

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Frank Milton Kimber (Applicant)
AND North Canterbury Salmon Farm Limited (Respondent)
REPRESENTATIVES Dennis Standring, Counsel for Applicant
Brian Nathan, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 8 August 2005
9 August 2005
DATE OF DETERMINATION 30 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Kimber) was employed by the respondent, North Canterbury Salmon Farm Limited (North Canterbury Salmon) from 14 March 1990 until 8 August 2003 as a salmon farm manager.

[2] Mr Kimber alleges that, at the end of his employment relationship with North Canterbury Salmon, he was owed wages, specifically overtime, unpaid statutory holidays, and unpaid annual holidays.

[3] The applicant also claims a breach of section 130 of the Employment Relations Act 2000 in that it is alleged that North Canterbury Salmon failed to keep a wages and time record in accordance with that section of the Act.

[4] North Canterbury Salmon for its part denies the wage arrears claim and denies there has been a breach of section 130 of the Act.

[5] Mr Kimber was engaged to manage the North Canterbury Salmon Farm owned by North Canterbury Salmon by Mr Richard Steele who was acting on behalf of the owners of North Canterbury Salmon. I note that at the time that Mr Kimber was engaged by North Canterbury Salmon that company had a different name but nothing turns on that now.

[6] Before employment matters could be concluded, Mr Richard Steele referred Mr Kimber to his father, Mr Rodney Steele who, according to Mr Kimber, was always the driving force behind North Canterbury Salmon during his employment there.

[7] Mr Kimber's evidence is that Mr Rodney Steele offered him a salary of \$38,000 per annum and that he and Mr Rodney Steele talked about overtime. Mr Kimber's evidence was that Mr Rodney Steele knew about the amount of overtime that would need to be worked on the farm. Mr Kimber said that he was not all that happy with the salary offered but that with the overtime which he claimed had been agreed with Mr Rodney Steele, "it would be okay".

[8] It is important to note that Mr Rodney Steele has now died. While he was alive at the time that the employment relationship problem was first notified to the employer, he had passed away by the time the Authority conducted its investigation meeting and in consequence, had no opportunity to give evidence to the Authority. Notwithstanding that, it seems clear that Mr Rodney Steele would have been able to advise North Canterbury Salmon of his view of Mr Kimber's claim before his passing even although he was not able to give evidence in person.

[9] Mr Kimber said that he accepted the offer of employment proffered by Mr Rodney Steele notwithstanding that there was no written contract of employment. He said that at first each fortnight, he filed a time sheet identifying his overtime. It is important to note at this point that the remote nature of the workplace in North Canterbury meant that most of the administration was done in Christchurch where Mr Rodney Steele was based. At the relevant times, North Canterbury Salmon's administration, marketing and general management came from Steele Bro. Ltd in which Mr Rodney Steele and (to a much lesser extent) Mr Richard Steele were involved.

[10] Mr Kimber said that when he filed these time sheets, he did it by facsimile and he faxed these documents to Steele Bro. Ltd marked for the attention of Mr Rodney Steele.

[11] He says that Mr Rodney Steele told him reasonably smartly that he did not need to do this and so eventually he stopped completing the time sheets.

[12] Mr Kimber then noticed that he was not being paid the overtime and so he says he raised it with Mr Rodney Steele. He says Mr Rodney Steele told him that he (Mr Rodney Steele) knew that Mr Kimber was doing the overtime and that he "would be looked after".

[13] Mr Kimber says that he raised the matter of the unpaid overtime "three to four times, over time" with Mr Rodney Steele.

[14] Mr Kimber says that he thought at that time about seeing a lawyer, but that he was anxious about Mr Rodney Steele's response to that as he was an old fashioned type of employer.

[15] Mr Kimber says that he did raise the matter with Mr Richard Steele although Mr Richard Steele cannot recall that and both Mr Richard Steele and Mr Kimber are clear that Mr Richard Steele's firm view was that no overtime was payable. That fact in itself is significant for reasons which we will come to in a moment.

