

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 94
3015352

BETWEEN MICHAEL GILBERT JACOBS
 Applicant

AND R.E. AND C.J. PARTNERSHIP
 T/A HAWKES BAY TOWING
 First Respondent

AND HAWKES BAY TOWING
 LIMITED
 Second Respondent

Member of Authority: Trish MacKinnon

Representatives: David Oliver, counsel for Applicant
 Libby Brown, counsel for Respondent

Investigation Meeting: 17 May 2018 at Hastings

Submissions Received: 7 June and 5 July from Applicant
 28 June from Respondent
 Final information received 10 July 2018

Determination: 26 October 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Michael Jacobs was employed by R.E. and C.J. Partnership trading as Hawkes Bay Towing and/or Hawkes Bay Towing Limited from December 2011 until February 2017. Mr Jacobs seeks to recover wages he claims are owing to him under minimum pay legislation from 2 July 2012 until the end of his employment. He also seeks arrears of wages arising from his claim that his employer breached holidays legislation by underpaying him for work he performed on public holidays.

[2] Hawkes Bay Towing Limited says it was Mr Jacob's employer. It says he was initially employed by R.E. and C.J. Partnership but that changed in June 2016. At that

time Mr Jacobs and all other employees, and all employment liabilities, were transferred from R.E. and C.J. Partnership to Hawkes Bay Towing Limited.

[3] The respondents, whom I will refer to as HBT, say there are no unpaid wages owing. They deny any breaches of the minimum wage or holidays legislation.

The Authority's investigation

[4] I have referred to three witnesses who gave evidence at the Authority's investigation of this matter but I have not set out all the evidence brought to the Authority. Instead I have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Employment Relations Act 2000.

[5] The determination has been issued outside the timeframe at s 174C (3) (b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Background

[6] Mr Jacobs is an experienced tow truck driver who started working on a casual basis for HBT on or about 5 December 2011. That arrangement changed from 2 July 2012 as a result of a proposal he discussed with his employer shortly before that date.

[7] Mr Jacobs had spoken with Rod Naylor, a partner of the first respondent and director of the second respondent, about starting a night shift. Mr Jacobs was familiar with the idea from other cities in New Zealand and believed it would work well in Hawkes Bay. It would ameliorate the problem of tow truck drivers who worked for HBT during the day getting over-tired as a result of being called out at night.

[8] Mr Naylor's evidence is that he was not immediately attracted to the proposal that HBT employ an on-call night tow truck driver but he discussed it with other HBT tow truck driver employees. They were concerned they would be out of pocket if Mr Jacobs took away an additional source of income for them by taking all the night work.

[9] Mr Naylor said he put this to Mr Jacobs who told him that as long as he was paid the equivalent of a guaranteed minimum of 30 hours a week he would make the

arrangement work and other staff would still be able to pick up extra hours. On this basis Mr Naylor decided to try out the proposal and sealed it with a handshake with Mr Jacobs.

[10] Mr Jacobs denied having proposed the 30 hours and said that was what Mr Naylor offered him. I prefer Mr Naylor's evidence on this matter because of a handwritten note, which Mr Jacobs acknowledged he had written, that was provided to the Authority by HBT. The note recorded the following:

30 hrs + O.T. 32 1/2

Wed To Sunday.

6 pm - ~~6 am~~

- 8 am

OR 7. Days No Days On Weekends

[11] Below those words was Mr Naylor's signature, as well as the number 6 and some seemingly random letters which remained unexplained. Apart from the signature and the "32½", Mr Jacobs confirmed the note was in his handwriting. He also acknowledged that he had agreed to be paid 30 hours per week with Mr Naylor at the time. The hours were raised on later dates to 32½, then to 35 per week. The "O.T" referred to overtime the parties had agreed would be paid to Mr Jacobs for any call-outs he attended that went beyond the agreed 8 am finish time.

[12] The note appears to be the only contemporaneous documentary record of the parties' agreement as HBT did not provide Mr Jacobs with an employment agreement until more than a year later. Mr Naylor's evidence was that he was "a handshake type of person and trust(ed) people on their word".

[13] The parties signed an individual employment agreement (IEA) on 12 December 2013, effective from 1 November 2013. This was approximately 17 months after Mr Jacobs had started working the night shift. The employer was cited on the IEA as R.E. & C.J. Naylor Partnership. Schedule A to the IEA specified the provisions for hours of work, remuneration, annual leave and duties. The hours of work clause provided as follows:

The Employee's (sic) shall be on call from 5pm to 8am Monday to Friday plus any additional hours that may be required outside of the above hours.

