



# New Zealand Employment Relations Authority Decisions

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## Morrissey v Ofoske (Auckland) [2007] NZERA 104 (4 April 2007)

Determination :AA 101/07 File Number:5049888

Under the [Employment Relations Act 2000](#)

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE**

**BETWEEN** Mathew Morrissey (Applicant)

**AND** Mark Ofoske (Respondent)

**REPRESENTATIVES** Mathew Morrissey in person

Mark Ofoske in person

**MEMBER OF AUTHORITY** Vicki Campbell

**DATE OF DETERMINATION** 4 April 2007

### DETERMINATION OF THE AUTHORITY

#### **Employment Relationship Problem**

[1] Mr Mathew Morrissey was employed by Mr Mark Ofoske as a farm labourer from 6 August 2005 to 31 May 2006. Mr Morrissey claims he is owed outstanding wages and holiday pay totalling \$3,845.35.

[2] Mr Ofoske denies he owes Mr Morrissey any outstanding wages or holiday pay, however at the investigation meeting he conceded that Mr Morrissey is due payment for statutory holidays which he worked and only received his ordinary pay for. Mr Ofoske has filed a counter-claim against Mr Morrissey for money owed to him for livestock which he says Mr Morrissey took but did not pay for, as well as missing items belonging to the employer.

#### **The employment agreement**

[3] Mr Morrissey has based the calculation for his claim on the premise that he was to be paid \$32,000 per annum plus an allowance of \$2,600 for his accommodation benefit. In support of his claim Mr Morrissey relies on a document he claims is the written confirmation of the terms and conditions of employment offered to him and which he says he accepted.

[4] Mr Ofoske denies the document given to Mr Morrissey was an employment agreement. Mr Ofoske says it was a template sharemilkers agreement which he gave to Mr Morrissey after they had had a discussion about the possibility of Mr Morrissey undertaking a sharemilkers arrangement.

[5] The document has not been signed by either Mr Morrissey or Mr Ofoske. While the dates of Mr Morrissey's employment have been included in the document there are important

aspects to the document which have not been completed. For example, there is no figure in the remuneration clause. Also, there are matters contained within the document which do not appear to be related to Mr Morrissey's employment, for example there is a table included on the first page of the document which purports to outline the required production rate for milksolids. The table relates to the years 2002 to 2005 (the production year ends on 31 May). These periods are prior to Mr Morrissey's employment.

[6] I am satisfied it is more likely than not, that this document was provided to Mr Morrissey as an example of what may be available if he was to undertake a sharemilking contract, and does not constitute the employment agreement between the parties.

[7] At the investigation meeting Mr Morrissey agreed that when he applied for the job he was offered, and accepted payment

at the rate of \$600.00 per week. This is contrary to Mr Morrissey claim in his statement of problem where he says he was offered and accepted \$32,000.

[8] I am satisfied Mr Morrissey was offered and accepted a rate of pay of \$600.00 per week including the provision of a free house. There was no evidence that the value of the accommodation was agreed or even discussed between the parties. However, it was accepted by Mr Ofsoske that he had failed to account for the value of the accommodation in Mr Morrissey's PAYE calculation and therefore had not accounted to IRD for the tax attributable to the provision of the accommodation.

#### **Claim for payment of days off - not taken during employment**

[9] Mr Morrissey says he was entitled to four days off each month. Mr Ofsoske says it was three. Mr Morrissey says Mr Ofsoske's partner, Ms Beverley Miller, told him he would get three days off over a weekend and then another day off during the week. Ms Miller denies she had that conversation with Mr Morrissey. Ms Miller told me she had nothing to do with the employment of staff and would never have told Mr Morrissey he was entitled to four days off each month. Mr Ofsoske says he told Mr Morrissey, when he offered him the job, that he would get three days off per month. He told me he would never have offered four days off, as all his employees only get three days off each month.

