

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA101/08  
5095193

BETWEEN                      RICHARD KIRK  
   Applicant

AND                              WILLIAM GORDON CRAIG  
   ON BEHALF OF THE  
   TRUSTEES OF THE  
   ESTATES OF W BRUCE  
   CRAIG AND WILLIAM  
   CRAIG  
   Respondent

Member of Authority:        G J Wood

Representatives:             Richard Kirk on his own behalf  
   Lance Rowe for the Respondent

Investigation Meeting:       23 July 2008 at Wanganui

Determination:                31 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Richard Kirk, claims that the respondent (known as William Craig & Co) did not pay him for hours worked on its Te Hui farm in addition to those required of him under his employment agreement, and that he was also not paid for work on a statutory holiday.

[2]     William Craig & Co does not accept that it has underpaid Mr Kirk. Instead it has counterclaimed for what it considers are overpayment of wages and holiday pay, and for reimbursement for various items bought on William Craig & Co's accounts, as well as Telecom accounts and for three sheep allegedly taken by Mr Kirk without authorisation.

## The Facts

[3] There can be no certainty about events that occurred over a year ago. The Authority is, however, charged with determining the facts on the basis of the balance of probabilities, in other words what is more likely to have occurred than not. In this case there are a number of disputed events between the witnesses - Mr Kirk, Mr William (Gordon) Craig (who is the trustee responsible for the overall operation of the farm) and Mr Michael Black (the farm manager at the time).

[4] I have made my findings of fact, not on the basis of demeanour and credibility between each of the witnesses, but rather on the documents created close to the time and the background circumstances of events. Where there is a direct conflict of evidence between witnesses I have looked to those documents and the background circumstances to determine in each instance what was more likely than not to have occurred. I have not made findings on matters that are not relevant to the dispute between the parties because the Authority is only required to determine relevant issues.

[5] Mr Kirk was employed on a full time basis at the Te Hui farm (situated about a one hour's drive from Wanganui) between 1 May 2006 and 19 April 2007. He reported to the farm manager, Mr Michael Black. Mr Black in turn reported to Mr Gordon Craig (a trustee of the two relevant estates that owned the farm), who is responsible for its operation. Mr Craig lives in Wellington and only attended the farm every month or so. Mr Black and Mr Kirk lived in separate houses on the farm.

[6] Mr Kirk signed an individual employment agreement based on a Federated Farmers standard form *Individual Employment Contract*, which provided for hours of work in the following way:

*Normally a 42.5 hour week, the hours worked between 8am and 5pm Monday to Friday. However with seasonal work in mind, greater hours may be worked on any, or all, of the days of the week, Monday to Sunday inclusive as may be required to best suit the management of the farm.*

[7] In practice, however, the eight and a half hour day contracted for usually consisted of an 8.25 hour day, worked between 7.45am and 5pm, with an hour for lunch. In addition, it was accepted between the parties (although not committed to writing) that because extra work was required in the Summer, time off in lieu would be given during seasons when there was less work, such as in the Autumn.

[8] After a little while Mr Kirk's rate of pay was increased to \$33,000 per annum. It is clear that in the way that Mr Black operated the farm on behalf of William Craig & Co, Mr Kirk was

only usually required to work 8.25 instead 8.5 hours per day and he therefore had the benefit of working 1.25 hours less each work. Of course the hours he worked were in fact often in excess of that amount. On an hourly basis his pay for a 45 hour week was \$14.93 gross.

### **Hours of Work**

[9] The matter of the *unders and overs* of Mr Kirk's work could not be properly addressed until the day of the investigation meeting, because Mr Kirk failed to comply with a direction to provide copies of his diaries (in which he regularly diarised his hours of work) in advance of the investigation meeting.

[10] Having inspected Mr Kirk's diaries over the course of over two hours during the investigation meeting, and having compared the hours claimed in those diaries with Mr Black's records, William Craig & Co only contested four particular items. For all other periods it was prepared to accept Mr Kirk's records and to pay him for hours worked that should have been provided to him as time off in lieu under the parties' understanding.

[11] First, Mr Kirk had claimed a full day's work for 22 September 2006, whereas Mr Black's diary indicated that he had taken half a day off. After hearing Mr Kirk's explanation for what he was doing that day, however, Mr Black could not deny that that was what Mr Kirk had in fact done, because he was not present at the farm that day. I therefore conclude that Mr Kirk's evidence should be accepted and that his estimate of 4.25 hours should be preferred for that half day.