[14] Two versions of Schedule A were included in the bundle of documents provided to the Authority. The only differences between the versions related to the remuneration provisions. The first version recorded payment of a minimum of 32.5 hours per week with an hourly pay rate of \$18.00. The second version recorded payment of a minimum of 35 hours per week with the same hourly pay rate. The differences reflected the increased minimum hours for which Mr Jacobs would be remunerated per week.

[15] In relation to the payment for public holidays Mr Naylor said Mr Jacobs had been paid time and a half for all the hours he worked on public holidays.

Issues

[16] The issues for determination are:

- whether Mr Jacobs was undertaking work for all of the 75 hours per week of his rostered on call periods; and, if so,
- what wage arrears are owed to him
- whether Mr Jacobs was correctly paid for public holidays during his employment; and, if not
- what wage arrears are owed.

Was Mr Jacobs undertaking work for 75 hours a week?

[17] Mr Jacobs submits he was working for the entire periods of his 5 pm to 8 am shifts. He relies on *Sanderson v South Canterbury District Health Board* as authority for his claim.¹ That case concerned anaesthetic technicians (ATs) at Timaru Hospital which operates theatre services during business hours and as necessary at other times. ATs were regularly rostered to be on call at night and regularly, but less frequently, over weekends.

[18] Judge Corkill assessed the ATs' circumstances against the "sleepover" principles set out by the Employment Court in *Idea Services Limited v Dickson*² and confirmed by the Court of Appeal as being helpful when deciding whether sleepovers

¹ [2017] NZEmpC 127.

² (2009) 6 NZELR 666.

constituted work for the purposes of s 6 of the Minimum Wage Act 1983 (MWA).³

Those factors were:

- the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
- the nature and extent of the responsibilities placed on the employee; and
- the benefit to the employer of having the employee perform the role.⁴

[19] Following a comprehensive analysis Judge Corkill concluded that, when on call, the ATs employees ought to be regarded as undertaking work for the purpose of s 6 of that Act.⁵

[20] Referring to *Idea Services Limited v Dickson*, Judge Corkill said:

The Court emphasised that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question ought to be regarded as work. The Court also says that the assessment has to be undertaken in an intensely practical way.⁶

[21] In the situation of the ATs in *Sanderson* the employee plaintiffs were performing their on-call duties in accommodation provided by their employer close to the hospital. The employer considered that to be necessary in order for them to be able to respond quickly to a call out.

[22] The effect on each of them differed according to their personal circumstances but the most important factor that affected all of them was found to be the requirement to live away from their own homes and families. The Court found the constraints this imposed on the employees, and their inability to undertake their normal range of activities, to be significant.

Constraints on Mr Jacobs

[23] Mr Jacobs did not have the restriction of having to live away from home but submits that, in performing his role, he was constrained by the duties he had to perform and by his inability to sleep properly at night because of the requirement on

³ *Idea Services Limited v Phillip William Dickson* CA CA405/2010 17 February 2011.

⁴ n3 at [7].

⁵ n1 at [136].

⁶ n1 at [6].

him to respond quickly to a call out. It was Mr Jacobs' evidence that, during an overnight shift, he would:

- attend the company cell phone
- respond to calls for tow runs
- operate the scanner to listen for accidents and respond by attending
- (after 18 months) attend at the HBT depot each day at 5 pm
- attend accidents, breakdowns and impounds
- (sometimes) sweep the depot yard or clean the tow truck
- wear the company uniform
- stay awake and alert and ready to respond immediately
- stay close to the tow truck, which he kept at his home

[24] His evidence was also that he was constrained, during his 75 on call hours per week, from:

- living a normal life
- drinking alcohol
- eating a meal without fear of interruption by a call-out
- attending a social function
- getting a proper amount of sleep.

[25] Mr Jacobs also said he could not watch television programmes because of the requirement for an immediate response to a call out. In written evidence Mr Jacobs stated that "I haven't watched TV in years". That evidence was undermined by the friend with whom he shared a house. Her evidence was that the television was on frequently and Mr Jacobs would watch it with her when she wished to view particular programmes. Additionally, she said he would also spend approximately two hours a night playing games on his computer and would also check websites and programmes about tow trucks and tow drivers on his computer.

[26] HBT disputed claims Mr Jacobs made about the amount and type of work he had undertaken while on night shifts and about the restrictions imposed on him. Mr Naylor's evidence was that he had never required Mr Jacobs to perform many of the duties he claimed to have been required to undertake. He did not require Mr Jacobs to wear his company uniform from 5 pm to 8 am and he assumed Mr Jacobs spent part of each night sleeping.

[27] According to Mr Naylor, and not disputed by Mr Jacobs, the company's main call out phone was diverted to Mr Jacobs' work mobile phone on three of the five nights he worked each week. On the other two nights another employee had the

number diverted to her mobile phone and she would allocate jobs. Mr Jacobs was the only tow truck driver who worked nights only but, as noted earlier, other tow truck drivers who worked days also liked to earn additional remuneration by attending call outs at night.

