

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 114  
3082372

BETWEEN

KIERAN FERGUSON  
Applicant

AND

B W SILVESTER LIMITED  
First Respondent

BRYCE SILVESTER  
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Roland Samuels, advocate for Applicant  
No appearance for First or Second Respondents

Investigation Meeting: 19 February 2020

Determination: 11 March 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Bryce Silvester is a person involved in breaches of minimum standards.**
- B. Mr Silvester is ordered to pay to Mr Ferguson the sum of \$893.21 as arrears of wages within seven days of the date of this determination.**
- C. Interest is to be paid on the arrears of wages calculated from the date of this determination until the arrears of wages are paid in full.**

**D. Mr Silvester is ordered to pay to Mr Ferguson a contribution to his costs in the sum of \$1,000 within seven days of the date of this determination.**

### **Employment relationship problem**

[1] B W Silvester Limited owns and operates a farm. Mr Ferguson worked for B W Silvester as a Farm Assistant. Mr Ferguson claims he is owed arrears of wages, seeks interest on the arrears and claims B W Silvester Limited has breached minimum standards.

[2] The second respondent, Mr Bryce Silvester, is the sole director and shareholder of B W Silvester Limited. Mr Ferguson claims Mr Silvester was a person involved in the breaches of the minimum standards and seeks orders against him personally.

[3] At the beginning of the investigation meeting Mr Ferguson withdrew claims for penalties.

[4] The Authority has issued three earlier determinations in respect of Mr Ferguson and B W Silvester Limited.<sup>1</sup> The third determination included orders that B W Silvester Limited comply with the previous two determinations of the Authority. Mr Ferguson has attempted to enforce those determinations without success.

### **Procedural history**

[5] Due to difficulties in serving B W Silvester Limited and Mr Silvester, Mr Ferguson was directed to personally serve the statement of problem and associated documents. While they were not personally served, I am satisfied the documents were served on both respondents by courier. Mr Silvester has acknowledged receipt by signing for the documents in his own name at 9.31 am on 28 December 2019.

[6] No statements in reply were received from either of the two respondents. On 20 January 2020 I issued a Notice of Direction setting out a proposal to progress Mr Ferguson's application to an investigation meeting. Courier records confirm the Notice of Direction was served on both respondents on 23 January 2020 and the Notice of Investigation Meeting was served on both respondents on 28 January 2020.

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<sup>1</sup> *Ferguson v B W Silvester Limited* [2019] NZERA 95; *Ferguson v B W Silvester Limited* [2019] NZERA 253; *Ferguson v B W Silvester Limited* [2019] NZERA 404.

[7] To date neither respondent has engaged in the Authority's process.

[8] The investigation meeting was delayed 15 minutes to allow either or both of the respondents to attend or be represented at the investigation meeting in case the respondents or any representative had become caught up in traffic, had difficulty finding a park or for some other reason was delayed. Neither respondent nor a representative attended.

[9] As provided in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act fully in the matter as if B W Silvester Limited and Mr Silvester had engaged in the process or were represented.

### **Issues**

[10] In order to resolve Mr Ferguson's application I must determine:

- a) Whether Mr Ferguson is owed arrears of wages for:
  - i. unpaid minimum wages;
  - ii. two weeks wages being notice of termination;
  - iii. outstanding holiday pay.
- b) Whether interest should be ordered on the arrears of wages;
- c) Whether B W Silvester Limited breached:
  - i. section 130 of the Act;
  - ii. sections 50 and 56 of the Holidays Act 2003;
  - iii. section 6 of the Minimum Wage Act 1983.
- d) If there were breaches, whether Mr Bryce Silvester is a person involved in any of the breaches pursuant to s 142W of the Act.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and

specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered everything.

### **Arrears of wages**

[12] Mr Ferguson claims arrears of wages for unpaid minimum wages amounting to \$9,856.80, two weeks wages being notice of termination amounting to \$2,326.56, payment for public holidays worked and holiday pay on the arrears of wages claim.

