

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 69
5629823

BETWEEN LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS INNOVATION
 AND EMPLOYMENT
 Applicant

AND WYATT FARM LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jodi Ongley, Counsel for Applicant
 Adam Gallagher, Counsel for Respondent

Investigation Meeting: 23 February 2017 at Christchurch

Submissions received: On the day and 7 March 2017 from applicant.
 No further submission from respondent

Determination: 5 May 2017

DETERMINATION OF THE AUTHORITY

- A. The Authority has found that Wyatt Farm Limited breached the following minimum standards:**
- i. It has failed to keep holiday and leave records for three employees that comply with s 81 of the Holidays Act 2003.**
 - ii. It has failed to pay two employees for working on public holidays in breach of s 50 of the Holidays Act 2003.**
 - iii. It has breached s 6 of the Minimum Wage Act 1983 in respect of one employee by paying less than the adult minimum wage at the time.**

B. The Authority has ordered payments for arrears and recovery as follows:

- i. Payment to the Labour Inspector for the use of Tanya the sum of \$57 gross being payment for working on a public holiday together with interest on that sum.**
- ii. Payment to the Labour Inspector for the use of Phillipa the sum of \$104.03 gross, being payment for working on a public holiday, and payment of the sum of \$1389.81 gross, being recovery of wages under the Minimum Wages Act 1983. Interest has been awarded on both sums.**

C. A time table has been set for submissions on penalties and costs have been reserved.

Employment Relationship Problem

[1] Labour Inspector, Vikram Lakhera (Mr Lakhera or the Labour Inspector) in the statement of problem lodged in this matter seeks:

- (a) Penalties under s 75 and 83 of the Holidays Act 2003 for Wyatt Farm Limited's failure to keep holiday and leave records for three of its employees that comply the requirements of s 81 of the Holidays Act 2003.
- (b) Penalties under s 75(2) (c) of the Holidays Act 2003 for Wyatt Farm Limited's failure to comply with all the requirement under s 50 of the Holidays Act 2003 by not paying two employees time and a half for working on public holidays.
- (c) Recovery of arrears under s 77 of the Holidays Act 2003 for the failure to pay the two employees time and a half for working on a public holiday in the sums of \$104.05 gross and \$57.00 gross.
- (d) Penalties under s 10 of the Minimum Wages Act 1983 for the failure by Wyatt Farm Limited to comply with the requirements of s 6 of the Minimum Wage Act 1983 for not paying an employee at least the minimum wage.
- (e) Recovery of wages for the employee under s 11 of the Minimum Wages Act 1983 for the failure to comply with the requirements of s 6 of the Minimum Wages Act 1983 in the sum of \$1499.81 gross.
- (g) Costs and reimbursement of the filing fee.

[2] A claim by the Labour Inspector for penalties under s 13 of the Wages Protection Act 1983 for failure to comply with the requirements of ss. 4 and 5 of the Wages Protection Act 1983, where the employer had made deductions from two employees' final pay without written consent, was not pursued. Following a telephone conference with the Authority Mr Gallagher was able to provide information to Mr Lakhera that confirmed the deductions were made by way of consent.

[3] Wyatt Farm Limited (Wyatt Farm) is a duly incorporated company having its registered office at Christchurch and carrying on business as a dairy farm in Hari Hari on the West Coast of the South Island. Wyatt Farm in its statement in reply states that it believed its holiday and leave records complied with s 81 of the Holidays Act 2003, that it did not believe it had breached s 50 of the Holidays Act 2003 in respect of one employee and that it had rectified the failure to pay for a public holiday in respect of the other. Further, Wyatt Farm did not believe it had failed to pay its employee the adult minimum wage for every hour worked, and did not believe the employee had a claim for recovery of wages.

The background to this matter with the enforceable undertaking

[4] On 29 July 2013 Wyatt Farm signed an enforceable undertaking under s 223 B of the Employment Relations Act 2000 (the Act) to rectify a breach of s 6 of the Minimum Wage Act 1983. In September 2013 the Labour Inspector accepted that the Respondent had met the requirement of the undertaking.