[16] Mr Kimber's evidence is that about six months into the employment relationship, he had told Mr Rodney Steele that the job was larger than he had expected and that he wanted a written agreement. He says that he was sent to Mr Richard Steele who produced a written agreement. Mr Kimber says that this agreement included paid overtime and that he signed it and left one copy with Mr Richard Steele.

[17] That agreement (assuming that Mr Kimber's recollection of it existing is correct) has disappeared and there are no copies of it available to the Authority.

[18] However, in 2000, Mr Kimber's evidence is that Mr Richard Steele posted to him a draft employment agreement which Mr Kimber says was in broadly similar terms to the earlier agreement. In particular, the provision for there to be paid overtime was included.

[19] However, this new agreement contained a restraint of trade provision which Mr Kimber did not care for and he arranged to have that restraint of trade provision changed and then signed the agreement.

[20] A copy of this so-called "second" agreement was produced at the investigation meeting and it contains a number of important elements. These are:

- (a) The agreement is expressed to be made pursuant to the Employment Relations Act although that Act came into force on 2 October 2000 and the agreement is dated 1 October 2000.
- (b) As well as being dated, the agreement is signed both by Mr Kimber and Mr Richard Steele – both parties gave evidence at the investigation meeting that the signatures on the document on the Authority's file were indeed their signatures.
- (c) Clause 4 of the agreement is in these terms:

The employee shall be paid \$55,000 pa for a basic 8 hour day.

- (d) Clause 6(a), (b) and (c) is in these terms:

(a) *The ordinary hours of work shall be between 8 am and 5 pm Monday to Friday with the basic hours being 8 hours.*

(b) *Hours worked outside the basic hours will be paid at an overtime rate of time and a half.*

(c) *Emergency call-outs outside the ordinary hours of work will be paid at an overtime rate of time and a half. For any night call-outs the employee must be accompanied.*

- (e) Clause 7(c)(i) is in these terms:

Public holidays will be taken pursuant to the Holidays Act 1981 provided that an employee may be required to work on such a day and will in such circumstances be provided with a day in lieu.

- (f) Clause 11 on restraint of trade has been deleted and the initials of Mr Kimber appear beside that deletion which is in the form of a straight diagonal line running from the bottom left corner to the top right corner of the clause.

[21] On the face of it, this is a concluded employment agreement between the parties to this employment relationship problem. Furthermore, it appears that this concluded employment agreement contains provisions which cover the areas in dispute between the parties.

[22] In essence, Mr Kimber's claim is a claim to enforce the relevant provisions of this employment agreement on the footing that this agreement has applied since 1 October 2000 and that beyond that, (insofar as going beyond that is possible in terms of the six year limitation on wages

claims) the agreement is sufficiently similar to be persuasive evidence of the terms of the earlier collective-employment agreement.

[23] Conversely, North Canterbury Salmon say that whatever this agreement is, it is not an agreement covering the terms and conditions of employment of Mr Kimber or that if it is, they seek rectification of the agreement so as to remove the effect of the provisions on which Mr Kimber seeks to rely. They say in effect that the company never agreed to pay, for instance, overtime to Mr Kimber and the only evidence there is of that alleged agreement is Mr Kimber's own evidence to that effect, Mr Rodney Steele having died before it was possible for him to give any evidence.

[24] Mr Kimber's evidence was that he regularly raised the issue of the non-payment of his overtime. In addition to speaking with Mr Rodney Steele and Mr Richard Steele which I have already referred to, he says that he also spoke with various other officers of the company including he says "with the CEOs who came and went if I could get access to them". By way of example he says that he raised the matter with Nigel Stratford who was the Managing Director of the processing factory. Mr Stratford allegedly said that he would look into it and get back to Mr Kimber, but he did not. Mr Kimber's evidence is that when his dispute with the company first arose, Mr Kimber spoke with Mr Stratford and Mr Stratford allegedly said that he remembered Mr Kimber raising the matter with him. However more recently, Mr Stratford declined to get involved in the dispute between Mr Kimber and North Canterbury Salmon.