[13] Section 132 of the Act allows Mr Ferguson to call evidence to show that B W Silvester Limited has failed to keep or produce a wages and time record and its failure prejudiced his ability to bring an accurate claim under s 131 of the Act. If these factors are established the Authority may accept as proven, all claims made by Mr Ferguson in respect of the wages paid and the hours, days and time worked.

[14] B W Silvester Limited has not provided Mr Ferguson or the Authority with a copy of Mr Ferguson's wages and time record. This means I am entitled to treat Mr Ferguson's claim as proven in respect of wages paid to him and the hours, days and time he worked.

### ***Minimum wages***

[15] The terms and conditions of Mr Ferguson's employment were set out in the standard Federated Farmers employment agreement. The employment agreement was signed on 10 October 2017 but some clauses had not been completed.

[16] The employment agreement specifies Mr Ferguson's hours of work as being subject to a roster and records that Mr Ferguson is required to work from 5 am to 6 pm each day and will have every third weekend off. The employment agreement does not provide for a minimum or maximum number of hours to be worked each week.

[17] Mr Ferguson was paid a salary of \$35,000 which, according to the employment agreement was to compensate Mr Ferguson for any additional hours or days he was required to work. The employment agreement does not define what "additional hours" means but required Mr Ferguson to be paid at least the applicable minimum wage for any hours worked.

[18] Mr Ferguson has provided me with copies of two timesheets for the period 13 to 26 November 2018 inclusive. The timesheets record that on some days Mr

Ferguson started work earlier than 5 am and finished later than 6 pm. The timesheets show Mr Ferguson worked on average 74 hours each week. Mr Ferguson says he regularly worked these hours and that when he reconciled the number of hours he worked and the wages he received, he was paid less than the minimum rate of pay.

[19] Mr Ferguson suffered a work injury on 27 November and was absent from 27 November until 27 December 2017 inclusive. On 3 January 2018 Mr Ferguson was put off work due to his injury being exacerbated on his return to work. Mr Ferguson was declared fully unfit for work between 3 January and 4 February 2018. From 5 February until 18 March Mr Ferguson was cleared to work three hours each day on five days of the week. The activities Mr Ferguson was not able to perform during these three hours each day included:

- lifting or forceful movements
- heavy physical work
- repetition
- vibration
- driving
- prolonged sitting
- prolonged walking
- prolonged standing

[20] Despite being cleared for limited duties Mr Ferguson reported to his doctor on 5 February 2018 that he was not yet ready for work and was undertaking occupational rehabilitation the following week.

[21] Mr Ferguson did not return to work under the limited medical clearance. Mr Ferguson attempted to return to work under the limited clearance provided by his doctor on 1 March but was dismissed when he attempted to discuss this with Mr Silvester on 2 March 2018.

[22] Mr Ferguson claims he worked 140 hours between 27 December 2017 and 18 March 2018 and it is on these hours that he claims difference between his salary and the minimum wage. Mr Ferguson was absent between 3 January until his dismissal on 3 March 2018, so his claim for that period cannot succeed.

[23] Mr Ferguson has provided me with copies of his time sheets for the period 13 to 26 November 2017 inclusive. Accordingly, I have accepted Mr Ferguson's evidence that he worked on average 74 hours each week when he was working. This means that from 27 December and 3 January 2019 inclusive Mr Ferguson worked on average 10.55 hours each day.

[24] A salary of \$35,000 per annum for 74 hours each week equates to an hourly rate of \$9.09. The applicable minimum rate of pay for the period of Mr Ferguson's employment was \$15.75.

[25] Mr Ferguson is owed minimum wages for the period of five days from 27 December 2017 and 3 January 2018 inclusive. Taking into account the wages paid to him during that period Mr Ferguson is owed \$351.31 gross in minimum wages. This has been calculated on the basis that Mr Ferguson worked a total of 52.75 hours between 27 December 2017 and 3 January 2018. After taking into account the \$9.09 paid by way of salary payments, I have multiplied the 52.75 hours by \$6.66 (being the balance of the applicable rate of \$15.75).

