



New Zealand Employment Relations Authority Decisions

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McCleery and anor v Johnson CA203/10 (Christchurch) [2010] NZERA 867 (4 November 2010)

Last Updated: 23 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 203/10 5151507

BETWEEN BARRY BRIAN McCLEERY

& DEBRA JANE POWICK Applicants

A N D STEPHEN D JOHNSON

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Philip Cheyne

Brian McCleery and Debra Powick,
the applicants in person
Stephen Johnson,
the respondent in person

2 November 2010 at Hokitika

4 November 2010

DETERMINATION OF THE AUTHORITY

[1] Brian McCleery and Debra Powick worked as farm manager and manager's assistant respectively on a dairy farm owned by Stephen Johnson. The dairy farm is near Hokitika and Mr Johnson lives and works in the North Island.

[2] Mr McCleery's and Ms Powick's employment terminated in December 2008 and there arose several disputes about wages, holiday pay and reimbursement of an expense that the parties have not been able to resolve between themselves despite mediation and the assistance of professional advisors. Some matters are no longer in dispute but several issues are yet to be resolved.

The start date

[3] There are written employment agreements that give 1 June 2008 as the commencement date of the employment but it is common ground that Mr McCleery and Ms Powick actually commenced work on 19 May 2008. That must be taken as the commencement date of the employment. It is common ground that the employment ended on 11 December 2008.

[4] Under the employment agreements these were salaried positions subject to an obligation to work *as directed by the Employer to best suit the management of the farm ...normally Monday to Friday As Necessary ... Saturday As Necessary ...Sunday As Necessary* on a standard roster of days on and days off *As Agreed Between Brian & Steve* for Mr McCleery; and to work *as directed by the Employer to best suit the management of the farm ...normally Monday to Friday As required ... Saturday As Required ...Sunday As Required* on a standard roster of days on and days off *As Required* for Ms Powick. No other standard roster arrangements were agreed and in practice Mr McCleery and Ms Powell worked seven days each week except for the

June period mentioned below and another period in November mentioned later. No regular relief workers were engaged to allow for rostered days off.

[5] When Mr McCleery and Ms Powick agreed with Mr Johnson to start work before 1 June it was also agreed that they could take an equivalent amount of time off in early June. They would be paid salary as if they had started on 1 June but would be paid for the time off. What happened was that they actually took time off either from the 7th to the 15th of June (according to the applicants' evidence) or the 6th to the 15th of June (according to the respondent's evidence). They therefore worked 13 days extra but had time off of either 9 days or 10 days. The applicants did not raise this matter as a concern until the end of the employment.

[6] Mr Johnson does not accept that he should now be liable for the four or three days extra salary for time actually worked because it was not raised with him until after the employment ended when it was too late for him to do anything about making good the time off, especially since June is a quiet time of the year and he could have arranged part-time cover to give the applicants the extra days off. However, under the employment agreement it was for the employer to direct the hours worked each week. Mr Johnson did not do so other than to leave Mr McCleery and Ms Powick to do the necessary work. They had to work because the work had to be done and no relief workers were provided. Mr Johnson knew or should have known this at the time. Mr McCleery and Ms Powick are entitled to salary for the extra days they actually worked. I accept Mr Johnson's evidence about the number of days since Mr

McCleery and Ms Powick both said in the material originally lodged with the Authority that they *had from the 6th of June to the 15th of June off*.

Statutory Holidays

[7] There is a dispute about payments for statutory holidays. Mr McCleery and Ms Powick say they worked six and four hours on Queens Birthday, eleven and five hours on Labour Day and ten and five hours on Westland Anniversary Day respectively.

[8] In 2008 Queens Birthday was Monday 2 June. In his statement in reply Mr Johnson said that he employed a relief worker for the first two weeks of June including Queens Birthday. However, his evidence (as above) is that the relief worker was engaged from the 6th of June. There is no evidence anyone other than Mr McCleery and Ms Powick performed their work on the farm on Monday 2 June 2008. I accept the evidence of Mr McCleery and Ms Powick that they worked six and four hours respectively on Queens Birthday.

[9] Mr Johnson accepts that Mr McCleery and Ms Powick worked on the other two statutory holidays and he says that they worked ten and five hours on Labour Day and seven and five hours on Westland Anniversary Day respectively. The dispute is only about an hour for Mr McCleery on Labour Day. Mr Johnson has no records and his assertion is based on what he says Mr McCleery told him when they first spoke about Labour Day. For the reason explained below, it is not necessary to resolve this difference.

[10] Mr McCleery and Ms Powick are entitled to three lieu days each and time and half time extra for the hours actually worked on the statutory holidays.

Holiday pay

[11] Mr McCleery and Ms Powick were not paid any holiday pay when they left the employment.