[10] I have preferred the evidence of Mr Ofsoske in relation to offer made and accepted that Mr Morrissey receive three days off each month. I have found Mr Morrissey's evidence generally unreliable. He had difficulty remembering events and information pertinent to his claim for lost wages and changed his evidence as information was put to him for response.

[11] Mr Morrissey worked for 10 months. He was therefore entitled to take a total of 30 days off on pay during his employment. Mr Morrissey says he took only nine of the allowable

30 days off work. Mr Ofsoske says Mr Morrissey took all the days off he was entitled to and produced a schedule which shows payments being made for relief milkers employed to replace Mr Morrissey when he took his days off.

[12] There was considerable discussion at the investigation meeting regarding this aspect of Mr Morrissey's claim. The evidence is unclear about whether Mr Morrissey took the days off or not. What was clear was that Mr Morrissey, while being paid to work for Mr Ofsoske, would take time off and help his mother with her contracting business. Mr Morrissey also told me his partner's 15 year old brother would do milkings for no pay, instead of Mr Morrissey.

[13] The preponderance of the evidence strongly suggests Mr Morrissey took the equivalent of 30 days off during his employment without deduction. It follows therefore, that this aspect of Mr Morrissey's claim must fail.

#### **Statutory Holidays**

[14] The parties agreed Mr Morrissey had not been paid the statutory time and a half for working on public holidays. It was also agreed Mr Morrissey had not received or been paid for a day in lieu, having worked on a public holiday.

[15] Mr Morrissey worked on 6 public holidays. He is entitled to payment at *Vi* rate extra for each of those days. He is also entitled to be paid for the day in lieu for each of those days. Mr Morrissey is entitled to be paid the sum of \$771.39 gross.

#### **Holiday pay**

[16] Mr Morrissey says he is owed outstanding holiday pay which was not calculated and paid to him at the end of his employment. Mr Morrissey took annual leave from 2 to 22 May inclusive. Pursuant to the Holidays Act Mr Morrissey was entitled to receive a payment equal to 6% of his gross earnings subject to any deductions for holiday pay, paid in advance. Mr Morrissey took three weeks paid annual leave in advance of his entitlement falling due, as he did not complete 12 months employment. That equates to \$1,800 gross.

[17] Mr Morrissey earned \$25,200 gross during the period of his employment. Add to that the outstanding payments due for public holidays worked, Mr Morrissey's gross earnings is \$25,971.39, 6% of which is \$1558.28 gross.

[18] As can be seen from these figures, Mr Morrissey has been overpaid his holiday pay in the amount of \$241.72 gross.

#### **Counter-claim**

[19] Mr Ofsoske claims Mr Morrissey owes him \$1,000 for calves which he took from the farm but never paid for. It is not disputed that Mr Morrissey purchased eight calves from Mr Ofsoske. Mr Ofsoske says he offered the calves to Mr Morrissey and Mr Morrissey's partners' uncle at the price of \$200.00 plus GST each. Mr Morrissey says there were four or five smaller calves which Mr Ofsoske offered to him for \$150.00 each. Mr Ofsoske denies this.

[20] It is not disputed that Mr Morrissey paid \$800.00 to Mr Ofsoske as part payment for the calves. However, this problem

does not fall within the employment relationship. The sale and purchase agreement relating to the calves, and entered into by the parties, was not part of the employment agreement between parties and is therefore, outside my jurisdiction. I am unable to be of any further assistance to Mr Ofsoske in relation to this matter.

### **Determination**

[21] In resolution of this employment relationship problem the respondent is ordered to pay to Mr Morrissey immediately, the sum of \$529.67 gross. This amount has been calculated as follows:

Outstanding payments for public holidays worked \$771.39

Less overpayment of holiday pay -\$241.72

**TOTAL 529.67**

### **Costs**

[22] Neither party was represented before me and neither was completely successful. I consider in these circumstances that it is appropriate to let costs lie where they fall.

Vicki Campbell

Member of Employment Relations Authority

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