IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 28
EMPC 337/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TALBOT AGRICULTURE LIMITED Plaintiff
AND	FRANKLYN WATE Defendant

Hearing: 14 October 2019
(Heard at Christchurch)

Appearances: D Caldwell, counsel for plaintiff
J Horan, advocate for defendant

Judgment: 11 March 2020

REMEDIES JUDGMENT OF JUDGE K G SMITH

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[1] There is an unresolved issue about the remedies Franklyn Wate is entitled to having been unjustifiably dismissed from his job with Talbot Agriculture Ltd.[1]

[2] Talbot Agriculture unsuccessfully challenged the Employment Relations Authority's determination.[2] In dismissing the challenge the Court dealt with remedies Talbot Agriculture was ordered to pay by confirming the amount awarded by the Authority for humiliation, loss of dignity and injury to Mr Wate's feelings. The remainder of the remedies needed further calculation by the parties. They were given

1 *Wate v Talbot Agriculture Ltd* [2017] NZERA Christchurch 181.
2 *Talbot Agriculture Ltd v Wate* [2019] NZEmpC 31.

an opportunity to reach agreement about them and leave was reserved to seek further orders if agreement could not be reached.[3] The parties were unable to agree and a further hearing was necessary.

Employment, termination and initial remedies

[3] A brief description of the background to this proceeding is needed to place into context the unresolved dispute about remedies. A more detailed description is contained in the substantive decision.[4] In early 2016 Talbot Agriculture advertised a vacancy for a mechanic. Mr Wate applied successfully. Before being offered the job he participated in a work assessment at the company's premises in Temuka. The assessment took place between 2 May and 4 May 2016 and he was offered the job the next day. Mr Wate accepted the offer on 6 May 2016.

[4] The employment agreement was conditional on Mr Wate being granted a work visa and did not take effect as a binding agreement until one was obtained. There was a delay in the visa being granted and it was not issued to Mr Wate until 15 June 2016. From that date the employment agreement was effective and, the company considered, the 90-day trial provision in it was operative.[5]

[5] Despite the absence of a visa Mr Wate began working for the company from 10 May 2016. From that date he attended the company's workshop each day until his employment was ended by a letter dated 19 July 2016 giving him notice his employment was terminated from 31 July 2016. His last day of work was actually 29 July 2016. In dismissing Mr Wate, the company relied on the trial provision.

[6] Because Mr Wate began work in May 2016 the 90-day trial provision did not satisfy ss 67A and 67B of the Employment Relations Act 2000 (the Act) and could not be relied on. The Authority concluded Mr Wate had been unjustifiably dismissed and ordered Talbot Agriculture to pay to him the following amounts:

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3 At [69].
4 At [4]-[16].
5 Employment Relations Act 2000, ss 67A and 67B.

(a) Three months gross pay as reimbursement for lost wages pursuant to s 123(1)(b) of the Act.

(b) $10,000 as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

(c) For the period of time from 2 May 2016 to 11 June 2016, wages of $3,751.50 and $300.12 gross as holiday pay.

(d) For the period from 12 June 2016 to 29 July 2016, wages of $6,750 gross and $540 gross as holiday pay.

[7] The selection of the intervals of time in paragraph [6](c) and (d) need to be explained. The first period of time (2 May until 11 June 2016) was the Authority's calculation encompassing the assessment Mr Wate underwent at the beginning of May and for the work he performed from 10 May onwards. In the absence of any evidence about an agreed rate of pay for that work, the Authority applied the Minimum Wage Act 1983 and the applicable Minimum Wage Order, using Mr Wate's diary as the only available record of hours worked. The Authority calculated the amount of working time as 246 hours resulting in an order to pay wages of $3,751.50. Holiday pay was added.

[8] The second period of time, from 12 June 2016 to 29 July 2016, roughly corresponded with the work visa being granted and the end of employment. The Authority accepted Talbot Agriculture's solicitors' calculation of wages and holiday pay owing for this period.

The challenge

[9] Talbot Agriculture's challenge to the determination elected a full hearing of the whole matter.[6] The company sought to set aside the whole determination and a judgment that the dismissal was justified. As an alternative it disputed the compensation the Authority ordered to be paid.

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6 Employment Relations Act 2000, ss 179(1) and (3).

[10] The statement of claim pleaded that the period from 2 May to 4 May 2016, which the Authority had concluded was work time to be paid for, was actually to assess Mr Wate's suitability for employment and there was a common understanding that he was not an employee on those days. Mr Wate's statement of defence admitted this pleading and, in so doing, made a concession inconsistent with the Authority's findings. That concession meant the wages owed to Mr Wate had to be recalculated.

Unresolved issues

[11] In addition to recalculating wages owed to Mr Wate for working before his visa was issued, other disputes about his wages and the Authority's award for lost remuneration have prevented agreement being reached. The unresolved issues are:

(a) Given Mr Wate's concession, the amount of wages due to him for the period from 10 May to 11 June 2016.

