

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 79
5331579

BETWEEN ROBERT ALAN JAMES
 WILSON
 First Applicant

AND JOANNE MARY WILSON
 Second Applicant

AND KEITH POW & MARTY POW
 Respondents

Member of Authority: Philip Cheyne

Representatives: Kevin Murray, Representative for Applicant
 Keith Pow & Marty Pow, the Respondents in person

Investigation Meeting: 12 April 2012 at Christchurch

Further Information: 17 April 2012 from the Respondents
 19 April 2012 from the Applicants

Determination: 1 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Keith Pow and Marty Pow operate three dairy farms near Geraldine. They employed Robert Wilson and Joanne Wilson for a period of time on one of the farms. When Mr & Mrs Wilson gave notice of resignation, Mr & Mrs Pow stopped paying Mrs Wilson on the basis that they had been paying her in advance so she had already been paid for time worked in the pay periods prior to and after the date she gave notice. Mrs Wilson says that she should have received her salary and holiday pay as usual. Mr & Mrs Pow also withheld Mr Wilson's holiday pay. The reason given later was that there was damage to the house occupied by Mr & Mrs Wilson. Mr Wilson's claim is for arrears of salary and holiday pay. Although not referred to in his

statement of problem, Mr Wilson is also claiming payment of first week compensation for time off work in his subsequent employment but caused by an accident he says occurred during th employment with Mr & Mrs Pow.

[2] The employment ended in November 2010 and these proceedings were lodged with the Authority in January 2011. The parties agreed to attend mediation but they were not able to resolve the problems. In August 2011 Mr & Mrs Pow paid \$935.12 as their assessment of holiday pay owed to Mr Wilson after taking a deduction for damage to the property.

[3] In their statement in reply and during the Authority's investigation meeting Mr & Mrs Pow said that Mr & Mrs Wilson should have come to see them before vacating the house and leaving the farm in order to discuss and resolve the final pay issues. They say that is why Mr Wilson was not paid even the undisputed sum until August 2011. Mr & Mrs Pow also told me during the investigation meeting that Mr & Mrs Wilson lied to them about why they were leaving the employment. They acknowledge that was also partly why they did not pay what was owed to Mr Wilson. As it was put in the statement in reply:

This lack of gratitude for what we did for them, coupled with the blatant lies about why they were leaving, leave us with a vary bad taste.

[4] While such strong feelings explain why Mr & Mrs Pow acted as they did, the issues before the Authority are about legal rights. There is a dispute about Mrs Wilson's terms of employment which I will need to resolve. If the arrangement was as Mr & Mrs Pow claim there is no further payment due. If not, Mrs Wilson will be entitled to salary and holiday pay. Mr Wilson had a signed individual employment agreement. I will need to consider whether Mr & Mrs Pow complied with that agreement, the Holidays Act 2003 and the Wages Protection Act 1983 and whether Mr Wilson was liable to them for any property damage. Mr Wilson was employed first so it is convenient to start there. For Mr Wilson there is also an issue about whether Mr & Mrs Pow are liable under the Accident Compensation Act 2001 for the first week's lost earning in subsequent employment following an accident during his employment with Mr & Mrs Pow.

Mr Wilson's employment

[5] There is a written employment agreement dated 1 June 2010. Mr Wilson commenced work on that day but the agreement was apparently signed on 1 July 2010. For present purposes the delay in Mr & Mrs Pow attending to their legal obligations regarding the employment agreement is immaterial.

[6] Mr Wilson was employed as farm manager with a salary of \$50,000.00 per annum. In addition a house was supplied. Mr Wilson was engaged to work twelve days on, two days off. He had to work any statutory holidays that fell on rostered days on. Salary was paid fortnightly by direct credit.

[7] The agreement has features of fixed term employment for the season to the end of May but also has features of ongoing employment. It is not necessary to resolve whether it was genuinely a fixed term agreement. I do observe that Mr & Mrs Pow expected the employment to be at least 12 month's duration. There are two clauses in the agreement relevant to the issues before the Authority. Clauses 7.3 (b) and 9.1 c) (i) respectively state:

The Employer has the right to deduct from the Employee's net wages the deductions set out in Schedule 1. No other deductions shall be made from the payment due except with the Employee's prior written permission.