[28] If Mr Jacobs did not or could not answer the phone, it would divert to an answer phone. According to Mr Naylor HBT's main clients also had the contact phone numbers for the company's towing managers and for him (Mr Naylor). His evidence was that Mr Jacobs was not required to answer, or respond to, every call on the three nights the main call-out phone was diverted to his cell phone as there were two alternative options for ensuring a company response.

[29] Mr Naylor denied Mr Jacobs' evidence that, in addition to answering calls on the company cell phone and responding to calls for tow runs, he had to operate the scanner to listen for accidents and respond by attending. Mr Naylor said Mr Jacobs had no need to use a scanner while HBT had the Police contract, which it had during the majority of Mr Jacobs' employment, as the Police would contact HBT directly about call outs for accidents. The Police contract ended in August or September 2016.

[30] Mr Jacobs acknowledged under questioning that he had personally purchased a scanner after asking his employer for one which did not eventuate. It was his view that a scanner was a necessary tool for the job.

[31] Mr Naylor also disputed Mr Jacobs' evidence of having to stay awake and alert for the night's work. He said it was never his expectation that Mr Jacobs would do this and he had no knowledge of Mr Jacobs doing it. If he had wanted Mr Jacobs to be awake and alert all night he said he would have required him to work from the HBT depot for the 15 hour period of the tow night shift.

[32] Mr Naylor similarly rejected Mr Jacobs' evidence of having washed his truck in the depot, not being able to attend social functions, and having to be ready at all times to attend to a call-out. Mr Naylor's evidence was that he had encouraged Mr Jacobs to attend the depot at around 5 pm for social purposes as he was concerned Mr Jacobs was becoming isolated from the other employees who worked during the day.

[33] It is evident to me from the evidence that Mr Jacobs spent most of each shift at his home. Approximately 18 months after commencing the night tow arrangement he was encouraged to be at the yard around 5 pm on each of his working days. He did not stay at the yard and, if there was no immediate tow job, he would return to his home. He was not required by his employer to spend time working at the yard. Mr Naylor was unaware that Mr Jacobs kept himself in a state of readiness at all times to respond immediately to a call-out and did not require him to do so.

[34] Mr Jacobs, who had worked in the tow industry for many years and whose passion for it was evident, performed the job in the way he believed was appropriate. In evidence Mr Jacobs said he took his job seriously and professionally. I accept that he did and conclude he imposed restraints on himself beyond his employer's expectations or requirements.

[35] I do not regard the constraints on Mr Jacobs as being in the same category as the constraints on the ATs at Timaru Hospital. They were required to sleep in accommodation provided by the employer close to the workplace. Their privacy, and ability to relax, was impacted by having to share bathroom facilities, a kitchen and a living room with other employees of the District Health Board.

[36] Nor were the constraints on Mr Jacobs comparable to those on Mr Dickson who was required to sleep over in accommodation provided by Idea Services Limited; have an unlocked door; not have visitors; and not leave the house without permission. Unlike those employees Mr Jacobs had freedom to pursue leisure activities in the comfort and privacy of his own home and to interact with his housemates and friends if he chose to do so.

[37] The Court in *Sanderson* referred to the requirement on the Timaru Hospital ATs to reside away from their homes as the most important factor which affected all of them. In concluding that the constraints imposed on the ATs by "having to live away from their homes and families in shared accommodation where they were unable to undertake their normal range of activities" were significant, Judge Corkill noted their "time was not their own as would otherwise have been the case".⁷

[38] This was not the situation for Mr Jacobs who spent most of his on call time at home. He was constrained by the need to answer calls on the nights the HBT

⁷ n1 at [97].

telephone was diverted to his mobile phone, and to respond to calls if he was able to do so. However, he was otherwise free to pursue leisure activities or sleep between those calls.

The nature and extent of Mr Jacobs' responsibilities

[39] Mr Jacobs viewed his role as one where he was required to work with a high degree of responsibility, in conjunction with emergency services including Police, the serious crash unit, St John ambulance service and the Fire Service. He described his role as being important in respect of the transport and road safety system and as being "essentially a member of the emergency services at the scene, where members of the public were in distress, became seriously injured or suffered a fatal accident."

[40] HBT submits that the practical reality of "towies" is being part of the clean-up crew at the end of an incident after Police and investigators have worked with victims, taken statements and cleared the scene. It submits that in the case of a standard breakdown, it is not life threatening for driver and passengers and there is no critical time pressure or responsibility. Mr Naylor's evidence was that there was no set response time specified in the Police contract or in other contracts such as with the Automobile Association.

[41] I am not convinced the work of a tow truck driver carries the same level of responsibility as that of an AT required to report within 10 minutes to play a vital role in surgery. Nor is it on par with the responsibilities of a community service worker accountable for the welfare of people with disabilities who live in a community home. The tow truck driver provides a necessary service but I assess it as being at a lower level of responsibility than that of the employees in *Sanderson* and *Dickson*.

[42] A distinction between Mr Jacobs and the employees in those cases is that, if Mr Jacobs was unable, or chose not, to respond to a call out, there were other layers of response in the organisation as referred to earlier. Another tow truck driver could be assigned the call out for example. That was not the case for Mr Dickson in the community house situation or for the AT rostered for overnight on call duty.

Was there benefit to the employer from Mr Jacobs performing his role?

[43] Mr Jacobs' evidence is that the company derived benefit from his undertaking the night shift as he was the one person keeping the operation going under his

employer's 24/7 policy. He said there was a demand for tow work which was evidenced by how busy he was during his shift hours. He also submits the employer benefitted intangibly by promoting itself as a 24/7 ready response tow service which legitimised its brand and profile as a major player in Hawkes Bay. Mr Jacobs also submits HBT benefitted from the additional income earned overnight from the tow work he undertook from incoming calls and from his use of a scanner to pick up other tow jobs.

[44] Mr Naylor's evidence was that the company had a team of people who made the operation work, and that it was not all due to Mr Jacobs. There was insufficient work for a tow company in a provincial centre to sustain a night tow driver for 75 hours a week and, by Mr Naylor's account, HBT would never have contemplated entering into such an arrangement. No replacement for Mr Jacobs had been made since his February 2017 resignation, with any night work being undertaken since then by day tow drivers on an on call basis.

[45] There was no direct evidence of the benefit gained by HGT from Mr Jacobs' employment on the night shift. However, I conclude that if HBT had not perceived a potential benefit from starting the shift, it would not have established one in July 2012, or persisted with the arrangement for the four years and seven months Mr Jacobs was employed in the role.

[46] There was insufficient information provided to quantify the benefit to HBT from Mr Jacobs' night shift work. I am satisfied, however, the employer did derive financial benefit from the arrangement. I have no evidence on which to make a finding on whether there was also a reputational benefit.

Conclusion

[47] An application of the three factors referred to in paragraph 18 above has resulted in my finding that Mr Jacobs was constrained by the requirements of his job although not to the extent he claimed. He imposed restraints on himself that his employer neither expected nor required. When not responding to call outs he was free to sleep or pursue leisure activities in his home. The constraints upon him were accordingly far less significant than those imposed on the employees in the *Sanderson* or *Dickson* cases.

[48] He performed a role that provided necessary assistance in the clean-up that followed transport and traffic incidents but the level of responsibility was at a relatively low level. HBT undoubtedly derived financial benefit from his work.

[49] An application of the three factors to Mr Jacobs' situation does not persuade me that all the time between 5 pm and 8 am ought to be considered as work.

Was Mr Jacobs correctly paid for public holidays?

[50] At the outset of the investigation meeting Mr Jacobs withdrew the claim that he had not been awarded, or paid correctly for, alternative holidays. His claim to have been incorrectly paid for public holidays remained. His claim was for two different scenarios, one relating to underpayment under his employment agreement, and the other relating to underpayment in terms of his claim to have all hours in his shift considered as work. As I have not upheld his claim with respect to working hours, I will consider his claim under the first scenario only.

[51] Mr Jacobs claims to have been paid less than provided for under the Holidays Act 2003 in 17 different pay periods throughout his employment in respect of public holidays. He has quantified the wage arrears owing to him as \$1,498.50.

[52] The Holidays Act provides at s 50 that an employer must pay an employee at least time and a half for working on a public holiday. The relevant part of the provision is as follows:

- (1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of –
 - (a) the portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
 - (b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.
- (2) ...

[53] Mr Jacobs' claim is that he was entitled to be paid the relevant daily rate plus half that amount again for the six hours per shift he and HBT had agreed he would be paid rather than for the hours during the shift that he recorded as working on call outs. HBT paid him at the relevant daily rate plus half that amount again for those recorded

call out hours. In the employer's submission that was in accordance with the Holidays Act provisions.

[54] I accept HBT's submission. The methodology it used for paying Mr Jacobs for the times he actually worked on public holidays accords with the provisions of s 50 of the Holidays Act. Mr Jacobs' claim is dismissed.

Summary of findings

[55] Mr Jacobs was not working for all the hours he was on call and is not owed wage arrears.

[56] HBT paid Mr Jacobs correctly for public holidays and no wage arrears are owing.

Costs

[57] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority