] It is alleged that Mr Hokai took six days' annual leave between 6 and 12 January 2014. Mr Hokai accepts five days' annual leave was taken. In the absence of a holiday and leave record and other evidence, Mr Hokai's evidence is preferred and 5 days' annual leave will be deducted.

[64] It is alleged that Mr Hokai took 14 days' annual leave on 28 February 2014. However the evidence shows Mr Hokai took 14 days' leave from 1-16 March. An invoice from T & M Tiller shows they worked that period of time and billed the respondent for it. Accordingly, 14 days annual leave will be deducted.

[65] It is alleged that Mr Hokai took leave of 4.5 days from 23 March 2014 and one day's annual leave alleged to have been taken on 6 April 2014. Trevor and Melody Tiller are alleged to have covered the 23 March weekend milking but there is no corresponding invoice. There is no evidence of a relief milker for 6 April. In the circumstances and in the absence of a leave record or other evidence, Mr Hokai's evidence is preferred and no further deduction for that leave will be given.

[66] As at 31 May 2014 I determine his annual leave entitlement would have been 43 days.

Payments in lieu of holidays

[67] At the time of termination, Mr Hokai's gross annual salary was $51,871. Accordingly his gross ordinary weekly pay was $997.51. His ordinary hourly rate was $16.63.[15]

[15] Management Report D Hokai dated 18/05/2014 showed annual salary of $51,871. Dividing this by 52 weeks yields an average weekly salary of $997.51. Dividing the average salary by his weekly contracted 60 hours of work gives his hourly rate $16.63.

[68] It is agreed Mr Hokai received $6,101.11 in payments for holidays not taken calculated as follows:

- $587.60 on 8 March 2010 evidenced by a payslip that records payment of one day at $587.60 for *"time in lieu"*;
- During the season of 2010/2011 he was paid out six days' annual leave which equates to one working week or $997.51;
- $2,121.00 on 23 November 2012 evidenced by bank statements showing direct credits to various debtors of Mr Hokai and payment of cash;
- $400.00 on 6 November 2012;
- 12 days' cashed up annual leave on 10 December 2013 totalling $1,995.00.

Holidays owed

[69] From his payslips he worked a 6 days per week. I have determined Mr Hokai had an annual leave entitlement was 43 days or 7.2 weeks multiplied by the ordinary weekly gross pay was $997.51 equates to $6,284.31annual leave owed.

[70] He was also owed public holiday hours underpaid and alternative holidays as follows:

Date	**Hours underpaid**	**Alternative holidays**
2009/2010	32.25	10
2010/2011	29.25	9
2011/2012	20.25	6
2012/2013	28.50	8
2013/2014	11.25	3
TOTAL	121.50	36

[71] His hourly rate at the end of his employment was $16.63. Accordingly he is owed $2,020.55 for the hours underpaid. Dividing the 36 alternative holidays by 6 days yields 6 weeks multiplied by $997.51 equates to $5,985.06.

[72] Taking the total amount of leave and holidays I have determined as owed ($14,289.92) and deducting the accepted payments made in lieu ($6,101.11), I determine Mr Hokai is owed $8,188.81.

[73] Dion Hokai was owed $8,188.81 gross wage arrears at the end of his employment.

Is the applicant owed wage arrears from child support which was deducted but not paid to Inland Revenue Department?

[74] There is no evidence from Inland Revenue of outstanding child support for the period of Mr Hokai's employment. There is no evidence the respondent continues to retain child support payments deducted from his salary. In the circumstances I am not convinced on the balance of probabilities that there has been any failure to pay child support as alleged. This claim is dismissed.

Is the applicant owed wage arrears from bonus payments in accordance with Schedule 2 of the individual employment agreement?

Whether the respondent has breached its duty of good faith and/or clause 8 of the employment agreement by failing to turn its mind to payment of the performance bonus for the 2010 milking season onwards?

[75] Given these issues are intertwined I have determined to consider both matters together for the sake of expediency.

[76] The employment agreement provides for remuneration includes payment of a bonus. The respondent submits the words in the Second Schedule do not require it to consider payment of a bonus annually and even if it did, Mr Hokai's poor performance would not have resulted in any bonus being awarded.