The Employee shall keep the rooms occupied by him/her and the surroundings clean and free from all rubbish and shall leave the premises in a clean and tidy condition and free from any damage beyond fair wear and tear. If he/she fails to do so the Employer may employ some other person to do the work, and may deduct the cost of such work from any money due to or accruing to the Employee occupying the accommodation.

[8] Mr Wilson received his first fortnightly pay on Monday 14 June 2010. He was paid \$1,923.08 (gross). \$300 was added to that sum to represent the value of the accommodation before tax was calculated, then PAYE and the \$300 for the accommodation was deducted. That resulted in a net payment of \$1,419.36. The second pay was paid on 28 June 2010. From that pay, Mrs Pow treated Mrs Wilson as the employee entitled to the accommodation so the \$300 was not added to Mr Wilson's pay for the purpose of calculating PAYE. That resulted in him receiving \$1523.10 net. Thereafter, Mr Wilson was paid that sum subject to tax rate changes in October 2010. Mr Wilson's net pay was reduced in November 2010 when Mrs Pow

reverted to treating him as the employee entitled to the supplied accommodation, a change which was backdated to the previous pay period.

[9] In accordance with the employment agreement, on 14 October 2010 Mr Wilson gave written notice of resignation with his last day of work to be Thursday 11 November 2010 and the house to be cleaned and vacated by 14 November 2010.

[10] Mr Wilson's last regular payday was on Monday 15 November 2010. A payment was made into Mr Wilson's bank account on that day. Apparently Mr & Mrs Pow had calculated what was owed to Mr Wilson in holiday pay but because Mr & Mrs Wilson did not come to meet with them before departing the matter was not progressed at that time. Mr & Mrs Pow also felt that they had paid Mr Wilson more than he deserved and that he had lied to them about the reason for his resignation. They therefore did nothing further to notify Mr Wilson about the alleged damage to the property.

Holidays Act 2003

[11] S.27(2) of the Act states that where an employee's employment has come to an end *the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment.*

[12] Mr Wilson's employment was of less than 12 month's duration so his entitlement to annual holiday pay must be calculated in accordance with s.23 of the Holidays Act 2003. That requires the employer to pay 8% of the employee's gross earnings less any amount for holidays taken in advance. Gross earnings in turn is defined by s.14 of the Act to include (relevantly for present purposes) salary or wages, allowances and the cash value of any board or lodgings provided by the employer. The definition therefore includes the \$300 that was included for tax purposes in Mr Wilson's wages at the beginning and at the end of his employment.

[13] Mr Wilson worked half a day on South Canterbury Anniversary day (Monday 27 September 2010) and half a day on Labour Day (Monday 25 October 2010). In accordance with s.56 and s.57 of the Holidays Act 2003 Mr Wilson became entitled to two alternative holidays each of a whole day for working on these days. He was also

entitled to be paid half time extra for the time actually worked. None of these payments were made during the employment so they were owing with Mr Wilson's final pay. Mr Wilson's daily rate was \$160.27 for the three days totals \$480.81. That sum should have been paid to Mr Wilson and it must also be included in his gross earnings for holiday pay purposes.

[14] Mrs Pow's calculations show her offsetting her calculation of the statutory entitlements against Mr Wilson apparently not working for the afternoons of the previous three days. This was a salaried not an hourly rate position. There was no legal basis for Mr & Mrs Pow to offset the statutory entitlement even if they could establish that Mr Wilson did not work on those three afternoons.

[15] Mr Wilson worked eleven full fortnights. Gross earnings for that period should have been (and were) \$21,153.88. Mr Wilson's final day of work was 11 November 2010. Mr Wilson was paid for 9½ days work in the final pay period. Because it was not challenged I will assume that Mrs Pow's calculations reflect the roster; i.e. that Mr Wilson actually had his rostered days off early in the pay period. That gives a gross of \$1,522.47 for the final pay period. There were also two pay periods when Mr Wilson was treated as being entitled to the supplied accommodation, a total of \$600. These figures total \$23,276.35. Adding the statutory payments brings that up to \$23,757.16 for Mr Wilson's gross earnings. 8% of gross earnings totals \$1,900.57. Mr Wilson should have received \$1,900.57 in annual holiday pay, \$480.81 for statutory holidays and salary of \$22,676.35 (accommodation payments excluded).

[16] While Mr Wilson should have been paid \$25,057.73 (gross), Mrs Pow's calculations show that he received salary payments totalling \$22,676.31 (accommodation payments excluded) during his employment. The difference is \$2,381.42. Subject to what follows, Mr & Mrs Pow should have paid Mr Wilson a further \$2,381.42. (gross) on 15 November 2010 with his final pay. As explained above that is a mixture of holiday pay (annual and statutory).

Damage to the house

[17] There is a disagreement about two aspects of the supplied accommodation. Mr & Mrs Wilson say they left the property in a clean and tidy state. They say that the carpet in one bedroom was mouldy and had been that way from when they moved in. They also say that the new carpet next to one door was not properly affixed and the bottom of the door brushed over it when the door was opened or closed.

[18] Mr & Mrs Pow say that the carpet in the identified bedroom was *quite old but sound* (Mrs Pow's evidence) and not mouldy at the start of the employment (Mr Pow's evidence). They provided me with an unsworn statement from the subsequent tenant to the effect that *All was fine except for carpet in one bedroom that had a pungent pet stench*. Carpet cleaning apparently did not work because the stench had soaked into the floorboard. The carpet was lifted and the floorboards were sanded and sealed. This work was done by Mr Pow and/or the subsequent tenant without charge. I have been provided with an invoice for \$595.00 dated 5 May 2011 for supplying and laying new carpet in the bedroom.

[19] I do not accept that Mr & Mrs Pow are entitled to any deduction for this alleged damage. First and foremost, the Wages Protection Act 1983 requires an employer to pay the entire amount of wages due without deduction: see s.4 of the Act. An employer may make a deduction from wages due with the written consent of the employee: see s.5(1). Mr & Mrs Pow did not seek or have any consent. There are two clauses in Mr Wilson's employment agreement (see above) but they are contradictory and could not defeat the statutory requirements in any event.

[20] There is something of a conflict between Mr & Mrs Wilson and Mr Pow about the state of the bedroom at the start and the end of the employment, although Mrs Pow acknowledged that the bedroom was on the cold side of the house and at a lower level. Mr & Mrs Pow could have recorded the state of the property at the outset and had Mr & Mrs Wilson confirm the record. I could have been provided with date stamped photos. The subsequent tenant could have been brought to the Authority's investigation meeting to give evidence on oath. In the absence of standard record keeping such as that or other independent evidence Mr & Mrs Pow's claim fails for want of proof.

[21] I have not been given any explanation why, once the floor had been sanded and sealed, new carpet rather than the serviceable old carpet was installed. I note that this work was done about 6 months after Mr & Mrs Wilson departed. Whatever Mr Wilson's liability for proven damage might have been it would not extend to improving the state of the property.

[22] The second aspect of the disagreement about the state of the property is based on even less cogent evidence. Mr Pow told me that he had been told by Simpson Flooring that the new carpet under the aforementioned door was damaged in a manner typical of damage caused by dogs. Mr & Mrs Wilson had dogs. I have been given an invoice for \$25.88 dated 6 May 2011 with the description *Repairs to carpet – as per installers invoice 0.5 hrs labour*. The claim for a deduction from Mr Wilson's final pay in respect of this matter fails for want of proof as explained above.

[23] To summarise, Mr & Mrs Pow must pay Mr Wilson \$2,381.42. (gross) as arrears less the \$935.12 (net) paid to Mr Wilson on 10 August 2011. Mr Wilson is entitled to interest on the arrears.