[26] B W Silvester Limited is ordered to pay to Mr Ferguson the sum of \$351.31 gross as minimum wages within seven days of the date of this determination.

***Failure to provide notice***

[27] Mr Ferguson claims payment of two weeks' pay in lieu of notice. At the investigation meeting I raised with Mr Ferguson the orders I have previously made in his successful claim that he was unjustifiably dismissed.

[28] In that case B W Silvester Limited was ordered to pay lost wages for the entire period from his termination date of 2 March 2018 to the date at which he commenced new employment. I raised this because of a concern that he may be seen to be "double dipping" by receiving payment for the same period, twice.

[29] Mr Ferguson told me B W Silvester Limited had still not paid the remedies awarded to him under my determination dated 21 February 2019 and that he would probably not pursue the remedies awarded in that determination.

[30] I have carefully considered Mr Ferguson's application for two weeks' pay in lieu of notice. However, to make an award, after already making an award for the

same period in a different determination, would potentially lead to double dipping. Mr Ferguson still has avenues available to him to seek enforcement of the earlier orders and he may pursue those.

[31] Mr Ferguson's application for payment for two weeks' pay in lieu of notice is declined.

### ***Public Holidays***

[32] Mr Ferguson claims payment for public holidays worked. Mr Ferguson was not paid time and a half for working on two public holidays and neither did he receive an alternative day off in lieu for working the public holidays as required by ss 50 and 56 of the Holidays Act.

[33] Mr Ferguson worked on 1 and 2 January 2018. He was entitled to be paid the greater of his relevant daily pay or average daily pay that relates to the time actually worked on the day, plus half that amount again.

[34] The payment of the average daily rate has been paid to Mr Ferguson as a result of the payment of his salary and the orders made in this determination relating to the payment of minimum wages. Mr Ferguson told me the hours he worked on public holidays were the same as he would normally work on a Saturday and Sunday which averages out to 9.1 hours. For 1 and 2 January this equates to 18.2 hours.

[35] Based on the applicable minimum wage of \$15.75 this equates to a payment of \$143.41 gross. This has been calculated by multiplying 18.2 hours by 7.88 which is half of the applicable minimum wage.

[36] In addition Mr Ferguson is entitled to be paid for two alternative holidays. Mr Ferguson worked the public holidays and had not taken the alternative days before his employment ended.

[37] Mr Ferguson is entitled to a payment of \$332.33. This has been calculated on the basis of 21.1 hours being 10.55 hours per day for the two days multiplied by the applicable minimum rate of pay of \$15.75.

[38] B W Silvester Limited is ordered to pay to Mr Ferguson the sum of \$475.74 gross for work undertaken on two public holidays within seven days of the date of this determination.

### ***Holiday Pay***

[39] Mr Ferguson seeks holiday pay on the arrears of wages. It is appropriate for holiday pay to be calculated and paid to Mr Ferguson on the sums awarded as minimum wages and for public holidays. This has been calculated at 8 percent of the gross amounts as follows:

Minimum wages	\$351.31
Public Holidays	\$475.74
Total gross wages	\$827.05
8 percent	\$66.16

[40] B W Silvester Limited is ordered to pay to Mr Ferguson the sum of \$66.16 gross as holiday pay within seven days of the date of this determination.

### **Interest**

[41] Mr Ferguson seeks interest on the arrears of wages including holiday pay. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[42] It is appropriate where a person has been deprived on the use of money to make an award for interest. B W Silvester Limited is ordered to calculate and pay interest within seven days of the date of this determination on the sum of \$893.21.

[43] Interest is to be calculated from the date of this determination until the sum is paid in full.

[44] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.<sup>2</sup>

### **Breaches**

[45] Mr Ferguson claims B W Silvester Limited breached the following:

- a) The employment agreement, being the failure to give notice;

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<sup>2</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator)

- b) Section 130 of the Act, being a failure to provide wages and time records;
- c) Section 6 of the Minimum Wage Act, being a failure to pay at least the minimum rate of pay;
- d) Sections 50 and 56 of the Holidays Act, being the failure to pay public holidays at time and a half and failing to provide an alternative holiday.