[25] Both parties accepted that Mr Kimber worked more than 40 hours per week on average. Mr Kimber's evidence was that he worked an average of around 52 to 53 hours a week although there was some seasonal variation because he indicated that in mid-winter he was doing almost no overtime at all.

[26] Mr Richard Steele for North Canterbury Salmon accepted that the role was not an 8 to 5 situation and in particular accepted that weekend work was required.

[27] Colin Knotley an independent expert on remuneration who gave evidence for North Canterbury Salmon thought that the hours suggested as necessary by Mr Kimber were the hours that he would expect for a person doing the sort of work that Mr Kimber was engaged to do.

[28] While clearly there was a consensus then about the need for additional work beyond 40 hours per week, there was no consensus that that necessarily flowed into payment for that additional work at overtime rates. North Canterbury Salmon argued that Mr Kimber was paid a competitive salary, which Mr Knotley confirmed from his stance as an independent expert on remuneration strategy, and North Canterbury Salmon expected that Mr Kimber would perform the duties required of the role without additional remuneration.

[29] For his part, Mr Kimber said that he relied upon the understanding that he thought he had with Mr Rodney Steele, the relevant provision in the initial employment agreement (which has disappeared) and a like provision in the 1 October 2000 employment agreement. North Canterbury Salmon denies the existence of the earlier agreement and denies that the 2000 agreement accurately reflects the intention of the parties. In answer to a question from me, Mr Richard Steele said in his evidence:

I can't categorically state that the agreement (he is referring to the 2000 agreement) was not entered into but it was inconsistent with my own view.

Issues

[30] The first issue and perhaps the most fundamental for determination is whether the 2000 employment agreement accurately reflects the intention of the parties.

[31] The second issue is whether the parties have behaved consistently in reliance on the 2000 agreement or not.

[32] The third question is what is the industry position and how does that help in determining the issues in contention here.

[33] The fourth issue is whether there has been a failure on the part of either party to maintain proper records.

[34] The fifth issue is the question whether the applicant has appropriately quantified his claim.

[35] The sixth issue is whether there is a difference between the claim for overtime and the claim for unpaid holiday leave.

The employment agreement

[36] Clearly there was an understanding between the parties when Mr Kimber was first employed. There were discussions between Mr Kimber and both Mr Richard Steele and Mr Rodney Steele and Mr Kimber's evidence is that those early discussions culminated in an initial written employment agreement which he thinks was executed about six months into the employment relationship. That would mean this initial agreement would have been dated around the middle of September 1990.

[37] North Canterbury Salmon denies the existence of this initial agreement. Their evidence was that Mr Rodney Steele would usually do things verbally and that it was highly unlikely that there was an initial written agreement. Certainly if there was, it no longer exists. Neither party could produce a copy to the Authority.

[38] Whether the initial understandings between the parties were reduced to writing in September 1990 or thereabouts is not capable of being accurately discerned. Plainly there was an employment relationship and there were agreed terms and conditions of employment whether they were written down or not.

[39] Critically, Mr Kimber says that the initial understandings included payment of overtime at time and a half.

[40] It is common ground that there was a written agreement between the parties dated 1 October 2000. This agreement provided for a salary increase for Mr Kimber from the level of salary he had previously enjoyed. It contained the provisions which I refer to earlier in this determination including, in particular, reference to the payment for overtime.

[41] North Canterbury Salmon simply says that the reference to overtime in the agreement is a mistake, that Mr Kimber had always been paid a salary on the footing that any hours beyond 40 per week would be subsumed within the salary payment and not remunerated separately. For his part, as I mentioned above, Mr Kimber alleges that he would not have agreed to work for the company in

the first instance if Mr Rodney Steele had not told him that he would be paid overtime and he sought to have this alleged understanding continue and was pleased that it was in fact included in the 2000 agreement.

