

of the initiating complaint fairly and well to the extent that the employee was invited to share Christmas with the employer's family, and was provided with bedding and cooking utensils without charge as part of the accommodation arrangement.

[3] Moreover, Te Awa says that its breaches of the law were innocent rather than malicious and that particularly in respect of the averaging arrangement that it applied to the wages of the subject former employee, it was doing no more than what many farming families did in paying staff.

[4] This case raises an important general question pertaining to the way in which employees on farms are remunerated.

The issues

[5] It will be helpful if I address the following questions:

- (a) Are there general issues raised about farm employment;
- (b) Should penalties apply in the present case and if so, what amount?

Are there general issues raised pertaining to farm employment?

[6] While averaging per se is not against the law, where hourly rates for employees are at the lower end of the spectrum and there is a fluctuation in the hours actually worked over a year, a payment regime based on an annual salary with periodical payments of weekly, fortnightly or monthly fractions of that annual salary, may make the practical accounting of what farmworkers are entitled to receive more difficult than would be the case if those workers were simply paid an hourly rate.

[7] This is because, if a farmworker is paid an annual salary which has the benefit of ensuring that the employee receives the same amount each pay period thus making budgeting for the employee easier, the risk is that when the busy part of the farming calendar comes around, it is more administratively challenging to calculate and pay out on the increments that are necessary to make up the difference between the hourly rate derived from the salary calculation and the hourly rate that is required by law pursuant to the minimum rate.

[8] Even where a salary is the basis of a farmworker's remuneration, employers of farm workers must also ensure an adequate time recording system so that they can ascertain that staff are not falling below the minimum wage at any point in the season.

[9] It may well be more sensible for farmworkers to be employed strictly on an hourly rate basis. This will have the consequence that their income will fluctuate over the season which may create some budgeting challenges for farmworkers but which should not have any particular deficits for farmers employing those farmworkers because the farm's income should be greater at the time when the additional work, and thus payment, is required.

[10] In any event, however difficult the arrangements are, it is necessary for everyone to obey the law and my conviction is that the best way of ensuring that farm employment is free of the sort of challenges that beset Te Awa is to employ farmworkers on an hourly rate which is at least equivalent to the minimum rate provided by law and that farms maintain a proper time record so that they are able to account appropriately for hours of work.

[11] The Authority will be happy to engage with Federated Farmers or other rural sector agencies in relation to these matters.

[12] Moreover, while not strictly on point in the present case, save for Te Awa's intimation that the subject employee had had his power account met as part of his remuneration in lieu of proper payment of public holidays, there was during the evidence in this matter some discussion about the appropriate treatment of accommodation costs for farmworkers.

[13] Nearly all dairy farmers provide housing for their employees if only because it is difficult to see how workers could be otherwise on duty at the hours required if they did not live reasonably proximate to the workplace.

[14] Difficulties arise when farmers discount the rental that would otherwise be charged for the provided accommodation on the footing that that discount is effectively taken into account for remuneration purposes. So far as employment law applications are concerned, the better view is that workers should be paid their strict entitlements in accordance with employment law and there ought not to be any arrangements in the nature of a rental or power account subsidy taken into account in calculating the gross income of the farmworkers.

Should penalties apply in the present case?

[15] The breaches for which penalties are sought concern two key statutes which are part of the building blocks of the minimum standards code that apply in this country. First there is a breach of s.6 of the 1983 Act. This section is the very cornerstone of the statute providing as it does for a minimum rate of pay for an adult worker in New Zealand. A breach of this section is in principle anyway, a serious breach of employment standards.

[16] However, it is important to put that breach into context. What Te Awa was doing was paying the complainant a salary as indeed was the case with all of its farmworkers. The relevant salaries were set by what appears to be a combination of the rate for the job and the rate for the individual employee. By its very nature, a salary payment is an annualised calculation which puts a yearly figure on the value attaching to that unit of labour.

[17] The challenge in the farming sector is that the effect of seasonal variation means that in the off-season for instance, a salaried employee is working potentially only four hours a day while at the peak of the season, daily worked hours might be almost three times that.

[18] The problem with that structural arrangement is that while the hourly rate of the employee in the off-season will be well within the requirements of the law, in the busy part of the season, the actual hours worked by an employee in any given day when married to the regular salaried amount that he receives net per week has the effect of bringing his hourly rate under the statutory minimum set in s.6 of the 1983 Act.

[19] This will inevitably be the case with employees earning modest salaries where the employer does not maintain an independent system of time recording so as to ensure that in the busy part of the season, if the effect of the annualised salary arrangement is to have workers dropping below the minimum hourly rate provided by law, simply because of the significant increase in the number of hours required to be worked in any given day in the busy period, steps can be taken to increase remuneration to cover that eventuality.

[20] In the present case, it is common cause that the reason that s.6 of the 1983 Act was breached was precisely because the subject employee was paid a salary and the

breaches occurred because of the dramatic increase in hours required to be worked over the busy part of the season, necessitating a great increase in hours but no commensurate increase in remuneration because that was determined by salary which simply averaged payments across the whole year.

[21] It is a truism that an averaging arrangement which has the effect of taking employees below the minimum wage threshold on any working day is a breach of the minimum standard for employment whenever that circumstance happens.

[22] Payment of salaries to farmworkers may well have its administrative attractions for farmers and farm workers but it is important that, if farmers continue to employ staff on salaries, they also maintain an accurate time recording system (as s.8A of the 1983 Act requires) in order to ensure that at no stage during the year are their employees in receipt of a lower hourly rate than the minimum rate provided by law, currently \$14.75 per hour.

[23] The law is absolutely explicit that while there is nothing intrinsically wrong with employing workers on a salary, the effect of that arrangement must be supported by an accurate time recording system which can ensure that at no point during the season is the employee effectively receiving an hourly rate lower than the law prescribes. In *Law v. Board of Trustees of Woodford House* [2014] NZEmpC 25, Chief Judge Colgan made it perfectly plain that wages and salaries were essentially different descriptions of the remuneration paid to employees for the work that they performed and however remuneration was described, each and every unit of work provided by the employee to the employer must be paid at least the minimum rate prescribed by law.

[24] In the Court of Appeal in *Idea Services Ltd v. Dixon* [2011] NZCA 14, the Court specifically rejected a submission that it was available to average out the appropriate rate so that there would only be a breach by the employer if the workers' **average** rate of pay over a pay period was less than the prescribed minimum.

[25] That decision was followed in *Law* where the Chief Judge rejected an argument that the averaging approach could apply to employees who were paid a salary. His Honour said that the fortnightly salary cycle was simply an administrative convenience and had no impact on the requirement that each period of work must be provided at at least the minimum rate of pay.

[26] For the avoidance of doubt then I conclude that while salary payments to farmworkers are not in principle against the law, such arrangements must be accompanied by a robust method for time recording so as to ensure that for each and every hour worked by the employee, those hours are paid for at no less than the minimum rate of pay. It may well be that because of the need to provide a method for ensuring that all work is performed at no less than the minimum rate of pay, it is easier for farmers to simply strike an hourly rate for their employees and pay them on that basis.

[27] I accept that the effect of that change would be to remove the benefit the employee currently has of certainty of income throughout the whole year which obviously makes budgeting easier, but employers of farm labour will need to make their own decisions on this matter based on the need to comply with the law.

[28] In my judgement, Federated Farmers could take a leadership role in facilitating an understanding amongst its members of the issues in this regard, and helping to encourage farmers to ensure that the arrangements that they have for employing staff, comply with our minimum standards legislation.

[29] The second statute that is breached by Te Awa in the present case is the Holidays Act where there are breaches identified of ss.50 and 56 of that Act. Section 50 of the 2003 Act provides broadly for employees working on a public holiday to be paid at least time and a half and s.56 is the alternative holiday provision, providing the requirement that where an employee works on a public holiday that falls on a day that would otherwise be a working day for him or her, that employee is entitled to an alternative holiday.

[30] In the present case, there is no particular context to the breaches of the 2003 Act; they are straightforward breaches which seem to be based on a misunderstanding, as much as anything, of the relevant law. What Te Awa told me was that instead of complying totally with the legal requirement, Te Awa paid for staff's domestic power use.

[31] The question then is what level of penalty, if any, ought to apply? The Labour Inspector has applied for a penalty notwithstanding his open acknowledgment that Te Awa had complied with the Improvement Notice and was now maintaining that compliance. Nonetheless, it is contended for the Labour Inspector that it is important

that penalties be levied. Mr O'Shea relies on decided cases to support that submission. In particular he refers to the leading case of *Tan v. Yang & Zhang* [2014] NZEmpC 65 where Her Honour Judge Inglis emphasised that the role of a penalty was to punish wrongdoing and the non-exhaustive list of factors that she considered ought to inform the Authority's consideration of the matter are:

- (a) The seriousness of the breach;
- (b) Whether the breach is one-off or repeated;
- (c) The impact on the employee;
- (d) The vulnerability of the employee;
- (e) The need for deterrence;
- (f) Remorse shown by the employer; and
- (g) Precedent.

[32] The Labour Inspector helpfully addresses each of those matters in his submissions. On the seriousness of the breaches, he correctly identifies that the breaches are fundamental errors pertaining to longstanding provisions in employment law. However, I consider it best to look at the nature of the breaches individually.

