IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC51
ARC 66/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GARRY BRUCE HOW Plaintiff
AND	MARK CAMPIN AND CHRIS CAMPIN TRADING AS CHEQUERS STUD Defendant

Hearing: 30 April 2010
(Heard at Hamilton)

Appearances: Garry Bruce How, in person with Shona Louise How
Mark Campin, on his own behalf and on behalf of Chris Campin both trading as Chequers Stud

Judgment: 10 May 2010

JUDGMENT OF JUDGE M E PERKINS

Facts

[1] Mr How was employed by the defendants in December 1999 as a general groom at Chequers Stud, Cambridge. He terminated his employment by resignation on 7 September 2007. He was suffering from ill health at the time. Following a recovery in his health, Mr How lodged a complaint with the Department of Labour in November 2007 asking it to investigate issues of money owing to him for holiday pay (including public holidays) and minimum wage issues.

[2] A Labour Inspector carried out an investigation of the matter including whether wage and time records had been adequately maintained by the defendants.

The Labour Inspector was not provided with wage and time records despite his request of the defendants and therefore he proceeded with his opinion based on documentation and information provided by Mr How through his then solicitor. In a written opinion dated 19 June 2008 he concluded that the defendants breached minimum wage requirements in the years 2002, 2006 and 2007 and for that owed Mr How $2,765.38. He further concluded that the defendants had breached the requirements of the Holidays Act 2003. The defendants owed Mr How $1,333.28, for alternative days off when he worked on public holidays and a further sum of $988.05 for both annual leave owing and incorrectly calculated holiday pay. The total sum owing was assessed to be $5,086.71 (gross).

[3] A preliminary issue arises from the Labour Inspector's opinion as to whether the correct legal entities have been named as defendant in these proceedings. This applies to both the proceedings before the Employment Relations Authority (the Authority) and this Court. The opinion dated 19 June 2008 is directed to "Chequers Stud Limited" for the attention of Mr Jim Campin. Amongst the documents produced by Mr How to the Court is an unsigned draft employment contract (which Mr How concedes he refused to sign) describing the employer as "J. W. Campin – Chequers Stud." A brief of evidence from the above named defendant Mark Campin, which was provided to the Authority and also the Court, contains the following statement:

> I manage Chequers Stud at Maungatautari Road, Cambridge. My father James Campin and my brother Chris Campin are also involved with the business. Essentially, the business is a family business and has operated for many years.

[4] From Mr How's evidence before the Court it is clear that he regarded the above named Mark and Chris Campin as his employers. No steps have been taken by the defendants in the challenge (apart from Mark Campin appearing at the hearing, which I shall mention later in this judgment). Accordingly, there is no pleading from the defendants disputing that they are the correct legal entities to be sued as Mr How's employers and they must be deemed to be so. The same position applies in respect of the Authority's determination, which is the subject of this challenge. Accordingly, I consider that the defendants are the liable entities.

The determination

[5] The defendants disputed the opinion of the Labour Inspector forcing Mr How to make the claim to the Authority at Auckland. Following an investigation meeting, the Authority issued a determination dated 7 August 2009. Mr How relied upon the Labour Inspector's opinion and this was upheld in the determination but only as to money owing under minimum wage requirements and for public holidays. Three working days before the investigation meeting Mr How lodged a new claim for a penalty for the defendants' failure to keep or produce wage and time records.

[6] At the investigation meeting the defendants produced an unsigned copy of the draft written employment agreement and a notebook used at the worksite to record details of days off. Neither document had been provided to the Labour Inspector. Nevertheless, Mr How acknowledged that he recognised the book and that it was used for days taken off on holiday and other leave.

[7] The Authority Member used the agreement and the book to retraverse the Labour Inspector's opinion (no dispute was raised to this). As a result, while upholding the arrears of wages and public holiday claims, she found that the defendants did not owe Mr How any pay for annual leave and indeed he had been paid $179 above his entitlement for annual leave. No orders were made against Mr How in respect of that overpayment.

[8] Insofar as penalties were concerned the determination records that the claim for penalty was not made within the period of 12 months after the cause of action first became, or ought to have become, known to the person bringing the action. (s 135(5) Employment Relations Act 2000 (the Act)). Accordingly, the Authority Member held the remedy for penalty was not available.

[9] The Authority dealt with interest and costs and awarded Mr How interest on the total sum of $4,098.66 and ordered that to be paid at the rate of 4.8 per cent commencing on 19 June 2008 until payment. Costs were reserved on the basis that if agreement could not be reached, memoranda were to be filed within 28 days.

[10] On 27 August 2009 the defendants paid Mr How the sum of $4,134.23 being the award of the Authority together with their calculation of the interest to the date of payment.

The challenge

[11] The matter of costs before the Authority was then overtaken on 3 September 2009 by Mr How filing a challenge to the determination pursuant to s 179 of the Act. The challenge relates to that part of the determination dealing with refusal to impose a penalty and the quantum of interest. The challenge does not seek a hearing de novo. The remedies sought are:

a) That a penalty be imposed for failure to produce wage and time records (s 130(1), (2) and (4) of the Act).

b) That a penalty be imposed for default in payment of agreed wages (s 131 of the Act).

c) That a penalty be imposed for breach of s 132 of the Act. (That section is purely evidentiary and no penalty could arise under it)

d) That a penalty be imposed under s 134 of the Act. (On the basis of the pleadings this seems to be merely a repetition of the earlier remedies sought in (a) and (b) above).

e) Any other relief as the Court deems fit.

f) Reimbursement of legal fees incurred of $1,035 and filing fees in total amounting to $270 paid to the Authority and Court Registries.

[12] No specific remedy is sought for the challenge to the determination on interest but the statement of claim was drafted by a lay person; the plaintiff's sister who also appeared on his behalf. It is clear from the body of the document that a claim is made. I shall treat the claim for interest as being covered by e) above.

The hearing

[13] As no steps were taken by the defendants the challenge proceeded by way of formal proof. Ms Shona How, the plaintiff's sister commendably represented Mr How at the hearing. While no steps had been taken, I allowed Mr Mark Campin to speak briefly on behalf of the defendants as he had made a last minute arrival. He had indicated in a letter sent to the Court Registry on 28 April 2010 that he would be in attendance and that both he and his fellow defendant accepted the determination. He also attached a copy of his brief of evidence presented at the investigation meeting. At the hearing he pointed out the extent of legal fees incurred in this matter to date by the defendants.

[14] Mr How was sworn in as a witness and he confirmed the truth and accuracy of the particulars set out in his statement of claim. He also produced a signed written brief of evidence and supporting documents and confirmed them as true and correct. Ms How, on his behalf, then made brief submissions on the prevalence of the abuse of stable hands in the industry who are particularly vulnerable. She submitted that this supported the imposition of penalties in this case.

Decision

[15] The determination is correct in rejecting the claim for penalty on the basis it was not commenced within the prescribed period of 12 months. Mr How became aware by June 2008 at the latest that breaches had occurred when he received the Labour Inspector's letter of opinion. That is confirmed in his brief of evidence, where he states:

> In or about June 2008 my solicitor received a copy of a letter from the Department of Labour (Alan Reid) addressed to and which had been sent to Chequers Stud Limited. A copy of that letter is attached hereto and marked with the letter "H". This letter contains all the information upon which my claim is based. I agreed to accept the calculations as set out in the Summary (2) of the letter marked "H" and referred to above.

[16] It is clear from the letter of Mr Reid, the Labour Inspector, that he had not been provided with wage and time records by the defendants. It is also clear from the letter the extent to which the defendants were in breach of minimum wage

requirements, failure to provide alternative days in substitution for public holidays, which Mr How had worked, and breach of the Holidays Act 2003 as to the provision of and payment for annual leave.

[17] The period of 12 months may have been capable of extension under s 219(1) of the Act. However, no application for an extension was made either to the Authority or the Court. No reasons for the delay have been put forward, which might provide grounds for an extension. The principles applying have been considered previously by this Court in *NZ Timber Industry IUOW v FL Anderson Ltd*[1] (in respect of equivalent sections in the Employment Contracts Act 1991 to sections 219 and 221 of the Act); *Jack v Faithfull Funeral Services Ltd*[2] and *An Employee v An Employer*[3].

[18] Even if such an application for extension of time had been made and granted, I do not consider this would be an appropriate case for penalties to be imposed. It is true the defendants had not followed proper procedures insofar as wage and time keeping records were concerned. However, I would not be prepared to say this was intentional on their part. They had been neglectful of their obligations but obviously this has been a salutary experience for them and costly by all accounts. As a result of the outcome of this challenge further sums are payable. Ms How's submissions as to what happens in the industry are anecdotal and not based upon any evidence presented. If abuse in this way of stable hands and other employees in the industry is indeed prevalent then this matter will have put other employers on notice.

[19] Insofar as interest is concerned I consider the determination has inadequately reimbursed Mr How. Mr Campin indicated in his letter to the Registrar that on 27 August 2009 the defendants paid Mr How $4,134.23. This would have included the sum of $35.57 in interest allegedly calculated at 4.8 per cent from 19 June 2008 until the payment. That calculation apparently made by the defendants' lawyer is incorrect. The true sum for interest at that rate and for that period is $233.39. Therefore, there has been an underpayment even on the basis of the determination.

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[1] [1989] 3 NZILR 94.
[2] AC38/06, 12 July 2006.
[3] [2007] ERNZ 295.

[20] Mr How should receive interest on the sums awarded from the date they became due and owing to him and not the date of the Labour Inspector's opinion on 19 June 2008. The exact calculation is difficult because of the differing periodic 90-day bill rates applying over the years. It is possible to work out an average 90-day bill rate over the period, which is certainly higher than the present rate of 2.76 per cent (the rate the Authority applied was roughly equivalent to that rate plus 2 per cent as required under cl 11 schedule 2 of the Act). It would be extremely complicated to go back over the periods and calculate interest on the sums on a daily basis to accurately take account of the fluctuating 90-day bill rate over the period. Accordingly, I exercise my discretion (under cl 14 schedule 3 of the Act) by applying the average 90-day bill rate over the periods involved plus the 2 per cent prescribed to calculate interest to the date of this judgment. The rate I have accordingly applied is 8.5 per cent. Insofar as the interest owing for public holidays is concerned the Labour Inspector has not specified exactly when the days in lieu accrued. Accordingly, and in respect of the amount of $1,333.28, I have calculated the interest from 7 September 2007 being the date of Mr How's resignation.

[21] The three amounts owing as breach of minimum wage requirements are $210.08 for 2002, $919.10 for 2006 and $1,636.20 for 2007. Again applying my discretion I have therefore commenced interest from 31 December 2002, 31 December 2006, and 7 September 2007 respectively. The calculations of interest to be paid are as follows:

a)	$210.08 at 8.5 per cent from 31 December 2002 to 10 May 2010 (7 years and 130 days)	$131.38
b)	$919.10 at 8.5 per cent from 31 December 2006 to 10 May 2010 (3 years and 130 days)	$262.18
c)	$1,636.20 at 8.5 per cent from 7 September 2007 to 10 May 2010 (2 years and 245 days)	$371.48
d)	$1,333.28 at 8.5 per cent from 7 September 2007 to 10 May 2010 (2 years and 245 days)	$302.73

Subtotal		$1,067.77
e)	Less interest paid to date	$35.57
TOTAL		$1,032.20

[22] On the subject of costs the plaintiff has produced an account received from his lawyer for attendances from April 2008. These relate to collating information relevant to the period of employment and further attendances with the Labour Inspector for the purposes of the Inspector's investigation and opinion. The opinion from the Inspector confirms that. As there was no information from the defendants as to time and wages records he had to rely upon information supplied to him by the plaintiff. The plaintiff was left in a vulnerable position following his resignation. He suffered a period of illness. He also has literacy difficulties. In these circumstances it was reasonable that he procured the assistance of a solicitor. From a perusal of the bill of costs the attendances had been kept to a minimum. The fee charged is fair and reasonable. Indeed, the solicitor has reduced the fee from $1,125 based on time and attendances to $900. Minor disbursements plus GST have been added. In these circumstances it is appropriate that the plaintiff be fully reimbursed. After all, such costs would seriously reduce the money received by him for his honest labours with the defendants through no fault of his own. Accordingly, the defendants are ordered to reimburse the plaintiff for $1,035 plus the Court and Authority filing fees totalling $270.

Disposition

[23] In summary the orders against the defendant are that they are to make the following payments to the plaintiff:

a) $1,032.20 for interest;

b) $1,035 for reimbursement of legal costs incurred;

c) Disbursements of $270.

[24] No penalties are imposed.

M E Perkins
Judge

Judgment signed at 4.00 pm on Monday 10 May 2010