[77] Schedule 2 states a performance bonus *"will be available for the 2009/2010 season*" and the gross amount is $4,000. The bonus will be calculated *"once performance data is available, and paid as soon as practical. Any performance bonus will be renegotiated annually."*

[78] Where there is a dispute about the interpretation and application of an individual employment agreement, the necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.[16]

[79] Where the contractual intention is clear from the words used, the Authority must give effect to it.[17]

[80] It is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.[18]

[81] To *"negotiate"* is to *"confer with others in order to reach a compromise or agreement … to arrange an affair or bring about a result (negotiated agreement)."*[19] The phrase *"re-negotiated annually"* must imply the same activity on an annual basis. It cannot mean that one party may unilaterally set aside part of a contractual term to pay a bonus on certain criteria being met. There would have to be an express term to this effect. There is not. Further if a compromise is not reached, it appears consistent with the meaning of negotiate and re-negotiate that the same criteria agreed and set out in Schedule 2 would apply to payment of an annual bonus in subsequent years.

[82] The respondent accepted in the first year of employment a bonus of $2,779.00 was paid by way of two payments of $1,279.00 on 5 July 2010 and $1,500.00 on 27 August 2010.[20]

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16 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

17 *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566 -567

18 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23].

19 *The New Zealand Oxford Dictionary* Oxford University Press 2005.

20 Brief JA Smith sworn 27 May 2015 at para 15.

[83] The respondent alleged it undertook formal reviews each month and not less than 5 to 6 each year. The review followed a process of discussing how Mr Hokai was operating in terms of farming requirements agreed and an assessment of Mr Hokai's "overall stability" given his personal issues. He would ask Mr Hokai if there was anything he wished to discuss with him. It is accepted Mr Hokai never raised the issue of payment of bonuses during his employment. Mr Hokai denies there were formal reviews. He accepts there were occasional chats around the cow shed but nothing more than that.

[84] The decision not to pay a bonus must be exercised in a fair and reasonable way.[21] I doubt formal performance reviews occurred. There is no corroborating evidence. Mr Smith's evidence of these reviews gives no dates or times or detail of what was discussed. I expect they were as Mr Hokai concedes 'occasional chats.'

[85] I do not accept Mr Smith evidence he micro managed Mr Hokai's performance as a result of these performance reviews. He lived and worked a farm at Pouto which was a round trip of 120 kilometres away[22] I doubt any micro-management occurred as alleged. Given this poor performance is alleged to have continued until his dismissal some 4 years later, I wonder why he did not consider disciplinary action instead.

[86] Whatever the concerns resulting in the respondent's unwillingness to pay a bonus Mr Hokai was never told about them. There was no evidence non-payment of the bonus was raised with Mr Hokai at all.

[87] In my view, the respondent's decision not to pay a bonus was exercised in an unfair and unreasonable way. This was a breach of the employment contract.

[88] An award of damages to place Mr Hokai back into the position he would have been in if not for the breach would usually be warranted. However I have little evidence Mr Hokai's performance would have met the criteria for payment of a bonus in Schedule 2. There is evidence he may not have. I am not convinced on the balance of probabilities that Mr Hokai would have met the criteria for payment of a bonus during subsequent years and suffered any damage I am required to compensate him for.

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21 *Jackson v Panda Catering Limited* [2000] 1 ERNZ 292, 300.

22 Brief J Smith para.24

[89] This also not an appropriate case for payment of a penalty. There was no wilful refusal to pay and Mr Hokai did not pursue payment of his bonus until after termination.

Whether the respondent is entitled to recover from the applicant child support payments of $2,474.50 plus PAYE, repairs $4,807.50, unauthorised personal purchases of $9,396.68 and repairs and cleaning of accommodation totalling $2,931.95?

[90] It is common ground the respondent had the right to make deductions from wages owed pursuant to clause 7.7 of the employment agreement for "*whatever monies the employer may be owed under the employment relationship (or otherwise)*."

[91] The payslips record deductions for child support of $49.15 being deducted each fortnight between 14 July 2013 and 30 May 2014.[23] A child support deduction notice was issued to the respondent on 3 January 2013 for the deduction of $49.15 from the applicant's pay.[24] The legal consequence of the failure to make deductions between 3 January and 14 July 2013 is dealt with below.