[12] Second, on 1 December Mr Kirk claims to have worked 9 hours because he had to go to physiotherapy for an injury he had suffered, and therefore had to complete his work after 5pm. Mr Black could not dispute this and again I accept Mr Kirk's evidence over the extra half hour worked.

[13] Third, on 14 December Mr Kirk claimed for an 11 hour day, noted as cleaning up after shearing and returning mobs of sheep. In contrast, Mr Black's diary entry for that day noted that all staff had worked only half a day. This half day was also recorded in his register of staff time off. As is to be expected, Mr Kirk did not always fill in his diary daily, so it is possible he has mistakenly recorded the length of his working day on this one occasion. Because the matter was clearly recorded by Mr Black on two occasions I prefer his evidence on this point, as Mr Kirk relies on his memory and a sole diary reference.

[14] The final occasion was on Good Friday, 6 April 2007. Mr Black was on leave that week, although often on the farm. Mr Kirk recorded 6 hours work, which involved separating mobs that had somehow become intermingled (which would have had serious consequences down the track if

he had not taken action). Mr Black accepts that while he was in and out that day he heard bikes going around and he could not deny that Mr Kirk may have done some work that day. I therefore accept Mr Kirk's claim for those 6 hours work on a statutory holiday.

[15] Given that Craig & Co is happy to otherwise accept Mr Kirk's claims for hours the matters of under or overpayments fall to be determined by whether Mr Kirk was properly compensated for the extra hours he worked, upon the termination of his employment.

[16] Mr Kirk resigned with immediate effect on 19 April 2007. During his employment he was paid for statutory holidays, sick leave and annual leave which he took and was on ACC for 15 working days, for which he was paid by Craig & Co for 5 days as the law requires.

[17] William Craig & Co claims that Mr Kirk actually worked 1,731.75 hours. It is clear from my analysis that in addition to that figure:

- Mr Kirk was required to work on a public holiday and is therefore entitled to 9 hours pay for the 6 hours that he worked; and
- There were 4.75 other hours that I have found that he is entitled to above.

[18] I therefore determine that Mr Kirk actually worked 1,745.5 hours over the course of his employment. When his entitlements to sick pay, statutory holidays, and the ACC week which is the responsibility of the employer are taken into account, his entitlement to pay for these matters therefore totals 1,898.5 hours.

[19] Mr Kirk was in fact paid \$31,179.98 gross during the course of his employment with William Craig & Co. His holiday pay at 8% should therefore have been \$2,494.40 gross, which equates to 167 hours. Thus Mr Kirk should therefore have been paid for a total of 2065.5 hours.

[20] Mr Kirk was in fact paid for 2091 hours. The main reason for this was because Mr Kirk was paid monthly in arrears and in advance, and he had just been paid his full month salary for April, yet he resigned on 19 April without notice. He was therefore overpaid for 8 working days. While William Craig & Co could not unilaterally deduct that from any monies owing to him (and it did not), the fact remains that the Authority is able to take into account such overpayments when assessing whether, in the overall analysis, Mr Kirk has been under or over paid. He is simply not entitled to pay for late April because he did not work it.

[21] I accept therefore that Mr Kirk was entitled to be paid for 2,065.5 hours but was in fact paid for 2,091 hours. It therefore follows that he was overpaid by the sum of \$380.72 gross, which is owing to William Craig & Co once all other relevant matters are taken into account.

[22] I note, however, that had Mr Kirk not been paid for the full month of April when he only worked part of the month, and had Craig & Co not allowed him to regularly work 15 minutes a day less than he was contracted for, Mr Kirk would have had a valid claim that he had been underpaid.

### **Reimbursement for Electric Dog Collar**

[23] Mr Kirk was entitled to book up personal items on William Craig & Co's account with Williams and Kettle, provided he got permission. One such item was for an electric dog collar, which he was to have paid back by the time his employment ended. He accepts that he owes the net sum of \$151.00 to William Craig & Co. The only reason he has given for not paying it is that he had been advised by a Disputes Tribunal referee not to pay any sums in dispute until all matters have been determined. It therefore follows that the \$151.00 remains owing.

### **Telecom Accounts**

[24] Mr Kirk was responsible for non-work calls made on the telephone provided to him in his farmhouse by William Craig & Co. He accepts that he owes the sum of \$160.32 on those accounts, which he had previously agreed in writing to pay. His reason for not paying is as set out above. The \$160.32 remains owing to William Craig & Co.

### **Dog Collars and Chains**

[25] There was a meeting involving Mr Craig, Mr Black, Mr Kirk and another worker on the farm on 1 April 2007. At that meeting Mr Black opposed the workers being reimbursed for purchasing dog collars and chains for their own dogs. Mr Craig and Mr Black's evidence was that Mr Craig stated that he would, however, look into it. Mr Kirk's evidence was that Mr Craig agreed to pay for the collars and chains.

[26] The other worker had already bought his dog collars and chains and therefore it is probable that Mr Kirk followed suit and purchased his set as well, at a cost of \$103.06, despite having no clear agreement that he would be reimbursed for it. Then, having decided to leave, he later declined to pay for these items. I so conclude on the basis of my acceptance that the other worker has been required to pay back the amounts for the dog collars and chains and has in fact done so, and as this is another item where Mr Kirk in fact most probably knew that he ought to pay the sums owing, but

has declined to do so because of the dispute between the parties over other matters. It follows that \$103.06 is payable to William Craig & Co.

### **Gumboots**

[27] Early on in his employment Mr Kirk bought some gumboots on the Craig & Co account, in the sum of \$120.22. Mr Kirk claims that he paid Mr Black \$100 owing on the gumboots, but Mr Black does not accept that he ever received this sum. Clearly someone is mistaken here. On the balance of probabilities I conclude that the \$100 was never tendered to Mr Black. This is for two reasons. First, Mr Kirk agrees that he never paid the balance owing of owing \$20.22, yet it was accepted that he was good at making his repayments from the Williams & Kettle accounts. Second, it is more likely that the account was overlooked by Craig & Co (as there is no record of it being addressed during the course of Mr Kirk's employment, unlike other debts) and as no payment was ever sought, none was ever made. I therefore conclude that Mr Kirk owes William Craig & Co the sum of \$120.22 for the gumboots.

### **Three Sheep**

[28] After he had resigned and stopped working, but while still living on the farm, Mr Kirk slaughtered three sheep and took them for his own use. This was a matter (along with the dog collars and chains) that Mr Gordon Craig raised with Mr Kirk by letter within three weeks of him leaving the property. I accept that there was a discussion between Mr Kirk and Mr Craig the day before he killed the sheep and that Mr Craig asked him if he was entitled to them and Mr Kirk confirmed that he was entitled to the three sheep. That is not acceptance by Mr Craig that the sheep could be taken.

[29] Mr Kirk's reasons for so stating were that :

- he was entitled to one sheep per month and he had not had a sheep that month; and
- he had spent his own money on brush fencing (which improved the farm properties, being the houses that he and Mr Black occupied) and that there was an informal agreement with Mr Black that he be recompensed for this.

[30] I accept that one sheep was owing to Mr Kirk for his usual purposes, as conceded by Mr Black. While Mr Kirk may have genuinely believed that he was within his rights to do so, I do not accept that the inconclusive discussions over repayment for the brush fence constituted grounds for Mr Kirk to take the other two sheep. He had never sought payment for this fencing in the several

months since January. Thus while Mr Kirk may have believed that he had the right to take the extra two sheep, in actual fact there was an element of self-help to this in that it was his assessment of what he was owed, rather than what had been formally agreed.

[31] I conclude that the discussions over the brush fencing were insufficient to constitute a binding agreement on both parties that he be reimbursed for this fencing. It therefore follows that Mr Kirk is required to pay the sum of \$130.00 for two of the three sheep, as I accept the market value of one sheep at \$65.00 as assessed by Mr Craig.

### **Conclusion**

[32] Mr Kirk's claim for monies owing is dismissed. William Craig & Co's claim for sums owing by Mr Kirk to it for overpayment of wages and holiday pay, reimbursement for an electric dog collar, Telecom accounts, dog collars and chains, gumboots and reimbursement for two sheep are upheld.

[33] I therefore order Mr Richard Kirk to pay to Mr William Gordon Craig, on behalf of the trustees of the estates of W Bruce Craig and William Craig, the following sums:

- \$380.72 gross in overpaid wages and holiday pay;
- \$151.00 reimbursement for electric dog collar;
- \$160.32 reimbursement for unpaid Telecom accounts;
- \$103.06 reimbursement for dog collars and chains;
- \$120.22 reimbursement for gumboots purchased; and
- \$130.00 reimbursement for two sheep.

### **Costs**

[34] Costs are reserved. I note that William Craig & Co will be entitled, having been largely successful in its claims, to a reasonable contribution to its legal costs and other expenses.

**G J Wood**

Member of the Employment Relations Authority