

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 183
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5601753

BETWEEN ADEN MURRAY McKINNON
Applicant

A N D GRAEME CHARLES SMITH
Respondent

BETWEEN PAIGE TYRA POU
Applicant

A N D GRAEME CHARLES SMITH
Respondent

Member of Authority: T G Tetitaha

Representatives: S Malone, Counsel for the Applicants
G Smith, Respondent in person

Investigation meeting: 7 June 2016 at Hastings

Submissions received: 23 May 2016 from Applicants
7 June 2016 at hearing from Respondent

Date of Determination: 9 June 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. Graeme Smith was the employer of Aiden Murray McKinnon and Paige Tyra Pou;**
- B. Aiden Murray McKinnon and Paige Tyra Pou were unjustifiably dismissed by Graeme Smith;**
- C. Graeme Smith is ordered to pay Aiden Murray McKinnon wage arrears of \$2,340.35 pursuant to s.131 of the Employment Relations Act 2000;**

- D. Graeme Smith is ordered to pay Aiden Murray McKinnon lost remuneration of \$6,183.93 which includes a 25% reduction for contribution pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000;**
- E. Graeme Smith is ordered to pay Aiden Murray McKinnon compensation of \$3,750 which includes a 25% reduction for contribution pursuant to s.123(1)(c)(i) and 124 of the Employment Relations Act 2000;**
- F. Graeme Smith is ordered to pay Paige Tyra Pou wage arrears of \$7,154.86 pursuant to s.131 of the Employment Relations Act 2000;**
- G. Graeme Smith is ordered to pay Paige Tyra Pou lost remuneration of \$7,478.25 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000;**
- H. Graeme Smith is ordered to pay Paige Tyra Pou compensation of \$5,000 pursuant to s.123(1)(c)(i) and 124 of the Employment Relations Act 2000.**
- I. Graeme Smith is ordered to pay \$3,500 as a contribution to both applicants' legal costs.**

Employment relationship problem

[1] Both applicants were employed as farm labourers for a share milking business run from 1042 Whatitiri Road, RD9, Whangarei.

[2] Both applicants allege that their employer was the respondent, Graeme Smith. Graeme Smith denies he was their employer because they were employed by his company Smith Family Farming (2011) Limited (the company). The company is in liquidation.

[3] Both applicants also seek orders for wage arrears including holiday pay, underpayments for six to eight public holidays they worked and the shortfall between

the applicable minimum adult wage of \$14.75 per hour and what they received in the hand each week.

[4] The liquidator has been notified of the investigation meeting. He has consented to the continuation of the proceeding even if the company is found to be the employer and liable for any orders to be made.

The issues

[5] The parties attended a teleconference before me on 24 May 2016. It was agreed that the issues for hearing were:

- (a) Who was the applicants' employer? Was it Mr Smith or Smith Family Farming (2011) Limited?
- (b) What were the applicants' agreed hours of work?
- (c) Were the applicants unjustifiably dismissed?
- (d) What wage arrears, including holiday pay, are to be paid to the applicants?

[6] I determined to hear the two files together given both applications involve the same respondent and seek similar orders. It was convenient to both parties to have the matter heard in Hastings to reduce the costs for both parties to travel to Whangarei for hearing.

Relevant Facts

[7] It is common ground there isn't any individual employment agreement for either applicant. Mr Smith referred to a calendar he was directed to produce but failed to do so. I also find there are no wage and leave records that comply with s.130 of the Employment Relations Act 2000 and s.81 of the Holidays Act 2003.

[8] Where there is a failure to keep proper records and this prevents applicants from bringing accurate claims, I may accept as proven the applicants' claims about wages and holidays unless the employer proves that those claims are incorrect or there is evidence to the contrary.¹ The absence of wage and leave records have prevented

¹ Section 132 of the Employment Relations Act 2000 (Act) and s.83 of the Holidays Act 2003 (HA03).

the applicants from bringing accurate claims. The onus therefore rests upon the employer to disprove their claims as a consequence.

[9] There is some dispute about the dates the applicants started work. I accept Mr McKinnon started work on 29 September 2014 as evidenced by a company cheque butt which shows the first payment to Mr McKinnon on 3 October 2014. If his employment started within the week prior, it is likely he did start work as suggested by Mr Smith on 29 September 2014. Ms Pou gave evidence that she started work one week later which I take to be from 6 October 2014.