ACC

[24] I have been given a copy of ACC's letter dated 14 November 2011 to Mr & Mrs Pow advising of the Corporation's decision to allocate Mr Wilson's injury suffered on 23 September 2010 to Mr & Mrs Pow as the employer at the relevant time. Doctor's notes and ACC documents indicate that the injury was to the left knee. Mr & Mrs Pow are sceptical about the veracity of the claim and suggest that any injury was caused by an accident or accidents that predate the employment. However, Mr Wilson says that surgery 10 years earlier after an accident was not on his left knee. There is no reason to doubt this evidence. I also note Mrs Pow's acknowledgment that Mr Wilson did mention to her during the employment an accident. At that point he was able to continue working.

[25] Mr Wilson did not advise Mr & Mrs Pow that he needed or was having the surgery for which he required time off after the employment ended. It would have been better if Mr Wilson had done so but it does not affect the legal basis of the claim.

[26] I have been given an unsigned letter from the subsequent employer that states that Mr Wilson required time off from Wednesday 9 February 2011 (½ a day) until Tuesday 15 February 2011. Mr Wilson's representative was asked to provide a signed letter from the subsequent employer and a copy of the relevant pay records to establish that this was unpaid time off. However, I have not received this further information. I will reserve determination on liability for the meantime but if the proper records can be provided a decision in Mr Wilson's favour is likely. The obligation will be to pay compensation for the first week's absence in accordance with the Accident Compensation 2001: refer to s.99 and s.98 of that Act for the Authority's jurisdiction and the employer's liability respectively.

Mrs Wilson

[27] Initially only Mr Wilson was employed. During his interview Mrs Wilson asked and was told that there would be work for her especially at the other farm. The farm Mr Wilson was employed on was once a day milking and usually operated on one employee plus a relief milker. It is common ground that Mrs Wilson told Mr and Mrs Pow that she did not do tractor work or move irrigators.

[28] Sometime soon after Mr Wilson's employment commenced Mrs Wilson again asked Mrs Pow about work on the basis that she would otherwise need to seek work elsewhere because they could not live on Mr Wilson's sole income. Only Mrs Wilson and Mrs Pow were parties to this discussion. Mrs Pow told me that she could not recall specifically what was said but accepted that Mrs Wilson had spoken to her about an arrangement that operated in former employment. Mrs Wilson gave evidence about this being a salary arrangement and told me that she used that word in her discussion with Mrs Pow. Mrs Pow disputes that Mrs Wilson discussed a salary arrangement. I prefer Mrs Wilson's evidence on this point. As noted, Mrs Pow started by telling me that she could not specifically recall what had been said. It is clear from Mrs Wilson's evidence that the previous arrangement was a salary arrangement and there is no reason to think that she would not have used that word when explaining the arrangement to Mrs Pow. Mrs Pow's denial is not a recollection – it just represents her and Mr Pow's position over the dispute.

[29] I should explain a little more fully about Mrs Wilson's previous arrangement. Mrs Wilson worked part-time not full-time. She was paid a regular salary based on an estimated number of hours for the entire season regardless of the hours actually worked in any pay period. Mrs Wilson was asked to keep a record on her actual hours so that, if at the end of the season she had actually worked more hours than had been estimated, she could be paid for those additional hours. If Mrs Wilson had worked fewer hours than estimated there would be neither extra pay nor a refund. I accept Mrs Wilson's evidence that this is what she explained to Mrs Pow.

[30] Mrs Pow spoke to Mr Pow. There was then a discussion between Mr and Mrs Pow and Mrs Wilson. They discussed the difficulty of Mrs Wilson being the relief milker for Mr Wilson – it would mean that they could not have time off together. That was acceptable to Mrs Wilson. There was discussion about Mr & Mrs Wilson needing time off together for a forthcoming event which Mr and Mrs Pow agreed could be accommodated. Mrs Wilson was to perform other work as required. Mrs Pow said that the employment agreement would be very similar to Mr Wilson's agreement which Mrs Wilson had already read. There was no specific discussion about other terms except for payment on the basis of \$25,000 per annum. There was no mention about the tractor and irrigator work Mrs Wilson was unable to do.