***Breach of the employment agreement***

[46] Mr Ferguson was dismissed on 2 March 2018 when he met with Mr Silvester to discuss a return to work on 18 March after recovering from his injury. The dismissal was not justified and no notice was given.

[47] The employment agreement requires a notice period of two weeks. Clearly B W Silvester Limited breached this provision when it terminated Mr Ferguson's employment without notice. Accordingly Mr Ferguson has established a breach of the employment agreement.

***Breach of the Act***

[48] B W Silvester Limited has breached section 130 of the Act. Mr Ferguson, through his representative, requested copies of his wages and time records. Section 130(2) of the Act requires employers to provide access or a copy or an extract from any part or all of the wages and time record relating to the employment of an employee immediately upon request. B W Silvester Limited has failed to provide the wages and time records.

***Breach of the Minimum Wage Act***

[49] Mr Ferguson has established B W Silvester Limited has breached the Minimum Wage Act 1983. Section 6 of the Minimum Wage Act required B W Silvester Limited to pay the prescribed minimum wages. I have addressed this matter earlier in my determination and have made orders accordingly.

***Breach of the Holidays Act***

[50] B W Silvester Limited has breached the Holidays Act 2003. Sections 50 and 56 of the Holidays Act required B W Silvester to pay to Mr Ferguson time and a half for hours worked on a public holiday and to provide an alternative day off in lieu.

[51] I have addressed this matter earlier in my determination and have made orders accordingly.

### **Persons involved in the breaches**

[52] Mr Ferguson seeks to recover his arrears of wages from Mr Silvester personally under s 142Y of the Act.

[53] Mr Silvester can be made personally liable for wages or other money payable to an employee if there has been a default in the payment of wages or other money payable and the default is due to a breach of employment standards and Mr Silvester is a person involved in the breach.

[54] Section 142W of the Act defines those who are involved in breaches. Where the breach is by a company, as is case here, a person who occupies a position in the company may be treated as a person involved in the breach if that person is an officer of the company.

[55] Mr Silvester is the sole director of B W Silvester Limited and is therefore, an officer of the company. He was the only representative of the company Mr Ferguson had dealings with. I am satisfied Mr Silvester is a person involved in minimum standards breaches being breaches of s 130 of the Act, minimum entitlements and payments under the Holidays Act and minimum entitlements under the Minimum Wage Act.

[56] I am satisfied leave should be granted for Mr Ferguson to recover his arrears of wages from Mr Silvester personally. The Authority has evidence in these proceedings that confirms Mr Ferguson's employer, B W Silvester, is unable to pay the arrears of wages or other money.<sup>3</sup>

### **Costs**

[57] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.<sup>4</sup> The principles applying to costs are well settled and do not require repeating.<sup>5</sup>

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<sup>3</sup> Above n. 1.

<sup>4</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

[58] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.<sup>6</sup> The investigation meeting took approximately one hour. As indicated to Mr Ferguson at the investigation meeting the starting point is \$750.

[59] Mr Ferguson has had to bring this matter to the Authority in order to seek payment of money owed to him including minimum wages and holiday pay. In accordance with the primary principle that costs follow the event, I consider it appropriate to make orders against Mr Silvester for costs.

[60] Because no wages and time records were provided Mr Ferguson has had to go to the expense of having his claim calculated for him. This will be reflected in an uplift to the daily tariff. Taking all factors into consideration an appropriate award for costs is \$1,000.

[61] Mr Bryce Silvester is ordered to pay to Mr Ferguson a contribution to his costs in the sum of \$1,000 within seven days of the date of this determination.

#### **Certificate of determination**

[62] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 Applicant is to be provided with a Certificate of Determination, sealed with the seal of the Authority recording that within seven days of the date of this determination, Mr Silvester is ordered to pay to Mr Ferguson:

- a) Arrears of wages in the sum of \$893.21 plus interest;
- b) Costs of \$1,000.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>6</sup> Practice Note 2, Costs in the Employment Relations Authority.