[10] In late February/early March 2015 Mr McKinnon was told to leave.

[11] On 6 April 2015 Ms Pou's hours of work were unilaterally reduced to an as-and-when-required for milkings thereafter. She did not return to work.

[12] Both applicants left the area in late April 2015 to look for work in Hastings.

Who was the applicants' employer?

[13] An employer is any person employing any employees.² An employee is any person employed by an employer to do work for hire or reward under a contract of service.³

[14] To determine whether any person is employed by another person, it requires me to determine what the "real nature of the relationship" is between them.⁴ I must consider all relevant matters including any matter that indicates the intention of the parties. However, I am not to treat as a determining matter any party's statement describing the nature of their relationship.⁵

[15] The essential question is who would an independent but knowledgeable observer have said was the applicants' employer?⁶

[16] Having heard evidence from both applicants and Mr Smith, I am not convinced on the balance of probabilities that the identity of the employer was discussed with at the beginning or at anytime during the employment relationship.

² Section 5 of the Act.

³ Section 6(1) of the Act.

⁴ Section 6(2) of the Act.

⁵ Section 6(3) of the Act.

⁶ *Hutton v Provencocadmus Limited (in receivership) & Anor* [2012] NZEmpC 207 at [79] citing *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451 at [22].

There was evidence of some pressure being brought to bear on Mr Smith by the owner of the farm to have two full time workers. I suspect Mr Smith was under some pressure to ensure he met those requirements or else his contract may not be renewed. He needed workers quickly.

[17] There was also little to corroborate the company was the agreed employer. There is no individual employment agreement. There are none of the standard IRD forms noting an employer. I heard evidence from Mr McKinnon today that he has contacted IRD and been told that there has been no tax paid on his behalf either. It is agreed Ms Pou's wages were never taxed.

[18] There is evidence that at times the company did pay wages to both of these applicants by way of a cheque which they were able to cash. However, this evidence is not conclusive. There is also evidence both applicants were in fact more regularly paid in cash by Mr Smith.

[19] A determining factor for me must be that Mr Smith personally controlled and directed the work of the applicants. There is no outward sign of the company's involvement. There was also perhaps more telling agreed evidence that Mr Smith was in fact paying Ms Pou out of his own wages and not from the company coffers.

[20] In my view, the evidence points to Mr Smith being the employer, not the company and I find on that basis.

[21] Graeme Smith was the employer of Aiden Murray McKinnon and Paige Tyra Pou

What were the applicants' agreed hours of work?

[22] It is common ground both applicants were employed to assist with two milkings per day and some general farm work. The morning milking took approximately 3 hours and the afternoon milking 2½ hours. The milkings were required for six days per week.

[23] It was agreed that Mr McKinnon was also employed to do two hours' general work for five days.

[24] It was less clear what Ms Pou was employed to do outside of the milkings, After hearing evidence it is likely she did at least one hour's general work per day for five days a week, similar to Mr McKinnon.

[25] Taking into account the factual findings, it is likely that Mr McKinnon was working 7½ hours 5 days and 5½ hours 1 day or 43 hours per week. Ms Pou is likely to have been working 6½ hours 5 days and 5½ hours 1 day or 38 hours per week.

Were the applicants unjustifiably dismissed?

[26] The law on unjustified dismissal is well known. Once a dismissal has been proven, the onus is upon the employer to show the dismissal was justified. This requires an employer to show that it investigated concerns, raised those concerns with the employee, gave an opportunity for the employee to respond to those concerns and genuinely considered that response prior to the dismissal taking place.⁷

Mr McKinnon

[27] Mr Smith told me the reason he dismissed Mr McKinnon was because he could not or would not do the day work. Both Mr Smith and Mr McKinnon accept that in January 2015 Mr McKinnon was spoken to by Mr Smith about the issues with his day work but possible dismissal for non-performance was not raised.

[28] Mr Smith referred to a further meeting occurring on 9 February 2015. He says that he told Mr McKinnon, "*if you can't do the day work I can't afford to keep paying you and you have to go*". He then subsequently dismissed Mr McKinnon on 23 February 2015 because his day work did not improve but required Mr McKinnon to continue working until 4 March 2015 due to notice requirements.

[29] Mr McKinnon denies this. He says he was not told anything on 9 or 23 February 2015. He says he approached Mr Smith about a pay rise and was told that Mr Smith could not afford it and he was subsequently dismissed on 4 March 2015 after having finished training a new worker.