[33] Dealing first with the breaches of the public holiday provisions in the 2003 Act, these breaches are errors occasioned by ignorance of the law. While they are important, the incidents of public holidays during the working week are relatively infrequent and accordingly errors that pertain to those days may properly be considered to have less impact than some other breaches.

[34] The failure to keep proper time records is a fundamental failure and I have already observed in a previous decision that it is important that employers generally get the message that a fundamental legal obligation that all employers have is to maintain proper time records (and although not relevant in this case, proper wage records as well) in order that the employer is able to demonstrate either to the employee or indeed to a statutory officer like the Labour Inspector or a Member of the Employment Relations Authority just what hours were worked by a particular employee.

[35] However, in the present case, I discount back my general condemnation about the failure to keep time records because in the present case, I am satisfied that Te Awa failed to keep proper records not out of any desire to avoid detection or slackness but out of a mistaken belief that by paying employees a salary it avoided the necessity of keeping those very records.

[36] Turning finally to the third breach, the failure to pay the minimum wage, that failure is also activated by Te Awa's mistaken belief that by paying a salary to the subject employee, it was compliant with the law because of the erroneous understanding that by averaging the hourly rate over the whole season, a relatively low paid farmworker would receive an average of the minimum wage or better throughout the worked hours of the year.

[37] But as I have explained already in this determination, that averaging process is fundamentally wrong because it does not comply with the law and for the avoidance of doubt I reiterate that in respect of every employee wherever employed and whatever employed as, the law requires that each and every unit of time paid for by way of wages or salary to that employee is compliant with the minimum wage requirement.

[38] Considering whether this is a one-off or a repeated breach, it is apparent on the facts that it was a repeated breach but a repeated breach which was speedily rectified as soon as the Labour Inspector became involved.

[39] Regarding the nature of the employee and the impact on that employee and the vulnerability of that employee, it is apparent that the subject employee was a Ukrainian national, not necessarily familiar with the laws of New Zealand and one would have to imagine that the impact on him was significant. That said, as soon as the error was identified, it was promptly rectified and without argument or prevarication.

[40] It was apparent on my engagement with Ms Stewart for Te Awa that she was genuinely remorseful; she was distressed at the investigation meeting not I think as a consequence of having to cope with the payment of a penalty so much as with the knowledge that Te Awa had got this very wrong. I formed the view that Te Awa was proud of its record of employing staff. It considered itself to be a good employer. It

pointed out to me that two of its current staff are long serving and frankly, that speaks for itself in the farming industry.

[41] Ms Stewart also pointed out to me that while it may not have got its legal obligations exactly right, it did go the extra mile for the subject employee who arrived in its service literally with the clothes he stood up in apparently, and as a consequence, it provided cooking utensils, bedding and other necessities so that he was comfortable.

[42] None of that avoids the legal obligation to meet minimum standards, but it does go to the bona fides of the employer and given that the imposition of a penalty is a discretionary remedy, I am satisfied it is proper for me to take into account my perception of the behaviour of the employer, both in its engagement with the Inspectorate and with me, and in its treatment of the subject employee.

[43] If the purpose of the levying of a penalty is to punish and deter wrongdoing, whatever the bona fides of this employer, I must consider my obligation to deter other employers in similar circumstances from making similar errors.

[44] It may be that this determination, and others like it, has an educative effect in the farming community and that that educative role will be of more significance than any penalty that is imposed in the present case. That said, I think it is unlikely to be consistent with my obligations to uphold the law if there is no penalty imposed at all. But I think the penalty has to be a modest one for the reasons that I have articulated in this determination. There is genuine remorse. There is a misunderstanding about the averaging concept, a misunderstanding which is by no means unique to this employer and which seems to be widespread in the farming community. There was a ready engagement with the Labour Inspector and a complete and full engagement with me during my investigation. The matters complained of have been completely dealt with by the employer and new systems put in place to ensure there will be no repeat. The underpayment to the subject employee has been immediately addressed without argument.

[45] In all the circumstances, I think a penalty of \$500 is appropriate. That figure reflects my consideration of the present decline in dairy farm incomes and the other matters that I have just referred to.

Determination

[46] Pekanga O Te Awa Farms Limited is to pay to the Employment Relations Authority at Christchurch for credit to the Crown account the sum of \$500 as a penalty for breaches of the Minimum Wage Act 1983 and the Holidays Act 2003.

[47] Pekanga O Te Awa Farms Limited is also to pay to the Employment Relations Authority at Christchurch for on-credit to the Labour Inspectorate the sum of \$71.56 being the reimbursement of the Labour Inspector's filing fee.

Costs

[48] There is a claim for costs based on the Authority's daily rate.

[49] Mr O'Shea acted on his own behalf in the Authority's investigation and did an outstanding job without the benefit of counsel.

[50] In those circumstances, I decline to make any costs order.

James Crichton
Member of the Employment Relations Authority