[5] Section 223B of the Act deals with enforceable undertakings. It provides that a Labour Inspector and an employee may agree in writing that the employer will by a specified date rectify the breach of any provision of the relevant Acts [such Acts as specified in s 223(1)E of the Act], pay money owed to an employee under a provision of the relevant Acts or take any other action that the Labour Inspector determines is appropriate having regard to the nature of the breach.

[6] In May 2015 the Labour Inspector was involved as part of a national follow-up audit programme in following up an audit of Wyatt Farm's employment practices. Wyatt Farm instructed Mr Gallagher and, following disclosure of records and other communications, the statement of problem was lodged by the Labour Inspector as he concluded that there was a failure to comply with minimum standards. Wyatt Farm at

the time of the audit had three employees. I did not hear from the employees and when I refer to them it shall be by their first name only. The three employees are Phillipa, Dannie and Tanya.

The investigation meeting

[7] Mr Gallagher attended the investigation meeting on behalf of Wyatt Farm. The Authority did not hear evidence from Tania and Zane Wyatt who operate the farm in Hari Hari. Unfortunately they had to attend a family funeral on the day of the investigation meeting. It was the understanding of the Authority and Ms Ongley that, because of emails to that effect from Mr Gallagher, the Authority would talk to Mr and Mrs Wyatt by telephone on the day of the investigation meeting. The Authority accepted that was an appropriate way to deal with their evidence and Ms Ongley had no objection. Mr Gallagher, however, advised at the investigation meeting that was not what he had intended to convey. He was, though, later able to discuss Mr Lakhera's evidence during an adjournment on the day of the investigation meeting with Mr and Mrs Wyatt by telephone.

[8] It was agreed that the matter would be determined in two parts. Firstly the Authority would, in this determination, determine issues in dispute, any monies payable and whether there are any minimum standard breaches. If breaches are found then the Authority in a second determination will deal with the issue of penalties. After the investigation meeting Mr Gallagher provided some financial information on behalf of Wyatt Farm to Ms Ongley and the Authority.

[9] At the investigation meeting Mr Gallagher confirmed what had been reflected in correspondence with Ms Ongley that Wyatt Farm concedes that there was a failure to keep accurate records in accordance with all the requirements in s 81 of the Holidays Act 2003 for three employees: Phillipa, Dannie and Tanya. That concession accords with my own conclusion that the records of the employees are non-compliant with the full requirements of the s 81 of the Holidays Act 2003. Amongst other matters they did not contain the amount of payment for annual, sick and other leave taken, and on occasion where it was agreed public holidays were worked, there is no record to show that or payment. One employee, Tanya, had been paid other than by money for hours worked on a public holiday. Mr Gallagher submits that payment was made later but the Labour Inspector does not accept that this was the case.

The Issues

[10] For the purpose of this determination I find that the issues for determination are as stated by Ms Ongley in her submissions:

- (a) To determine whether Wyatt Farm paid Tanya her public holiday arrears;
- (b) To determine whether Phillipa was paid time-and-a-half for working on 25 and 26 December 2014;
- (c) To determine whether Phillipa was paid minimum wage.

Tanya

[11] It is common ground that Tanya, a relief milker at Wyatt Farm, worked on 1 June 2015 from 4.30am to 6.45 am. That date was Queens Birthday, a public holiday. Tanya should have been paid accordingly at the rate of time and a half for the period worked of 2.15 hours. Mr Lakhera says that Ms Anderson is owed \$57.00 gross for working on 1 June 2014.

[12] There is no employee record showing that work was undertaken by Tanya on a public holiday. Mr Lakhera raised this as an issue during his audit. The only evidence put forward to support payment is a bank statement from Wyatt Farm Limited's Agri Current Account that shows a payment made to Tanya on 2 September 2016 of \$310.14. There is a handwritten notation beside that entry that refers to \$57.00 time-and-a-half pay for 1/6/15 and reference to holiday pay.

[13] Ms Ongley submits that the Authority could not be satisfied that the payment to Tanya included a component payment of \$57.00. I note the comparatively late provision of that bank statement on or about February 2017 in what had been a longstanding issue.

[14] The Authority needs to be satisfied in these matters that what was deposited into Tanya's bank account on 2 September 2016 included a payment at time and a half for working on Queens Birthday 2015. What would have assisted and clarified the matter would have been separate accounting to Tanya and/or the Labour Inspector about the make-up of the payment of \$310.14 at the time it was made. It is somewhat surprising that this exercise was not undertaken given that payment was made after Wyatt Farm lodged a statement in reply.

[15] In the absence of that the only conclusion I can reach is that payment may or may not have been made. The Authority cannot be clear as it must be that payment of \$57.00 for working the public holiday is included in the payment made to Tanya. I find that there is an amount owing to Tanya for working on a public holiday of \$57.00 gross.

[16] I order Wyatt Farm Limited to pay to the Labour Inspector for the use of Tanya the sum of \$57.00 gross being payment for working on a public holiday. Interest is payable on that sum from 7 June 2015 to the date of payment to the date of payment under clause 11 (1) of the second schedule of the Act at the rate of 5% per annum prescribed under s 87(3) of the Judicature Act 1908.

Phillipa

Payment for working on Christmas and Boxing Day 2014

[17] Phillipa worked for Wyatt Farm on two public holidays, 25 and 26 December 2014. Her time sheet records her working 7 hours and 40 minutes on Christmas Day and 7 hours and 10 minutes on Boxing Day. There is no record of the work having been undertaken on a public holiday. Wyatt Farm says that although not correctly set out in its records, Phillipa Crossan was in fact paid time-and-a-half for working those days.

[18] A pay slip is relied on by Wyatt Farm to that end which is attached to the statement in reply and refers to a payment made to Phillipa for the period ending 28 December 2014 for a gross five hours 35 mins overtime in the sum of \$110.00.

[19] The Labour Inspector says that Ms Crossan is owed the sum of \$104.05 gross. Mr Lakhera has calculated this on the basis of a minimum adult wage at that time of \$14.25 for the hours worked on the public holidays, as earlier set out, less payment received at the ordinary rate.

[20] I have tried to compare the payment made by Wyatt Farm, which is expressed to be an overtime payment to Phillipa, with the hours actually worked on the public holidays to ascertain whether there is any correlation between the two. I would have expected if the payment was for working on a public holiday that it would have, given the combined hours worked over both days exceeded 14, be a payment a little in excess of 7 hours not for five and a half.

[21] I cannot therefore safely conclude that payment has been made to Phillipa for working on a public holiday on 25 and 26 December 2014. I shall, after determining whether she was paid at least the adult minimum wage, make an order for payment for working on a public holiday as sought by Mr Lakhera.

Minimum Wage claim

[22] Dannie and Phillipa were a couple when they were employed to work at Wyatt Farm. Dannie was employed as a 2IC Farm Manager and Phillipa as a Farm Assistant. They both had separate employment agreements. Phillipa was paid on the basis of a salary of \$30,000 per year.

[23] It is clear from Phillipa's wage and time record that because of the hours she worked from in or about November to February 2014/2015 her payments fall below minimum wage.

[24] Mr Gallagher advanced on behalf of Wyatt Farm an argument that, because Dannie broke his hand and could not undertake his full duties, there was an agreement that they would both be paid at their usual salary notwithstanding Phillipa was working Dannie's hours and vice versa. A further argument was that Wyatt Farm had somehow been persuaded and/or that Phillipa and Dannie had acquiesced to there being no change in their wage and time records to reflect the arrangement.

[25] I am not persuaded by that argument. Both Phillipa and Dannie had separate employment relationships with Wyatt Farm. If they had agreed to a change then it should have been reflected in the wage and time records and payments made. It wasn't and there is no record to support such an arrangement, aside from a written note in the wage and time records. Payments were made into a joint bank account.

[26] Phillipa's wage record for the period from 3 June 2014 shows that she is paid a regular fortnightly gross payment of \$1,154. Correspondence from Mr Gallagher supported that payments from time to time expressed to be overtime payments were made to Phillipa of \$20 per hour up to about 1 December 2014 to ensure that payments did not fall below the adult minimum wage.

[27] The minimum adult wage at the material time was \$14.25. Mr Lakhera has calculated that on an annual salary of \$30,000 Ms Crossan could work 80.97 hours,

rounded to 81 hours per fortnight, and be paid minimum wage. It is clear from the wage sheet as set out below that payment to Phillipa fell below the minimum wage.

Period ending	Hours worked	Salary paid \$	Excess hours worked	Short paid by \$
17 Nov 2014	105.50	1,154	24.5	349.13
1 Dec 2014	92.25	1,154	11.25	160.31
15 Dec 2014	102.50	1,154	21.50	306.38
29 Dec 2014	126.60	1,154	45.5	648.38
9 Feb 2015	83.5	1,154	2.5	35.63
				1,499.81

[28] Mr Gallagher raises two further arguments. The first is that the overtime payment of \$110.00, which I have not accepted I can safely conclude was paid for working on a public holiday, would bring the hourly rate up to minimum rate for the period. Whilst I am not persuaded of that I am concerned that that payment does not appear to have been accounted for. The second argument is that 2 hours and 35 minutes when Phillipa was absent without notification should have been deducted for the pay period ending 9 February 2015. I am not satisfied of that matter.

[29] I find that the fairest approach is simply to deduct \$110.00 expressed to be gross overtime in a payslip dated 28 December 2014 from the sums owed to Phillipa for minimum wage arrears.

[30] Wyatt Farm Limited is ordered to pay to the Labour Inspectorate for the use of Phillipa the following sums

- (a) The sum of \$104.03 gross for working on two public holidays. Interest is payable on that sum from 28 December 2014 to the date of payment under clause 11 (1) of the second schedule of the Act at the rate of 5% per annum prescribed under s 87(3) of the Judicature Act 1908.
- (b) The sum of \$1389.81 gross being the adult minimum wage entitlement for hours worked having been adjusted for a payment made on 28 December 2014 for overtime. Interest is payable on that sum from the date the statement of problem was

lodged on 15 June 2016 to the date of payment under clause 11 (1) of the second schedule of the Act at the rate of 5% per annum prescribed under s 87(3) of the Judicature Act 1908.

[31] In light of the findings the following breaches have been made out:

- (a) A failure to keep holiday and leave records for three employees that comply with s 81 of the Holidays Act 2003.
- (b) A failure to pay two employees time-and-a-half for working on public holidays which is a breach of s.50 of the Holidays Act 2003.
- (c) A failure to pay the adult minimum wage to one employee for a period which is a breach of s 6 of the Minimum Wage Act 1983 in respect of one employee.

[32] Penalties are sought and before these are determined I want to give both parties an opportunity to make any further submissions. Ms Ongley has indicated that in light of Wyatt Farm's earlier breaches and the undertaking, the breaches, if made out, would be considered to be more serious. She has provided some cases that may be of assistance to the Authority and Mr Gallagher in that they are comparable cases.

[33] I give the Labour Inspectorate a further fortnight from the date of this determination to 19 May 2017 to lodge and serve any further submissions it wishes about penalty, particularly in light of the now provided financial records and determination as to the breaches. Mr Gallagher is to have a further fortnight to 2 June 2017 to lodge and serve submissions about penalty. If either party believes a further meeting would be of assistance I am happy to accommodate that.

Costs

[33] I reserve the issue of costs until the issue of penalties has been determined.

Helen Doyle

Member of the Employment Relations Authority