[30] Having reflected on the evidence I have read and heard, I accept what Mr McKinnon says. There is evidence that Mr Smith was under some financial pressure during this period of time. In 2015 the company was the subject of a

⁷ Section 103A of the Act.

liquidation application by IRD. Mr Smith has also advised he is “about to go bankrupt.” It corroborates Mr McKinnon’s evidence that Mr Smith could not afford his pay rise. It also gives some motivation to Mr Smith to consider Mr McKinnon’s dismissal and look for reduced labour costs in order to fulfil his financial obligations.

[31] Even if I was to accept Mr Smith’s evidence that dismissal occurred for inadequate performance, the process leading to dismissal were not the actions of a reasonable employer. If inadequate performance was at issue, a reasonable period of time should have been given to Mr McKinnon to improve his performance and clarity about the consequences i.e. dismissal if performance did not improve within that time.

[32] Mr Smith’s evidence about the alleged meeting on 9 February 2015 did not give any clear period of time for improvement nor was it particularly clear dismissal was a possibility by 23 February.

[33] There were alternatives to dismissal. Both parties were aware that Mr McKinnon had travel problems. Mr Smith could have required Mr McKinnon to remain on the farm after finishing milking to do the two hours general work rather than leaving to go home. Alternative travel arrangements or alternative times to complete his work were not offered or considered. The impression I got from the evidence was that on the date in question, Mr McKinnon was dismissed without further recourse or investigation.

Ms Pou

[34] It is common ground on 6 April 2015 Mr Smith unilaterally reduced her hours from 38 hours per week to an as-and-when-required contract.

[35] Employers cannot unilaterally reduce hours in that way. In my view, Ms Pou was within her rights to consider she had been dismissed from that point forward. It is unsurprising that Ms Pou did not return to work because she was not being offered any work. In my view the unilateral reduction of hours was an act of dismissal.

[36] Aiden Murray McKinnon and Paige Tyra Pou were unjustifiably dismissed by Graeme Smith.

What wage arrears, including holiday pay, are to be paid to these applicants?

Mr McKinnon

[37] Mr McKinnon was employed from 29 September to 4 March 2015 for 43 hours per week. The applicable minimum adult wage was \$14.75 per hour. He should have been paid \$634.25 per week. He worked for approximately 21 weeks and two days. Applying the minimum adult wage rate he should have received a total of \$13,540.50.⁸

[38] It is accepted he worked 3½ days public holidays⁹ and should have been paid at time and a half. He should have received an extra \$580.78.¹⁰

[39] It is accepted that he received \$12,863.76¹¹ during the period of time that he was employed plus a \$600 cash payment upon dismissal allegedly for unpaid holiday pay. This results in payment received of \$13,463.76. He should have received \$14,121.28. His wages shortfall therefore is \$657.52.

[40] Mr McKinnon is also owed 8% holiday pay plus 5 public holidays in lieu.¹² This results in a further payment of \$1,682.83¹³.

[41] Graeme Smith is ordered to pay Aiden Murray McKinnon wage arrears of \$2,340.35 pursuant to s.131 of the Employment Relations Act 2000.

Ms Pou

[42] Ms Pou weekly hours were 38 hours per week. The applicable minimum adult wage was \$14.75 per hour worked which results in \$560.50 payable to her each week. She worked from 10 October 2014 until 6 April 2015 or 25 weeks and 3 days and should have received \$14,344.38.¹⁴

⁸ This figure is calculated by 21 weeks x 634.25 per week (\$13,319.25) plus two days \$221.25 (Tuesday and Wednesday when he would of worked 7.5 hours x 2 x 14.75).

⁹ The parties accepted Mr McKinnon worked Labour day, Boxing Day (½ day morning only), 1-2 January 2015 (½ day each morning only) and Waitangi Day.

¹⁰ This figure is calculated by 3.5 days @ 7.5 hours = 26.25 hours @ 14.75 per hour multiplied by 1.5.

¹¹ In absence of any wage or bank records, parties agreed Mr Mckinnon received \$612.56 for 21 weeks.

¹² See note 9 above showing Mr McKinnon worked on 5 public holidays and is therefore entitled to 5 public holidays in lieu under s.56 HA 03.