[92] A child support deduction notice was issued to the respondent on 27 June 2012 for the deduction of $361.20 from the applicants pay.[25] The payslips for this period to January 2013 do not record any child support deduction being made. Upon receipt of the deduction notice, the respondent was required to make the deductions and pay these to the Commissioner of Inland Revenue.

[93] Section 168 of the Child Support Act 1991 provides where a payer such as the respondent fails to make a deduction in accordance with their obligations under the Child Support Act 1991, such as following receipt of a Deduction Notice, the amount in respect of which default has been made is a debt payable by the respondent to the Commissioner of Inland Revenue. Any payments the respondent made for child support they failed to deduct from his salary is therefore not a debt recoverable from Mr Hokai. This claim is dismissed.

[94] The alleged repairs occurred in 2011 and 2012. The un-authorised purchases occurred from 2010 to 2013. Reimbursement of these was not sought at the time. It

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23 Payslips 14 July 2013 to 11 June 2014 annexed to Statement of Reply dated 16 December 2014.

24 Inland Revenue Child Support Deduction Notice dated 3 January 2013.

25 Inland Revenue Child Support Deduction Notice dated 27 June 2012.

is only since these proceedings were filed that the respondent has taken action. This has resulted in evidential difficulties around proof the debts were improperly incurred as alleged.

[95] I accept Mr Hokai was not entitled to charge the respondent for repairs to his own motor vehicles. The respondent is entitled to deduct $4,807.50 for those repairs given they were incurred through access Mr Hokai had to the respondent's garage repair accounts during his employment.

[96] Mr Hokai alleged there was an agreement with Mr Smith in 2010 that he could incur expenses at the time because he was working non-stop. He was allowed to use the account for purchasing washing powder, coffee and pig tucker. He accepts the purchases of child's gumboots ($21.19)[26], soft drinks ($47.26)[27] and dog tucker ($892.13)[28] were not part of the agreement. It was accepted the respondent would be entitled to deduct $960.61 because this debt was incurred through access Mr Hokai had to the respondent's accounts during his employment.

[97] He denies the fuel purchases were personal because they related to trips to town to pick up items for the farm. I accept his evidence about the fuel and the agreement about purchasing some personal grocery items using the Farmlands and RD1 account. While the respondent alleged some of the purchases may not have been fuel that was mere speculation. The remainder of this claim is dismissed.

[98] I do not accept Mr Hokai should be responsible for the repairs to the accommodation. He was paid an accommodation allowance as part of his employment agreement of $200 per week. He was not provided with the house alleged to have required repair. This is not a matter arising from the employment relationship. There is no tenancy agreement regarding what state it was to be left in at the end of the tenancy or his obligations to clean or otherwise repair the property. There is no evidence the bench top and toilet required the repairs or extent of repairs now alleged. I have copies of invoices but little else.

[99] Accordingly I determine Sharemilk Limited is entitled to deduct from the wage arrears $5,768.11 pursuant to clause 7.7 of the employment agreement.

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[26] Farmlands Tax Invoice July 11 annexed to Statement in Reply.

[27] Farmlands Tax Invoice 29 February 12 and RD1 Tax Invoices dated 7 Mau 2012 to 28 February 2014 annexed to Statement in Reply.

[28] Farmlands Tax Invoices dated 30 November 2012 to 31 January 2013 and RD Tax Invoices dated 31 March 2013 to 31 January 2014.

[100] Sharemilk Limited is ordered to pay $2,420.70 to Dion Hokai being wage arrears pursuant to s.131 of the Employment Relations Act 2000.

[101] I decline to award interest given there was a genuine dispute about the public holidays worked, annual leave taken and deductions for unauthorised expenses incurred.

[102] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

[103] A party seeking costs must ensure they file copies of their actual invoices including a breakdown of fees incurred for mediation, preparation and attendance at hearing. If more than one counsel's fees are sought to be recovered, justification for the recovery of both counsels' fees and separation of the work undertaken by each counsel is required.

[104] Parties must provide justification for costs sought in excess of the Authority's daily notional tariff (currently $3,500).

[105] Failure to provide adequate information in support of a costs award may result in the refusal of a costs application.

T G Tetitaha
Member of the Employment Relations Authority