[42] Whatever the 2000 agreement (and/or its predecessor, if it existed,) provided, it is common ground that Mr Kimber was never paid overtime although his evidence, which is denied by North Canterbury Salmon is that in the early part of the employment relationship, by his admission for a relatively short period, he did claim overtime.

[43] North Canterbury Salmon invites me to rectify the 2000 agreement on the basis that there was never any intention to treat Mr Kimber as anything other than a salaried employee and therefore the provision of overtime in the agreement is simply a mistake. Rectification on that basis, on the evidence is clearly unilateral and unsurprisingly, the case law suggests one should only rectify in those circumstances with considerable caution. It is plain that there is no common mistake in this situation. Here, the employer says this is a salary relationship and the 2000 agreement is simply mistaken, while Mr Kimber says that the 2000 agreement with its provision of overtime is the very basis on which he accepted employment in the first place.

[44] This is an issue of no little difficulty but is central to the determination of this employment relationship problem between these parties. I propose to consider the parties' behaviour and the other issues I have identified for consideration before returning to this question.

The parties' behaviour

[45] The evidence supports the conclusion that North Canterbury Salmon always behaved as if this employment relationship was a straightforward salary situation without an overtime component. No records were kept (or sought from the applicant) of a time keeping nature. North Canterbury Salmon regarded Mr Kimber as a manager and clearly gave him a significant measure of autonomy.

[46] Mr Kimber worked at the salmon farm which was remote from the directorate of the company and its chief executive officer and he was clearly trusted to run the salmon farm including running basic personnel administration.

[47] The evidence was that Mr Kimber kept a leave record for the staff who worked at the salmon farm (presumably including himself) and that he signed off the time sheets submitted by the staff who reported to him before forwarding them on by facsimile to the central office in Christchurch.

[48] Mr Kimber was not subject to day to day supervision or scrutiny because of the level of trust that existed between him and North Canterbury Salmon and presumably also because he was considered to be a manager capable of running his own enterprise and managing his own time.

[49] Mr Kimber, for his part, says that the reason that he accepted the position when it was offered was, at least in part, because of his belief that there was an overtime component. He says that he submitted time sheets initially, marked them for the attention of Mr Rodney Steele and continued to do that until Mr Rodney Steele told him to stop doing it.

[50] Mr Kimber says that when he realised that he was not receiving the overtime payment which he thought that he was entitled to and had been agreed to, he raised it with Mr Rodney Steele who said something to the effect that the employer would *look after Mr Kimber*.

[51] However, despite Mr Kimber's contention that he raised this matter regularly with Mr Steele, and more occasionally with other people in the company, it is clear on the facts that overtime payments were never made.

[52] That raises the question in my mind as to how Mr Kimber could possibly believe that he had understood the proposition correctly when he thought it was agreed that he would be paid overtime for time over 40 hours. The factual position is that at no stage during the 13 year employment relationship was overtime paid to Mr Kimber. And yet the evidence that he advances about what he did about that (which on his evidence was a matter that was important to him) is pretty sketchy.

[53] He says that he spoke regularly to Mr Rodney Steele about it, but Mr Rodney Steele is dead and cannot confirm that. Mr Kimber says that he spoke to Mr Richard Steele and that Mr Richard Steele said that he was not entitled to overtime payments, a position absolutely consistent with Mr Richard Steele's own evidence given before the Authority.

[54] Mr Kimber says that he spoke to various other company officers including a succession of chief executive officers but the only one he mentions by name allegedly refused to give evidence on his behalf.

[55] Mr Kenneth Ross Bain gave evidence for North Canterbury Salmon. He said that during the period 1989 to 2000 he was the company accountant. He said that at no time did Mr Kimber ever raise with him payment for overtime work.

[56] John Grant is a director of Steele Bro. (North Canterbury Salmon's largest shareholder) and was chief financial controller for all the companies in the group (including North Canterbury Salmon) on and from 1985.

[57] Mr Grant's evidence was that he had worked closely with Mr Rodney Steele both in relation to his business affairs and in relation to his private trust affairs.

[58] Mr Grant said that despite working with Mr Kimber on a regular basis throughout the period that Mr Kimber was employed by North Canterbury Salmon, and despite "numerous" conversations with Mr Kimber over the years, Mr Kimber had never raised with him any concern about not being paid overtime.

[59] Further, Mr Grant said that Mr Rodney Steele never raised the issue with him either. Nor did Mr Rodney Steele say that Mr Kimber had raised the issue with him.

[60] Despite Mr Kimber's contention that he had filed claims early on in his employment relationship to be paid overtime, Mr Grant also refutes that. His evidence is unequivocal that overtime was never paid to Mr Kimber and almost as unequivocal that no claim was ever filed by Mr Kimber for overtime to be paid.

[61] Mr Grant's evidence is I think particularly important because he emphasises that he had a good relationship with Mr Kimber, that he talked to him regularly, that he had a good relationship also with Mr Rodney Steele and that he was in regular communication with him as well. He says in his evidence and I accept it as truthful that if anybody could have interceded on Mr Kimber's behalf in respect to a perception that Mr Kimber was not being paid something he was entitled to, it would have been him.

[62] In my opinion then there is ample opportunity for Mr Kimber to take up the matter of the overtime which he alleges was remaining unpaid. It would have been particularly easy, I suggest,

for Mr Kimber to take the matter up with Mr Grant who was in an ideal position to deal with any issues. Mr Grant knew nothing of the written employment agreement until the end of Mr Kimber's employment. Had Mr Kimber given Mr Grant a copy of the employment agreement and drew Mr Grant's attention to the relevant provisions, that might well have been all he need do to progress the matter.

[63] However, it seems that the only evidence available to the Authority about what Mr Kimber did to, as it were, enforce his employment agreement in this manner is Mr Kimber's own evidence particularly of his conversations with Mr Rodney Steele who is no longer with us to assist in confirming or otherwise Mr Kimber's evidence.

The industry position

[64] It was unchallenged evidence from North Canterbury Salmon that Mr Kimber's two predecessors were both paid a salary and were not paid overtime.

[65] This raises the question of why the employer would hire a new manager on terms and conditions which were, historically, profoundly dissimilar from the previous experience.

[66] Further, Mr Colin Notley's evidence for North Canterbury Salmon proceeded on the footing that a brief survey of like positions which he had conducted in anticipation of giving his evidence confirmed that North Canterbury Salmon's competitors were employing their farm managers on a salaried basis without the payment of any overtime.

[67] Mr Notley also gave evidence about the total remuneration packages of his sample and his evidence was that, without overtime, Mr Kimber's package was within the appropriate range.

[68] Accordingly I conclude that industry practise for positions of this kind does not include an overtime component as these employees are, it seems, salaried and the history of North Canterbury Salmon was that it had employed previous managers exclusively on a salary.

[69] The importance of this finding is that given that Mr Kimber was a most experienced individual in this particular industry, he would have known how managers of salmon farms were remunerated when he entered into his arrangements with North Canterbury Salmon.

Was there a failure to maintain adequate records?

[70] It is clear law that the employer has an obligation to maintain proper wage and holiday records: section 30 Employment Relations Act, section 81, Holidays Act 2003.

[71] Further, a breach of that obligation by the employer reverses the usual onus and allows the employee to call evidence to show that the employer failed to keep or produce proper records and that failure prejudiced the employee's ability to prosecute a proper claim. In those circumstances, I am entitled, unless the respondent employer proves that those claims are incorrect, to accept as proved claims made by the employee without those claims being verified by the employer's records: section 132 Employment Relations Act; section 83, Holidays Act 2003.