[31] Mrs Wilson was first paid on 28 June 2010. From the outset Mrs Pow treated Mrs Wilson as the employee entitled to the supplied accommodation. That meant Mrs Wilson was paid \$961.54 per fortnight gross with \$300 added before tax was calculated with PAYE and the \$300 deducted to arrive at the net payable. Mrs Wilson was paid in that fashion for eight pay periods with the last pay on 4 October 2010. Mrs Wilson kept a record of the hours that she worked from 2 June 2010 until 28 October 2010. That was her last day of work in accordance with two weeks notice given by her on 14 October 2010.

[32] While Mrs Pow had said to Mrs Wilson that the employment agreement would be similar to Mr Wilson's, Mr and Mrs Pow took no steps to actually provide Mrs Wilson with a draft employment agreement for her to consider or accept. In this context I note that Mr Wilson's employment agreement was signed on 1 July 2010, soon after Mr & Mrs Pow actually started paying Mrs Wilson.

[33] 18 October 2010 was the first pay day after Mrs Wilson gave notice. Mr and Mrs Pow did not pay Mrs Wilson on that day or thereafter. Mr Pow told Mr Wilson that this was because (on his view) Mrs Wilson was an hourly worker who had been paid in advance and they were owed work for the payments already made. Mr Pow never spoke to Mrs Wilson about this.

Paid in advance?

[34] For the reason explained earlier I accept Mrs Wilson's evidence about her discussion with Mrs Pow. To paraphrase, Mrs Wilson was engaged on a salary of \$25,000 per annum with her to record the hours actually worked against the possibility that she would be entitled to more salary at the end of the season depending on hours worked.

[35] There is no evidence of any discussion much less agreement that Mrs Wilson would be engaged as an hourly worker paid in advance with an obligation at the end of the employment to make up for any paid for but unworked hours. Mr and Mrs Pow might have anticipated that the variable demand for Mrs Wilson's labour throughout the season would have balanced out but they made no such arrangement.

[36] It follows that Mrs Wilson should have been paid her normal salary on 18 October (\$961.54) and salary for the balance of her employment plus holiday pay on 1 November 2010. It is difficult to establish Mrs Wilson's ordinary hours of work as she worked without regular days off from August 2010. I will treat her as being entitled to 2 days off per fortnight (as was Mr Wilson). The last pay period appears to have ended on Sunday 31 October 2010. Mrs Wilson recorded Tuesday 19 October and Monday 25 October 2010 as her days off that fortnight and her last day of work was Thursday 28 October 2010. Mrs Wilson therefore worked 9 rather than 12 days in that pay period. She should have been paid for 9 days at \$80.13, a total of \$721.17. The arrears of salary are therefore \$1,682.71.

[37] Mrs Wilson recorded gross earnings were \$10,092.33 which with the arrears totals \$11,775.04. Her holiday pay entitlement is therefore \$942.00.

[38] The combined arrears of salary and holiday pay for Mrs Wilson is \$2,624.71. Mrs Wilson is also entitled to interest, having been denied the use of this money since 1 November 2010 which is when it should have been paid to her at the latest.

Summary and orders

[39] Mr and Mrs Pow must pay Mr Wilson \$2,381.42. (gross) as arrears less the \$935.12 (net) paid to Mr Wilson on 10 August 2011.

[40] Mr and Mrs Pow must pay Mr Wilson interest on these arrears. I know the net but not the gross amount that was paid in August 2011 after these proceedings commenced. I will order interest on the whole sum starting on 15 November 2010 until 10 August 2011; and thereafter interest on \$1,000.00 (an estimate of the remaining gross sum) until payment in full has been made. The rate of interest is 5% per annum.

[41] Mr and Mrs Pow must pay Mrs Wilson arrears of salary and holiday pay of \$2,624.71.

[42] Mr and Mrs Pow must pay Mrs Wilson interest on the arrears starting on 1 November 2010 until payment in full has been made. The rate of interest is 5% per annum.

[43] I will reserve for later determination (if necessary) Mr & Mrs Pow's liability for the first week compensation in accordance with the ACC regime.

[44] Although Mrs Wilson lodged the statement of problem a representative was engaged at some point so issues of cost might arise. Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority