

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 605
3183339

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| BETWEEN | GRACE PATRICIA WAITAPU ASHER First Applicant |
| AND | ROBERT JOHN COLIN GAVIN Second Applicant |
| AND | MICHELLE LEE-ANN KNIGHT AND MURRAY NEIL KNIGHT AS TRUSTEES OF THE M N AND M L KNIGHT FAMILY TRUST Respondents |

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| Member of Authority: | Natasha Szeto |
| Representatives: | Applicants in person Anastasia Cox, counsel for the Respondents |
| Investigation: | 27 June 2023 at Rotorua |
| Evidence and submissions received: | 13 July 2023 from the Applicants 27 July 2023 from the Respondents |
| Date: | 17 October 2023 |

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms Asher and Mr Gavin worked for Michelle Knight and Murray Knight as trustees of the MN and ML Knight Family Trust (the Knights, or the Trust) as farm assistants. Mr Gavin lived on the farm and worked for the Trust for over a decade.

[2] Ms Asher and Mr Gavin left the farm at the end of the 2022 season. On leaving, they discovered they had not been paid the correct amount for public holidays they had worked. They had a number of complaints about their employment with the Trust.

[3] This is a determination about recovery of wages or other money under s 131 of the Employment Relations Act 2000 (the Act), and whether Ms Asher and Mr Gavin raised a personal grievance in time, in accordance with s 114 of the Act.

[4] An investigation meeting was held in Rotorua on 27 June 2023. Mr Gavin and Ms Asher attended and gave evidence, as did their friend Mr Bracken. A written letter in support of the Applicants was provided from another friend Ms Hall who was unable to attend the meeting. Ms Knight and Mr Knight gave evidence for the Trust, as well as the Trust's Accountant Ms Mann and Ms Asher's mother Ms Furneaux who now works for the Trust. I received evidence and submissions from both parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

Relevant Background

[6] Mr Gavin worked on the farm and was employed by the Trust from 1 June 2009 to 31 May 2022. His Individual Employment Agreement (IEA) from 1 June 2014 to 31 May 2021¹ was updated for the 2021 to 2022 farming season². Ms Asher worked for the Trust from 1 August 2017 to 14 May 2021. Some time prior to 31 May 2022, Mr Gavin and Ms Asher decided to leave the farm, and they advised the Trust that they resigned from their employment. The farming season ends on 31 May and farming assistants typically move out of their farm accommodation on 1 June. The Applicants' last day of employment was 31 May 2022, and they were scheduled to move on 1 June 2022.

¹ Signed by both parties on 10 June 2015.

² Signed by the parties on 14 and 15 May 2021.

[7] On 27 May 2022 there was an altercation between Mr Gavin and Mr Knight that gave rise to a personal grievance claim of unjustifiable disadvantage.

[8] When Mr Gavin received his final pay, he had been paid for time and a half for Easter Monday 2022. This caused the Applicants to both question why they had not been paid time and a half and received a day in lieu for public holidays previously. Mr Gavin and Ms Asher sent a letter to the Trust dated 28 July 2022 seeking compensation for public holidays they had worked, and to be paid time in lieu. They raised a variety of issues relating to how they had been treated in their employment. The Knights received the letter on 8 August 2022. The Applicants had given the Knights a deadline of two weeks for a response, and the Knights did not respond in that time.

[9] The Applicants lodged a Statement of Problem in the Authority on 16 August 2022. In their Statement of Problem, Mr Gavin and Ms Asher sought payment of time and a half and a day in lieu for holidays going back to 2016, loss of income and mental stress. They asked to be paid for this work, as well as being compensated for mental and emotional stress.

[10] The Knights say they were unaware of any issues with the Applicants' holiday pay until it was brought to their attention in the Applicants' letter and the Statement of Problem. They say they acted promptly to investigate the claims relating to underpayment and remedy them. This involved seeking advice and assistance from their Accountant Ms Mann. On 1 September 2022, the Knights paid the Applicants \$3,529.84 (gross) for unpaid annual holiday pay based on calculation of the arrears Ms Mann had provided.

Issues

[11] Mr Gavin and Ms Asher do not believe they have been paid the correct amount for their statutory holiday entitlements. The Knights say that as at the date of the Authority's investigation meeting, all outstanding money has been paid to the Applicants.

[12] Mr Gavin and Ms Asher also claim they were disadvantaged by both the failure of the Trust to pay them properly for working public holidays and due to an altercation between Mr Knight and Mr Gavin before the Applicants left the farm. The Knights

deny a personal grievance claim was raised with the Trust but say that even if a personal grievance had been raised in time, it has no merit.

[13] The issues for the Authority to investigate and determine are:

- a. Whether the Applicants worked on public holidays during their employment with the Respondent.
- b. Whether the Applicants were paid in accordance with the Holidays Act 2003 for working any public holidays.
- c. Whether the Applicants were provided with alternative holidays under the Holidays Act 2003 or were paid in lieu of taking alternative holidays.
- d. Whether the Applicants raised a personal grievance on grounds set out in s 103 of the Act in time, and in accordance with s 114 of the Act.
- e. If the Applicants have a valid personal grievance, whether any remedies such as compensation under s 123 should be awarded.

[14] The Trust also requested the Authority order Mr Gavin and Ms Asher repay them the PAYE tax mistakenly paid to the Applicants when correcting the underpayment. The Authority noted that the PAYE tax overpayment was first raised in Ms Mann's statement (dated 16 May 2023) and has not been raised as a claim or counter-claim by the Trust. Accordingly, the Authority declined to deal with this issue as part of this determination.

Wage Arrears Claim

[15] The Applicants' wage arrears claim relates to payments for public holidays worked for which the Applicants were entitled to be paid time and a half.³ They were also entitled to an alternative holiday (or "day in lieu") for working on a public holiday.⁴ If they did not take their alternative holiday, they were entitled to be paid for it in their final pay, at the rate of the employee's relevant daily pay or average daily pay for their last day of employment.⁵

[16] It is common ground between the parties that Mr Gavin and Ms Asher worked on public holidays during their employment with the Trust. It is also common ground

³ Section 55 of the Holidays Act 2003.

⁴ Section 56 of the Holidays Act 2003.

⁵ Section 60(2)(b) of the Holidays Act 2003.

between the parties that at the time of their employment, the Applicants were not paid in accordance with the Holidays Act 2003 for working those public holidays.

[17] Following receipt of the Statement of Problem, the Trust promptly (in its words) arranged for Ms Mann to investigate whether there were any inaccuracies in the payments. Ms Mann calculated the Applicants' statutory holiday pay based on the average time worked across all statutory holidays in the period based on the Applicants' 11:3 roster (11 days on and three days off). Ms Mann said that in farming there is some flexibility about hours actually worked but the rate must always be above the minimum wage per hour. Ms Mann gave evidence that her methodology is a conventional way to calculate hours worked on statutory holidays.

[18] During the Authority's investigation, the Applicants were provided with the wages and time records held by the Trust for the 6-year period preceding the Applicants' claim in the Authority, as well as a detailed summary from Ms Mann explaining how she had worked out the arrears owing to the Applicants for statutory holidays. Ms Mann gave further evidence at the investigation meeting to explain her calculations.

[19] By the Trust's own admission, there are gaps in their source documents (wages and time records). Where a record was missing, the Trust used the daily hours to determine an hourly average per day. Where annual leave was paid instead of holiday pay, the Applicants were credited their annual leave on a favourable assumption of 10 hours per day for Mr Gavin, and 8 hours per day for Ms Asher and this was paid to them on 1 September 2022.

[20] Mr Gavin and Ms Asher have been given multiple opportunities to clarify and quantify any wages they say are outstanding but have not done so. The Applicants accept Ms Mann's calculations and did not provide any evidence to contradict the records provided by the Trust. In his statement following the Investigation Meeting, Mr Gavin acknowledged what Ms Mann had already done was correct to his knowledge.

[21] Having reviewed the wages and time records provided by the Trust, and the summaries provided by Ms Mann, the Authority has found some minor anomalies in the figures when compared with the source records. Some of the figures may have resulted in overpayments to the Applicants, and some in underpayments. I consider

that any arrears are likely to be negligible. For the sake of completeness, the records with anomalies identified by the Authority are attached to this determination as a Schedule for the parties' review. There may be others. Further mediation may assist the parties to resolve any arrears issues. Leave is reserved for either party to return to the Authority if they are unable to reach resolution on the figures and whether there are any arrears owing.

[22] Finally, the Applicants asked the Authority to determine whether they had been provided with alternative holidays under the Holidays Act 2003 or were paid in lieu of taking alternative holidays.

[23] The evidence before the Authority from the Knights was that Mr Gavin received three-day weekends at least once a month to cover his "day in lieu" as is stated in his employment agreement. This was a hand-written addition to Mr Gavin's Individual Employment Agreement⁶ at section 5, where it is noted:

3 day weekend covers stat days...Note: Friday covers any stat days worked during the year.

[24] Mr Gavin's most recent Individual Employment Agreement⁷ was slightly more ambiguously worded, but references the 11 days on and three days off roster for the period 1 November 2021 – 31 May 2022 and states that Mr Gavin would have every Friday off from 12 – 2:30pm.

[25] Ms Asher's Individual Employment Agreement (1 August 2017 to 27 May 2018) contains a "Holidays Act 2003 Leave" clause on page 8 that states:

If your rostered time on includes a Public Holiday, this is covered by way of your 3 day weekend. The 3 day weekend covered 12 Public holidays

[26] While Mr Gavin is correct to say that his most recent Individual Employment Agreement did not state "Friday for stat day" as his previous Agreement did, the time off every Friday would have equated to a minimum of 130 hours per year (or 13 x 10-hour days). Based on the information before the Authority, the Applicants have been provided with alternative holidays.

⁶ Signed by both parties on 10 June 2015.

⁷ Signed by the parties on 14 and 15 May 2021.

[27] I am not without sympathy for Ms Asher's submission that the Knights failed in their responsibility to know and understand basic employee entitlements, but having considered all the evidence, I am not persuaded that the underpayment was deliberate as the Applicants have submitted. In the absence of any evidence to the contrary, I accept the Knights were unaware of the underpayment issue until it was brought to their attention by the Applicants, and they acted promptly to investigate and remediate the underpayment.

[28] Based on the information before the Authority, I am satisfied that since lodging their Statement of Problem, the Trust has paid Mr Gavin and Ms Asher the majority of what they were owed for working on public holidays including providing the Applicants with alternative holidays in accordance with the provisions in their employment agreements. If there are any arrears owing based on the anomalies in the Schedule, as I have noted above, they are likely to be negligible.

Personal grievance claim

[29] A personal grievance must be raised with the employer within a 90-day period that the action alleged to give rise to the grievance occurred or came to the notice of the employee.⁸ A personal grievance can only be raised outside that time with the employer's consent, or with the leave of the Authority which can only be granted in exceptional circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.⁹

[30] The case law supports the well-established position that the grievance process is designed to be informal and accessible. A grievance can be raised orally or in writing and there is no particular formula of words that must be used. In some cases, the totality of communications might constitute raising a grievance.¹⁰

[31] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.¹¹ This is because the employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to

⁸ Section 114(1) and (2) of the Employment Relations Act 2000.

⁹ Section 114(6) of the Employment Relations Act 2000.

¹⁰ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

¹¹ *Creeedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

resolving the complaint informally and as soon as practicable. It is not necessary for the employee to state how they would like the matter resolved. Raising an employment relationship problem might constitute raising a personal grievance.¹²

[32] Mr Gavin and Ms Asher rely on their letter of 28 July 2022 to say they raised a personal grievance with the Knights. In the letter, Mr Gavin and Ms Asher referred to wage arrears issues concerning their holiday pay. They told the Knights that if the matter cannot be mediated, they will be taking the next step which is court action and the other matters would be discussed and investigated including gender pay equity, living conditions, discussion of personal information, discrimination, rostered time off, and timesheets / Paysauce. The Applicants raised the altercation between Mr Knight and Mr Gavin on the last visit to the house. The letter did not specifically use the words “personal grievance”.