[72] North Canterbury Salmon says that their records are perfectly adequate for a salaried engagement given that in their view, there is no overtime payable.

[73] Even if they are wrong about that, it is clearly the case that there is no evidence of any proper record or claim made by Mr Kimber in respect to overtime having ever been filed with North Canterbury Salmon.

[74] The only proper basis, it seems to me, on which North Canterbury Salmon could have addressed an overtime claim from Mr Kimber is on the basis that Mr Kimber provided evidence to North Canterbury Salmon of that claim and by common consent, no such evidence exists.

[75] It seems to me that if there has been a failure to keep proper records then that failure is squarely at the door of Mr Kimber and not at the door of the company.

[76] In relation to the annual leave record, the evidence was that Mr Kimber maintained his own leave record at the salmon farm and for reasons which are far from clear, all Mr Kimber's records including the leave record were burnt when he left the employment. That fact is certainly not Mr Kimber's fault and while I accept without reservation that the witnesses for North Canterbury Salmon were not personally responsible for burning the records, they do have an obligation to ensure that the company maintains proper records and the fact that the records in respect to leave appear to have been burnt is something they have to take responsibility for.

[77] Accordingly, my conclusion is that any default in respect to wage records must rest with Mr Kimber because he generated no claim for overtime during the whole 13 years he was employed by the employer or at least none that the employer can now find.

[78] The position is otherwise in respect to the annual leave record where it seems to me the company is responsible for the loss of Mr Kimber's leave book. It must take responsibility for that.

Has the applicant appropriately quantified his claim?

[79] We have already established that Mr Kimber at no time during the period now in contention, (ie the last 6 years of the employment relationship) filed a time sheet claiming overtime. It follows that there are no company records to justify Mr Kimber's overtime claim. The company of course says that is entirely consistent with its position because there is no entitlement to overtime anyway.

[80] However, disappointingly, Mr Kimber has very spartan records of the overtime which he says that he ought to have been paid. He did maintain a work diary but this is effectively an operational diary rather than a time keeping diary and there was only scanty information in the examples that were produced to me which would assist in identifying any overtime claim, assuming such a claim was to be contemplated.

[81] Essentially, what Mr Kimber and his advisers have done is to work up a calculation which North Canterbury Salmon's submissions describe rather unkindly but I fear accurately as *a rough and ready stab in the dark*.

[82] The calculation simply takes two months of each of the years in question, applies the same overtime component as was claimed on a time sheet by a wage worker colleague at the salmon farm, plus an additional allowance of overtime for administration.

[83] That calculation is then extrapolated to produce a global sum. A second calculation is produced to compare and contrast this material with the sketchy material from Mr Kimber's diary.

[84] I confess I do not think that the Authority could safely determine Mr Kimber's arrears of wages claim based on these two sources of information even assuming that Mr Kimber can satisfy the Authority that he is in fact entitled to those wages.

The claim for unpaid holiday leave

[85] It seems to be accepted that the leave book was kept by Mr Kimber at the salmon farm. There was no back-up record, it seems, at the head office in Christchurch.

[86] When Mr Kimber's period of service concluded, it seems that Mr Kimber's replacement as manager burnt all of Mr Kimber's records including the leave book.

[87] That clearly was a silly thing to do and in my opinion, North Canterbury Salmon must take responsibility for that act. They are the employer, the new manager presumably reports on a similar basis to the reporting line that Mr Kimber would have worked to when he was manager, so, notwithstanding the remoteness of the salmon farm, in my view the employer had an obligation to ensure that its new manager behaved appropriately.

[88] Presumably nobody knew the significance of the material that was being destroyed and no doubt nobody turned their minds to the possibility that some of the records that were burnt were unique and important.

[89] But whatever the circumstances, the fact is that the records have been destroyed and in my opinion the responsibility for that destruction must rest with North Canterbury Salmon.

[90] It seems to be common ground that Mr Kimber took very little leave although there was some evidence given by North Canterbury Salmon (which Mr Kimber challenged) that he would go AWOL from time to time.

[91] Mr Peter Devine said that Mr Kimber was a keen shooter and that he would occasionally take time off to go shooting. Mostly, Mr Devine said that Mr Kimber would take Fridays off and that he was lucky to do that three times a year. He went on to say that he had never known Mr Kimber to take a long holiday apart from a three week break in August of 2003 shortly before his employment relationship with North Canterbury Salmon ended.

[92] The claim from Mr Kimber in respect to annual leave is \$25,440. I am not persuaded that this has been accurately calculated. It proceeds on the footing that Mr Kimber's annual leave entitlement was four weeks over the whole period of his entitlement yet Mr Kimber's own evidence was that one of the changes in the 2000 employment agreement was a change in the amount of annual leave. Given that the 2000 agreement provides for four week's annual leave, one would have to assume that the earlier arrangement was for three week's annual leave.

Determination

[93] In respect to the claim for unpaid overtime, my considered view is that there is insufficient evidence before the authority to enable it to make a decision in respect to the period before the so-called second agreement came into effect on 2 October 2004.

[94] In effect, the only evidence for an agreement to pay overtime to Mr Kimber before the 2000 agreement is Mr Kimber's own evidence. There is no supporting documentary evidence or

evidence given in person to justify the claim. I do not think it enough that Mr Kimber says that the 2000 agreement is in similar terms to the earlier agreement, particularly where North Canterbury Salmon denies the existence of that earlier agreement and continues to deny the requirement to pay overtime at all.

[95] For those reasons then, there will be no order in respect to the period of time prior to the 2000 agreement.

[96] The position is otherwise in respect to the period from the 2000 agreement down to the date at which the employment relationship ended on 8 August 2003. Whatever North Canterbury Salmon might say about the intention that they had in remunerating Mr Kimber, it is difficult to understand how they could have entered into an employment agreement which clearly on its face provides for the payment of overtime, in circumstances where they say that no overtime was agreed.

[97] This was an employment agreement that, by common consent, had been furnished to Mr Kimber by his employer and had even been the subject of some negotiation in terms of Mr Kimber's desire to remove the restraint of trade provision.

[98] It follows that there will be an order for overtime to be calculated and paid to Mr Kimber for the period from 1 October 2000 down to 8 August 2003.

[99] There will also be an order for the payment to Mr Kimber of annual leave for the period from 8 August 1997 down to 8 August 2003.

[100] North Canterbury Salmon had an obligation to allow Mr Kimber to take his annual leave as it fell due. The evidence, which I accept, is that that did not happen.

[101] No doubt that fact is partly at least a consequence of the remoteness of Mr Kimber's workplace from the management and directorate of the company but notwithstanding that, the employer still has an obligation to ensure that the statutory provision that Parliament has made for the taking of annual leave is properly effected.

[102] I direct the parties are to confer on both the annual leave position and the overtime position and, if possible, reach conclusions between themselves as to what amount of annual leave for Mr Kimber remains unpaid and what amount of overtime is due to him for the period that the 2000 agreement applied for.

[103] In the event that the parties are unable to agree on these matters, the applicant's representative is to advise the Authority and there will be further directions to enable those outstanding issues to be addressed and concluded.

Summary

[104] Mr Kimber's claim in respect to unpaid overtime succeeds in part and is successful in respect to the period covered by the 2000 employment agreement from October 2000 down to 8 August 2003, the amount to be quantified by the parties by agreement or failing that by the Authority after notification from the applicant.

[105] Mr Kimber's claim in respect to unpaid annual leave is successful but again, the quantification of his entitlement for the period from 8 August 1997 down to 8 August 2003 is also referred back to the parties for their agreement as to quantum, failing which the matter will be referred back to the Authority for further direction.

Costs

[106] Costs are reserved.

James Crichton
Member of Employment Relations Authority