

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 106  
5415775

BETWEEN	PAUL BRENDAN WHYTE Applicant
A N D	LABOUR INSPECTOR, KATE FEENEY, FOR THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority: Michele Ryan

Representatives: The Applicant in person  
Kate Feeney, for Respondent

Investigation Meeting: 5 July 2013; on the papers

Date of Determination: 2 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Daniel Almao worked as a farm assistant for Paul and Shelley Whyte (the employer) on their farm in Stratford from 2 November 2010 to 19 October 2012.

[2] Towards the end of his employment Mr Almao lodged a complaint with the Ministry of Business, Innovation and Employment (the Ministry) concerning his rate of pay.

[3] With Mr Whyte's cooperation, between October 2012 and February 2013 Labour Inspector, Kate Fenney, undertook an investigation into:

- (a) whether the employer kept appropriate wage, time, and leave records;
- (b) whether Mr Almao received minimum wages; and

(c) whether Mr Almao was owed arrears of wages.

[4] On 19 November 2012 the Labour Inspector issued an initial investigation report and concluded that the employer had not maintained wage, time and leave records in accordance with the Employment Relations Act (the Act) and s.81 of the Holidays Act. Ms Feeney also considered that the employer was in breach of s.6 of the Minimum Wage Act 1983 and found Mr Almao was owed arrears of wages.

[5] Mr Whyte disagreed with the Labour Inspector's report and in particular the hours it was alleged Mr Almao had worked. He noted that Mr Almao had not worked out his notice period as required by the written employment agreement. In response to Mr Whyte's concerns the Labour Inspector amended her calculations and both Mr Whyte and Mr Almao agreed to a revised record of hours worked.

[6] On 19 February 2013 the Labour Inspector sent Mr Whyte a letter requesting payment of arrears of wages owed to Mr Almao. No payment was made.

[7] On 6 March 2013 the employer received a demand notice, pursuant to s.224(1) of the Employment Relations Act (the Act), which advised \$6473.77 (gross) in arrears of wages were outstanding and Mr Almao was entitled to the amount specified.

[8] On 2 April 2013 Mr Whyte exercised his statutory right pursuant to s.255 of the Act and lodged an objection to the demand notice.

[9] Mr Whyte's primary objection relates to the Labour Inspector's conclusion that Mr Almao was paid below the minimum wage when he was paid a salary, apportioned into equal weekly payments throughout his employment. In essence Mr Whyte says weekly wages paid under the minimum wage should be offset against wages paid during the "dry season"<sup>1</sup> where Mr Almao was paid above the minimum wage. In this regard Mr Whyte says dry season overpayments are able to deducted from Mr Almao's final wages according to the employment agreement between them which provides for wage deductions.

[10] Further, Mr Whyte says the Labour Inspector does not have "*jurisdiction to enforce provisions within [the] employment contract*". I understand this aspect of Mr

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<sup>1</sup> A period of time where less work is required and appears to occur between May, June and July for 12 weeks.

Whyte's objection to mean that the Labour Inspector has no power to interfere with terms and conditions of employment agreed between the parties.

### **The Authority's investigation**

[11] Following Mr Whyte's objection to the demand notice and receipt of the Labour Inspector's response, the Authority convened a conference call between the parties. Each of the parties considered the matter could be determined on the papers and a timetable for the exchange of documents was agreed.

[12] Mr Whyte's objection also sought a determination as to whether deductions could be made in accordance with the employment agreement regarding... "*firewood and wet weather gear*". The Authority advised it did not have jurisdiction<sup>2</sup> to deal with those matters in its determination. This information was reaffirmed in an email to Mr Whyte on 14 August 2013.

### **The issues**

[13] The Authority is required to determine:

- Whether the employer paid Mr Almao in accordance with the s.6 of the Minimum Wage Act and Minimum Wage Orders relevant to the period of his employment?
- Is the employer able to set off "overpayments" made in the dry season against final payments as provided for in the employment agreement?

### ***Did the employer pay Mr Almao in accordance with s.6 Minimum Wage Act?***

[14] Mr Almao was employed pursuant to an individual employment agreement (the employment agreement) When he began his employment his remuneration was set at salary of \$30,000 per annum which was increased to \$32,000 by agreement on 1 April 2012.

[15] Clause 5 of the employment agreement provides for hours of work and states amongst other things that the normal start time will be 5am and hours of work each week shall be directed by the employer and may be on any, or all days of the week.

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<sup>2</sup> Section 226 provides "*The function of the Authority is in respect of an objection to determine whether or not the whole or part of the wages or holiday pay or other money specified in the notice is due to the employee by the employer and, if so, the amount payable.*"

The agreement also made provision for the variable hours of work dependent on the season.

[16] Mr Almao's employment agreement does not detail the specific hours he was required to work but there does not appear to be any dispute about the hours Mr Almao was required to work. The parties confirmed<sup>3</sup> that Authority could rely on information recorded in spread-sheet at Schedule One of the Investigation Report as an accurate reflection of hours worked by Mr Almao throughout his employment.

[17] The Minimum Wage Act 1983 sets out minimum terms and conditions with regard to wages. Section 6 provides that a worker is entitled to receive from the employer payment for his or her work at not less than the "minimum rate".

