

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Simone Kirk (Applicant)
AND Alanna Barrett (Respondent)
REPRESENTATIVES Both parties in person
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Ohai 27 November 2006
DATE OF DETERMINATION 8 December 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Kirk) complains that she is owed wages from her employment with the respondent (Ms Barrett). The wages claimed are the first week's Accident Compensation payment at 85%, statutory holidays and annual holidays.

[2] The respondent, Ms Barrett resists this claim and, while agreeing that Ms Kirk is owed some unpaid wages, objects to the calculation advanced in some particular respects.

[3] Ms Barrett, amongst other things, runs a labour pool to provide milking services for dairy farmers in western Southland. She has continuing relationships with a number of farmers who contract her services. Ms Kirk, in company with other workers, was engaged by Ms Barrett to deliver that service.

[4] The parties are (or more correctly were) neighbours in a small close knit rural community. It is a source of some regret that the relationship between them has broken down to the extent it has and the apparent inability of the parties to resolve their differences by agreement has led to the matter being referred to the Authority.

[5] Ms Kirk worked for Ms Barrett from 8 February 2006 until 13 May 2006 when Ms Kirk sustained a work injury to her ankle which precluded her from continuing employment.

[6] It seems that the disagreement about the payment of the first weeks pay while on earnings related compensation (at 80% of the full rate) caused the relationship between the parties to irretrievably break down.

[7] Ms Kirk quite correctly claims that she is entitled to receive this payment from the employer; Ms Barrett in evidence before the Authority, accepted that the payment was due and owing to her but indicated that her difficulty in paying it was a function of Ms Kirk's apparent ability to both walk some distance (with an ankle that allegedly she could not walk on) and drive a motor car in similar circumstances.

[8] Notwithstanding those reservations, Ms Barrett now understands that her employment obligations are to make the payment indicated.

[9] Ms Barrett also contends that the calculations made by the Labour Inspector in respect to statutory holiday pay and annual holiday pay are flawed. Ms Barrett argues that the nature of the relationship was a casual employment relationship and not a permanent employment relationship as Ms Kirk seems to contend. The significance of the difference in Ms Barrett's mind is that she considers that seasonal employees are not entitled to receive holiday pay separately from payment of their hourly rate; in other words Ms Barrett contends that seasonal workers by definition receive their holiday pay as part of their hourly rate.

[10] In support of this contention, Ms Barrett refers to the recent decision of the full Employment Court in the decision *Alliance Group Limited v. New Zealand Meat Workers Union Inc* (CC 7/06, CRC 2/05). In that decision, the Court was asked to consider whether seasonal workers could be deemed to enjoy the benefits of "continuous employment". It was found that on the facts of the particular employment agreement pertaining in that dispute, the workers could not be considered to enjoy the benefits of continuous employment as they effectively ceased their employment at the end of each season and were subsequently re-engaged for the succeeding season.

[11] The instant case is different. It is a situation where, within a particular season, a worker's entitlement to holiday and statutory holiday leave falls for determination.

[12] In my opinion, the question of whether the worker in question is a permanent employee or a seasonal or casual worker is neither here nor there. As a matter of fact I think the Labour Inspector was mistaken in reaching the conclusion that the worker was a permanent employee. I am satisfied on the evidence before me that Ms Barrett called Ms Kirk to work as and when required and in particular that Ms Barrett had to tell Ms Kirk *which shed she went to* for every day that she worked. On that basis, it seems to me that factually this is a seasonal employment relationship on casual principles rather than a permanent relationship.

[13] However, as I explained to Ms Barrett during the course of the investigation meeting, nothing turns on that distinction in my view because the fundamental issue in this case in relation to public holiday pay is not what the status of the worker was but whether the worker habitually worked on days of the week that were also statutory holidays.

[14] The factual position, as ascertained by the Labour Inspector, was that Ms Kirk habitually worked on Fridays and therefore she should have been paid for Good Friday 2006. Similarly, Ms Kirk habitually worked on Mondays and accordingly she should have been paid for Easter Monday as well. In relation to Anzac Day, there is no argument that Ms Kirk worked three hours but she was not paid time and a half which the Holidays Act 2003 (s.50) requires. She is entitled to the extra half time for the hours worked. Further, because she worked on a Public Holiday and has not had the benefit of a paid holiday as s.56 of the Holidays Act entitles her to, she is also entitled to a paid alternative day.

[15] In relation to annual holiday pay, again the question of whether Ms Kirk is a casual worker (as Ms Barrett contends) or a permanent worker as Ms Kirk believes, is neither here nor there. As I have indicated, I am satisfied that Ms Barrett is correct as to Ms Kirk's status but nothing turns on the distinction.

[16] The Labour Inspector has, by marrying the records of the employer and the employee together, been able to reach a conclusion as to Ms Kirk's holiday pay entitlement.

[17] Fundamental to Ms Barrett's defence of the claim in this regard is her contention that Ms Kirk was paid her holiday pay as part of her hourly rate. I indicated to Ms Barrett in the course of the investigation meeting that that contention could only successfully be made out if there was a written employment agreement which affirmatively committed the employee to a wage rate inclusive of holiday pay. As no such employment agreement exists, it is simply impossible for Ms Barrett to successfully maintain her claim that a wage rate inclusive of annual holiday pay was agreed to.

[18] It follows that a simple calculation can be done of the wages paid by Ms Barrett to Ms Kirk over the period of the employment and the annual holiday pay discerned from those calculations.

Determination

[19] I have great sympathy for the parties, living as they do in close proximity to one another in a small rural community. Each blames the other for their inability to resolve this matter by agreement. Ms Kirk says that Ms Barrett refused to engage with her and ordered her off her property; Ms Barrett says that Ms Kirk was abusive and that she ordered her off her property because she was abusive.

[20] The fact that there are ongoing arguments and difficulties between the two families is a source of regret but not something which the Authority can advance.

[21] I am satisfied on the evidence before me that Ms Barrett owes Ms Kirk the following sums:

- (a) 80% of one weeks wages calculated in accordance with s.98(1) of the Accident Compensation and Rehabilitation Act 1992 in the sum of \$250; and
- (b) The sum of \$504.99 being the holiday pay and statutory holiday pay due and owing by Ms Barrett to Ms Kirk; and
- (c) The sum of \$70 being the filing fee incurred by Ms Kirk in her filing her statement of problem in the Authority.

[22] I order Ms Barrett to pay those sums to Ms Kirk. I note that Ms Barrett has indicated to me that she is temporarily somewhat stretched for funds. She has also indicated to me that she wishes to put the matter behind her and to pay the sum that the Authority orders on the basis that she now has a better understanding of why those sums are actually owed by her.

[23] Because I am satisfied that Ms Barrett genuinely wishes to put the matter behind her, and because I am sure that it is Ms Kirk's wish as well, I direct that Ms Barrett have time to meet her obligations such that the total amount owing of \$824.99 is to be paid to Ms Kirk in three more or less equal monthly instalments, the first of such instalments in the sum of \$274.99 to be paid on or before 30 days from the date of this determination, the second 60 days from the date of this determination and the third and final payment 90 days from the date of this determination.

[24] In the event that Ms Barrett does not pay any of those part payments on or before the date I have directed, then the whole outstanding amount becomes due and owing immediately the default happens and Ms Kirk may take the appropriate action to recover the monies owed to her through the Court system.

James Crichton
Member of Employment Relations Authority