¹³ This figure is calculated by adding \$1,129.70 (8% holiday pay) and \$553.13 (5 public holidays in lieu x 7.5 x 14.75).

¹⁴ This figure is calculated by adding \$14,012.50 (38 hours @ 14.75 multiplied by 25 weeks) and \$331.88 (3 days x 7.5 x 14.75).

[43] It was agreed Ms Pou worked 6½ public holidays¹⁵ but was not paid time and a half or given 8 public holidays in lieu.¹⁶ Therefore she is entitled to receive a further payment of \$1,701.79.¹⁷

[44] The total wages she should have received would have been \$16,046.17. She is also owed 8% holiday pay of \$1,283.69. She should have received wages totalling \$17,329.86. It is accepted that she was paid \$407 for 25 weeks until 6 April 2015 of \$10,175. There is a shortfall in wages for Ms Pou of \$7,154.86.

[45] Graeme Smith is ordered to pay Paige Tyra Pou wage arrears of \$7,154.86 pursuant to s.131 of the Employment Relations Act 2000.

What remedies should be granted for personal grievances?

Mr McKinnon

[46] Mr McKinnon has been found to have a personal grievance of unjustified dismissed and therefore is entitled to seek remedies of lost remuneration of up to three months¹⁸ and compensation for hurt and humiliation.¹⁹

[47] In terms of his lost remuneration I accept he mitigated his losses. He has given evidence about trying to find jobs and the difficulties in doing so. He eventually relocated to Hastings and I understand found work through his father.

[48] In my view, he would be entitled to at least three months' lost remuneration at his ordinary pay rate of \$2,748.42 per month²⁰ or \$8,245.25 less any reduction for contribution.

[49] In terms of compensation, he seeks \$10,000. I have little in the way of evidence which would justify a figure of that amount. In my view, \$5,000 is an appropriate amount to mark the hurt and humiliation he suffered as a result of losing his job. That would also be subject to any reduction for contribution.

¹⁵ The parties accepted Ms Pou worked Labour day, Xmas day, Boxing Day (½ day night only), 1-2 January 2015 (½ day each night only), Waitangi Day, Good Friday and Easter Monday.

¹⁶ See above n 15 showing Ms Pou worked on 8 public holidays and is therefore entitled to 8 public holidays in lieu under s.56 HA 03.

¹⁷ This figure is calculated by adding \$934.79 (6½ public holidays worked x 6.5 x 14.75 x 1.5) and \$767.00 (8 public holidays in lieu x 6.5 x 14.75).

¹⁸ Section 128 of the Act

¹⁹ Section 123 (1)(c)(i) of the Act.

²⁰ This figure is calculated by multiplying the weekly wage \$634.25 by 52 (\$32,981) then dividing this by 12.

[50] For Mr McKinnon I determine there is some contribution. He admitted in evidence that he did not turn up to do the day work for at least five days. That was one of the issues that Mr Smith referred to as giving rise to the dismissal. In my view that behaviour was causative and blameworthy and justifies a 25% reduction.

[51] Graeme Smith is ordered to pay Aiden Murray McKinnon lost remuneration of \$6,183.93 which includes a 25% reduction for contribution pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

[52] Graeme Smith is ordered to pay Aiden Murray McKinnon compensation of \$3,750 which includes a 25% reduction for contribution pursuant to s.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

Ms Pou

[53] Ms Pou is a different matter. There is no contributory behaviour for her unjustified dismissal. She has given evidence of mitigating her losses in looking for work and then relocating to Hastings and finding work. She is entitled to three months' lost income which is \$2,428.83 per month.²¹ Accordingly the lost remuneration she is entitled to is \$7,286.50. I award a similar amount in terms of compensation of \$5,000 and there will be no reduction for contributory behaviour.

[54] Graeme Smith is ordered to pay Paige Tyra Pou lost remuneration of \$7,286.50 pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000;

[55] Graeme Smith is ordered to pay Paige Tyra Pou compensation of \$5,000 pursuant to s.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

Costs

[56] Having given both parties an opportunity to address me about costs I have determined to award the single sum of \$3,500 for both applicants costs given both matters were heard together.

²¹ This figure is calculated by multiplying the weekly wage (\$560.50) by 52 (\$29,146.00) then dividing this by 12.

[57] Graeme Smith is ordered to pay \$3,500 as a contribution to both applicants' legal costs.

T G Tetitaha
Member of the Employment Relations Authority