[18] Section 4 allows for minimum wage orders to be set. Mr Almao's employment traversed Minimum Wage Orders of 2010, 2011 and 2012. Each of the Orders provides a minimum rate of wages for the following units of time; either by the hour, piecework, day or week.

[19] Clause 7.2 of Mr Almao's employment agreement states "*salaried employees will be paid by equal weekly instalments*". The relevant unit of time measuring Mr Almao's minimum entitlement is a week.

[20] In 2011 the Court of Appeal endorsed<sup>4</sup> the judgement of the majority of the Employment Court in *Idea Services Limited v Dickson*<sup>5</sup> that the frequency as to when an employee gets paid and by which unit of time wages are calculated are a matter of agreement between the parties. But an employee must be paid at least the minimum wage associated with one of the relevant time units stipulated in the applicable Minimum Wage Order.

[21] In this respect payment by way of salary cannot be used as a mechanism to avoid the rates set out in a Minimum Wage Order. An employer is not able to look towards salary provisions in an employment agreement and say it is able to average out salary payments made for weeks requiring less work against weeks where hours of work are of a duration that the payment is below minimum rates.

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<sup>3</sup> During the conference call of 22 May 2013

<sup>4</sup> *Idea Services Ltd v Dickson* [2011] NZCA 14; [2011] ERNZ 192

<sup>5</sup> [2009] ERNZ 372

[22] With the exception of the dry season, Schedule One evidences that over any given four week period Mr Almao would work 60 hours a week for three weeks, with the fourth week at 49 hours per week.

[23] In the dry season<sup>6</sup> Mr Almao's hours of work would reduce to between 38 - 44 inclusive per week.

[24] I find that for the weeks Mr Almao worked 49 hours a week, and for the duration of the dry season Mr Almao was paid above the minimum wage. However for all other weeks<sup>7</sup> (approximately 58% of his employment) his rate of pay was less than the minimum rate in the applicable Minimum Wage Order.

[25] Mr Almao is entitled to be paid the difference between the amount of salary he received and the relevant weekly minimum rate plus the hourly rate associated with those weeks above 40 hours per week. I accept that the agreed calculations set out at Schedule One and further recorded in the demand notice is the correct sum owed to Mr Almao.

**Is the employer able to make deductions for overpayments made during the dry season from Mr Almao at the conclusion of his employment?**

[26] Mr Whyte has advanced an argument that he is able to deduct from Mr Almao's final wages the sum equal to payments made to Mr Almao during the dry season which were above the minimum wage, on the basis that these are "overpayments" and where deductions are permissible under the employment agreement. In this respect Mr Whyte is looking to set-off alleged overpayments against any underpayments made.

[27] Section 12.5 of Mr Almao's individual employment agreement states that:

*The employee authorises the employer to deduct from wages/salary, and final wages including holiday pay, any monies owing by the employee to the employer.*

*These monies include but are not limited to:  
...overpayment of wages or annual holidays, holiday pay, sick leave or bereavement leave taken in advance.*

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<sup>6</sup> Ibid at footnote 1

<sup>7</sup> With the further exceptions of the week ending 9 October 2012 and the week following notice

[28] I accept that Mr Whyte perceives, most likely in response to the Labour Inspector's view that periods of Mr Almoa's employment have been paid under the minimum wage, that where payment has been above the minimum wage these should be considered overpayments. However I am unable to accept that Mr Whyte is able to deduct monies from Mr Almoa's final wages in the way he proposes.

[29] The Minimum Wage Act and Minimum Wage Orders require workers to be paid a minimum rate but the statutory requirements do not usurp a contractual agreement between an employer and employee beyond insuring minimum entitlements. The provisions of the remuneration clause contained in the employment agreement record that the salary is paid in equal weekly instalments. It is clear from the evidence that the salary was paid accordingly as the agreement provided. There is no provision within the agreement which allows salary payments to be reduced according to the work, or lack of it, in the dry season or otherwise.

[30] It follows that it has not been established nor do I accept that there are "*any monies owing by [Mr Almoa] to the employer*". The employer is not able to make deductions pursuant to the clause 12.5 when there is no apparent debt.

### **Jurisdiction**

[31] Mr Whyte, in his objection to the Authority stated that the Labour Inspector does not have jurisdiction to enforce provisions within the employment agreement. No further detail was provided by him on this matter.

[32] I accept Ms Feeney's submissions that a Labour Inspector may not have direct jurisdiction over a number of the clauses in a written employment agreement, but section 229 sets out the powers of a Labour Inspector with a warrant of designation. Those powers allow an Labour Inspector to bring proceedings against a person for non-compliance with any of the Acts listed at s223(1) including the Minimum Wage Act 1983.

### **Order**

[33] The employer has breached the Minimum Wage Act and is required to comply with the demand notice dated 27 February 2013.

[34] Pursuant to s137 of the Employment Relations Act I order Paul and Shelly Whyte to comply with the demand notice and pay of \$6,473.77 (gross).

[35] The amount ordered is to be paid to the Labour Inspector within 28 days of this determination.

Michele Ryan  
**Member of the Employment Relations Authority**