[33] There was no mention of a personal grievance in the Statement of Problem lodged with the Authority on 16 August 2022. The potential personal grievance claim was noted as an issue with the parties in the Case Management Conference with the Authority on 27 February 2023, but the exact nature of the Applicants’ personal grievance claims (being the events two weeks prior to the Applicants’ employment ending, and the failure by the Trust to pay time and a half to the Applicants for public holidays worked in the preceding 6 years) was only clarified at the investigation meeting on 27 June 2023, which was well outside the 90-day period allowed in the Act. Ms Asher accepted at the investigation meeting that her claims were out of time to be raised as personal grievances.

[34] The Knights say Mr Gavin did not raise a personal grievance within the statutory 90-day time frame. They do not consent to a personal grievance being raised out of time. The Knights also say Mr Gavin has not applied for leave to raise the personal grievance after the expiration of the 90-day time frame. Such application would require consideration of whether Mr Gavin has shown ‘exceptional circumstances’ which the Knights say he has not.

[35] Based on the legal principles, and the information before the Authority, I find the Applicants did not raise a personal grievance in time in accordance with the Act. The failure to use the words ‘personal grievance’ in their 28 July 2022 letter is not fatal,

¹² *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

but it is clear the focus of the Applicants' letter was their desire to be paid appropriately for public holidays. This remained the Applicants' focus when specifying their claims in their Statement of Problem on 16 August 2022. The Applicants have not claimed exceptional circumstances, and there is no evidence to support a finding of exceptional circumstances in this case.

[36] For the sake of completeness, I note that even if grievances had been raised in time, I am not persuaded that the altercation between Mr Gavin and Mr Knight would have constituted a disadvantage to Mr Gavin in his employment. By the time of the altercation, Mr Gavin and Ms Asher had already resigned from their employment and arranged to move away from the farm. Any disadvantage personal grievance regarding failure to pay holiday pay is more appropriately determined as a wage arrears claim which has been properly raised in time.

[37] Mr Gavin and Ms Asher have not raised personal grievances in time in accordance with s 114 of the Act. The Trust does not consent to grievances being raised out of time, and there are no exceptional circumstances that would justify leave being granted to pursue personal grievances out of time. The personal grievance claims must therefore fail.

Findings

[38] Leave is reserved for the parties to revert to the Authority on the issue of arrears arising from the holiday pay calculations as noted in the Schedule.

[39] Given my finding that the Applicants did not raise a personal grievance in time in accordance with s 114 of the Act, there are no remedies available to the Applicants under s 123 of the Act.

Application for dismissal

[40] The Respondents submit that the Authority ought to use its discretion under the Act to dismiss this matter for being frivolous or vexatious.¹³ The Trust failed to meet its obligations to its employees to pay them in accordance with statutory entitlements under the Holidays Act 2003. Although the Trust remedied this prior to the investigation meeting, Mr Gavin and Ms Asher brought this proceeding for final

¹³ Schedule 2, clause 12A of the Employment Relations Act 2000.

resolution of whether they have been paid appropriately. Given the evidence before the Authority, there is a total lack of trust and confidence by both parties. In those circumstances, I do not consider the claims to be frivolous or vexatious.

Costs

[41] The Authority has power to award costs and expenses to a successful party under clause 15 of schedule 2 of the Employment Relations Act 2000.

[42] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁴

[43] Costs in this matter are reserved. The parties are strongly encouraged to resolve any issue of costs between themselves alongside review of the Schedule.

[44] If the parties are not able to resolve the issue of costs, and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs.

Natasha Szeto
Member of the Employment Relations Authority

¹⁴ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi, August 2023 (<https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>)

Schedule

Ms Asher

25/04/2021 ANZAC Day
6/02/2020 Waitangi Day
28/01/2019 Auckland Anniversary Day
2/01/2019 Day after New Year's Day
1/01/2019 New Year's Day
25/05/2018 ANZAC Day
6/02/2018 Waitangi Day
23/10/2017 Labour Day

Mr Gavin

7/02/2022 Lieu Day for Waitangi Day
13/04/2020 Easter Monday
22/04/2019 Easter Monday
2/01/2019 Day after New Year's Day
6/02/2018 Waitangi Day
6/01/2018 Auckland Anniversary
01/01/2017 New Year's Day
27/12/2016 Lieu Day