[12] Mr McCleery and Ms Powick say that the only days off they had (apart from those mentioned above) were from the 4th of November until the 7th of November 2008 (four days). No deductions were made from their salaries at the time. In his statement of reply Mr Johnson included calculations showing a deduction from final pays of seven days as annual leave, presumably including these days treated as annual leave taken in advance. At Mr Johnson's direction Mr McCleery and Ms Powick arranged for a Mr Brake to cover their duties in November. Mr Brake invoiced Mr Johnson for five days work, not four days. However that does not explain the deduction of seven days.

[13] The issue is resolved by reference to the [Holidays Act 2003](#). Under [s.20](#) an employer may allow an employee to take an agreed portion of the employee's annual holiday entitlement in advance. In the present case there was no agreement that the days off in November were annual leave in advance. Annual leave was not mentioned. Mr McCleery and Ms Powick simply asked for some time off as they had worked every day of every week since June 2008. Mr Johnson agreed and instructions were given about arranging a replacement to cover the work. Mr McCleery and Ms Powick then had the days off. I accept their evidence that they had days off from the 4th of November until the 7th of November.

[14] Mr McCleery's and Ms Powick's employment ended before they had become entitled to any annual leave. The calculation of their holiday pay payable at termination is covered by [s.23](#) of the Act which permits a deduction for any holiday pay paid to the employee for annual leave taken in advance. It does not permit a deduction because the employer decides at the end of the employment to treat days off given during the employment as if they were annual leave taken in advance. Mr McCleery and Ms Powick must be paid their holiday pay without deduction.

Motor bike service

[15] It is agreed that Mr Johnson must reimburse the cost of a motorbike service. The amount was earlier in dispute but Mr McCleery has now agreed to the sum offered by Mr Johnson (\$281.25).

Personal grievance

[16] In April 2010 for the first time Mr McCleery and Ms Powick referred to a personal grievance in relation to the termination of their employment and asked for compensation for the added stress and humiliation in bringing this matter to the Authority.

[17] No grievance was raised with the employer in time and it is now too late to do so without the employer's consent or establishing that the delay was occasioned by exceptional circumstances. Neither applies here so there is no personal grievance properly before the Authority. I should also note that stress associated with litigation is not compensable in any event.

Calculations

[18] First, for Mr McCleery.

[19] His daily rate was \$137.36. He must be paid an additional four days pay for the early start date, a total of \$549.44. Proportionate holiday pay must be added to this amount to make it \$593.40.

[20] The number of hours normally worked on any day were not fixed by the employment agreement so it is difficult to identify the proportion of the relevant daily pay that relates to the time actually worked for the purposes of [s.50 of the Holidays Act 2003](#). I will treat Mr McCleery as having done a whole day's work on each of the statutory holidays. He is therefore entitled to an additional half day's pay for each of the three statutory holidays on which he worked. That amounts to \$206.04. Mr McCleery must also be paid three days pay for alternative holidays. That sum is \$412.08. The total for statutory holidays is therefore \$618.12.

[21] During his employment Mr McCleery was paid \$26,922.98. Holiday pay of 8% on that sum is \$2,153.84.

[22] Next, Ms Powick.

[23] Her daily rate was \$54.85. She must be paid an additional four days pay for the early start date, a total of \$219.40. Proportionate holiday pay must be added to this amount to make it \$236.95.

[24] The number of hours normally worked on any day were not fixed by the employment agreement so it is difficult to identify the proportion of the relevant daily pay that relates to the time actually worked for the purposes of [s.50 of the Holidays Act 2003](#). I will treat Ms Powick as having done a whole day's work on each of the statutory holidays. She is therefore entitled to an additional half day's pay for each of the three statutory holidays on which she worked. That amounts to \$82.28. Ms

Powick must also be paid three days pay for alternative holidays. That sum is \$164.55. The total for statutory holidays is therefore \$246.83.

[25] During his employment Ms Powick was paid \$10,780.00. Holiday pay of 8%

on that sum is \$862.40.

Orders

[26] Mr Johnson is to pay Mr McCleery \$3,365.36 (gross) in arrears of wages and holiday pay.

[27] Mr Johnson is to pay Mr McCleery \$281.25 (without deduction) to reimburse him for the motorbike service.

[28] Mr Johnson is to pay Ms Powick \$1,346.18 (gross) in arrears of wages and holiday pay.

[29] These sums should have been paid on 11 December 2008. Mr Johnson is to pay interest on each amount at the rate of 5% per annum commencing on 11 December 2008 until the arrears and reimbursements are paid in full.

[30] Costs are reserved. Any claim for costs should be made within 28 days by lodging with the Authority and serving on the other party a memorandum setting out details of the costs claimed and the reasons for that claim. The other party may then lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority
