



New Zealand Employment Relations Authority Decisions

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Millar v Coast Farming Limited (Christchurch) [2017] NZERA 1221; [2017] NZERA Christchurch 221 (19 December 2017)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 221
3009391

BETWEEN DESMOND MILLAR Applicant

AND COAST FARMING LIMITED Respondent

Member of Authority: Christine Hickey

Representatives: Desmond and Tracie Millar, in person

Lucky Zvinowanda, Representative for the Respondent

Investigation meeting: 28 November 2017 in Greymouth

Submissions: Oral submissions were made at the meeting

Determination: 19 December 2017

DETERMINATION OF THE AUTHORITY

A. Coast Farming Limited must pay Desmond Millar a total of

\$4,606.70 gross, to be paid in the following way:

(i) \$1,000.00 on or before 31 December 2017; and (ii) \$1,500.00 on or before 31 January 2018; and (iii) \$1,500.00 on or before 28 February 2018; and (iv) \$606.70 on or before 29 March 2018.

B. If any amount is late or short-paid the full amount outstanding is immediately due for payment.

Employment relationship problem

[1] Desmond Millar worked on the dairy farm for Coast Farming Limited (the company), initially as a casual worker. However, detailed records kept of his working

days show that from late October 2015 he became a full time worker. He was on a salary of \$55,000 gross, paid fortnightly.

[2] Lucky Zvinowanda and his wife are share milkers and were Mr Millar's

employers. Mr and Mrs Zvinowanda worked alongside Mr Millar.

[3] Mr Zvinowanda explained that he considered Mr Millar to have been a good worker but that the company's cash flow was compromised by a very wet Spring season in 2016. That meant that he was unable to ensure he paid Mr Millar fortnightly. Instead, he proposed paying Mr Millar on the 20th of each month. Mr Millar did not agree and wanted to continue being paid fortnightly. Some of the wage payments were overdue and some were reversed by Mr Millar's bank.

[4] Mr Millar made the decision to stop work temporarily until Coast Farming Limited (the company) was able to catch up with his pay and was in a position to pay him fortnightly again.

[5] In fact, the company was never able to guarantee that it could pay Mr Millar regularly again and he did not return to work. His last day of work was 23 January

2017.

[6] He claims unpaid wages, holiday pay at 8%, alternative days for public holidays days worked and the costs of interest and an unarranged overdraft incurred from not being paid on time and from his pay being reversed out of his bank account. He also claims the filing fee.

What evidence can I rely on?

[7] As part of the preparation for the investigation meeting, I issued a number of directions to the parties. I directed the company to provide Mr Millar's wages and time records to the Authority and to Mr Millar by 28 July 2017. It did not do so.

[8] [Section 130](#) of the [Employment Relations Act 2000](#) (the Act) requires an employer to keep and be able to produce wages and time records.

[9] If an employer fails to produce a wages and time record and that failure prejudiced Mr Millar's ability to bring an accurate claim for wage arrears, [s 132\(2\)](#) allows me to accept Mr Millar's evidence to prove the wages that were paid to him and the hours, days and times worked by him.

[10] At the investigation meeting, Mr Zvinowanda told me that he did have more records than the company had produced to me. However, I consider, having given the company sufficient opportunity to produce those records, and not having seen them, I am able to rely on Mr Millar's evidence of the days worked by him to calculate his outstanding wages.

[11] Mrs Millar kept diaries with extensive entries of Mr Millar's and her own hours and days of work for the company. I have relied on these records and on Mr and Mrs Millar's oral evidence to establish days of work and annual leave taken.

The issues

[12] The issues I need to resolve are:

(i) Does the company owe Mr Millar further wages?

(ii) How much holiday pay and pay for alternative days does the company owe Mr Millar?

(iii) Was Mr Millar paid correctly when he worked on public holidays?

(iv) Were Mr Millar's bank charges of \$59.00 incurred because of his employer's failures to pay on time?

Does the company owe Mr Millar further wages?

[13] I am satisfied that as at 20 March 2017, when the last fortnightly pay amount was paid, the company owed Mr Millar one further week of pay, at an amount of

\$1,057.69 gross.

How much holiday pay does the company owe Mr Millar?

[14] Mr Zvinowanda's evidence was that all payments prior to 1 June 2016 were on an hourly rate of \$20 per hour inclusive of 8% holiday pay. Mr Zvinowanda was unable to tell me what Mr Millar's basic hourly rate was at that time. Mr Millar disputed Mr Zvinowanda's explanation. Mr Millar's evidence is that he agreed to work for \$20 per hour but did not agree that would contain his annual holiday pay.

[15] [Section 28](#) of the [Holidays Act 2003](#) requires a number of conditions to be met before an employer can pay 8% of an employee's pay as their annual leave entitlement with each pay. These conditions were not met for the following reasons. I do not accept that up until 1 June 2016 Mr Millar was a casual employee whose work was so "intermittent or irregular it is impracticable for the employer to provide the employee with 4 weeks' annual holidays". Nor is there a written agreement specifying that the \$20 per hour included an annual leave component. In addition, no annual holiday pay was paid as an identifiable component of Mr Millar's pay prior to

1 June 2016.

[16] Therefore, Mr Millar is owed 8% of his final pay as payment for his annual leave entitlements, less the amount of paid leave he actually took. Based on the length of time he worked and the number of annual leave days he took, I am satisfied that Mr Millar is owed \$562.69 gross in annual leave entitlements.

[17] I am also satisfied that Mr Millar worked a total of nine statutory holidays. For each of those days he is due an alternative holiday. He had not taken those holidays when he finished work so should be paid \$1,903.84 gross for them.

Was Mr Millar paid correctly for working on public holidays?

[18] Mr Millar was only paid at his usual rate when he worked on those public holidays instead of at time and a half. He must be paid a further \$951.92 gross.

Did Mr Millar incur other payments because of the wage arrears?

[19] Mr Millar's bank records show that he incurred \$59 in fees and interest as a direct consequence of the company failing to pay him correctly and on time. Mr Zvinowanda agreed that the company would pay those fees.

Conclusion

[20] I am satisfied that the company owes Mr Millar a total of \$4,476.14 gross in wages, holiday pay and pay for alternative days. Mr Millar is responsible for paying his own income tax on the \$4,476.14.

[21] The company must pay Mr Millar \$71.56, which is the fee he paid to bring his claim to the Authority.

[22] The company must pay Mr Millar \$59.00 in unnecessary fees incurred.

[23] I am satisfied that the company's financial circumstances mean that it needs to pay what it owes Mr Millar in instalments. Mr Zvinowanda undertook to pay a total of \$1,000 immediately.

[24] Neither party was legally represented. Therefore, I will make no order as to costs.

Christine Hickey

Member of the Employment Relations Authority