(b) The amount of wages due to Mr Wate from mid-June until the end of July 2016. Wages during this period were not paid because he had not provided the company with an IR330 form.

(c) Whether there should be deductions from the amount owed by Talbot Agriculture to Mr Wate for three cash payments he received, to reimburse the company for the value of its petrol used when traveling between Temuka and Christchurch, and for rent on a property he occupied and associated expenses for the use of electricity and Sky TV.

(d) Whether the Authority's award of three months gross pay as reimbursement for lost wages can remain.

[12] The dates involved in these unresolved issues described in paragraphs [11](a) and (b) do not correspond exactly with those in the substantive judgment but are sufficiently close that no material difference arises from using them.

Wages owed

[13] Talbot Agriculture calculated the amount of wages owed as follows:

(a) For the period from 10 May 2016 to 11 June 2016, wages of $3,050, plus holiday pay of $244 (calculated at 8 per cent).

(b) For the period from 12 June 2016 until the last day of Mr Wate's employment, wages of $6,750 plus holiday pay of $540 (calculated at 8 per cent).

[14] The amount of $3,050 was reached by multiplying 200 hours of work at $15.25 per hour, which was the minimum wage rate at that time.[7] To calculate the number of hours the company relied on Mr Wate's diary where he recorded his work. The company did not accept the accuracy of the diary during the substantive hearing, but acknowledged it was the best available record from which to attempt to calculate this part of the remedies. By totalling each diary entry that described being at work, Talbot Agriculture claimed that the maximum number of hours that could have been worked was 208.5. It argued that caution should be used in accepting that figure, given reservations about the accuracy of the diary. Presumably, the 200 hours in its calculation incorporated a rough and ready adjustment to take account of the uncertainty it was concerned about, but that was not very clear from submissions.

[15] Talbot Agriculture calculated the wages due for the second period, June to July 2016, as being for six weeks work, at 45 hours per week, paid at $25 per hour. The hours per week and pay rate were sourced from the employment agreement. Mr Caldwell, counsel for the plaintiff, acknowledged this methodology was unsophisticated because, for example, the period was not precisely six weeks, but submitted it was reasonable in the circumstances.

[16] Mr Horan, in submissions for Mr Wate, did not accept the company's calculations of the wages due and owing for either period. The differences between the parties are about the hourly rate of pay to use and the number of hours to be paid for.

[17] Mr Horan submitted that the wage debt from May to June was $5,362.50 plus holiday pay of $429. The rate of pay used in this calculation was $25 per hour, taken

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7 Minimum Wage Order 2016, s 4(b)(ii).

from the employment agreement. Mr Horan said that, since a rate of pay was known from that agreement, it should apply to this earlier period as well. The contractual rate of pay was then multiplied by 214.5 hours of work to produce the amount claimed. Those hours were sourced from conversations between Mr Horan and Mr Wate, after the hearing, and involved a reconstruction of the work undertaken by using a calendar and memory.

[18] As to wages for the second time period, Mr Horan said the amount owed was $7,750 plus holiday pay of a further $620. The wage claim was calculated on 310 hours at $25 per hour. He did not explain the origin of the claim for those hours.

[19] I do not accept Mr Horan's calculations for the period from May to June 2016. There was no evidence that the parties turned their attention in any way to the pay rate to apply while Mr Wate worked before the visa was issued. Work was simply undertaken. In that situation, I am not satisfied that it is reasonable to apply the contract rate of pay. I agree with the Authority, that the minimum wage was appropriate to use.

[20] I prefer Talbot Agriculture's calculations of the time to be paid for the May to June period. Its calculation was reasonable given the work recorded in Mr Wate's diary and allowing 200 hours, instead of 208.5, reflects the risk that the diary entries are on occasions rudimentary and potentially uncertain. In contrast, Mr Horan's submissions relied on information and material not placed in evidence at the substantive hearing. I am satisfied the amount owed by Talbot Agriculture to Mr Wate for wages for the period of time from 10 May until the visa was issued is $3,050 plus holiday pay of $244.

[21] I also prefer Talbot Agriculture's calculation of what is owed for wages in the second period of time; that is from mid-June 2016 until employment ended in July 2016. The difference between calculations came down to the allocation of hours worked. The company's approach was transparent in the sense that it sought to identify the number of working weeks in this period of time and took into account the hours of work and rate of pay in the employment agreement. In contrast, there was no

explanation for Mr Wate's claim to have worked 310 hours over this time. The amount payable for this period of time is $6,750 for wages plus $540 for holiday pay.

[22] There is a potentially unresolved issue about taxation and its treatment that was not dealt with in the submissions except briefly and inconclusively. In a letter written by Talbot Agriculture's solicitors to Mr Horan, in October 2016, a statement was made that, from the sum offered to settle wages and holiday pay for the June to July period, a deduction should be made because PAYE had to be deducted at what was called the "no-notification rate". That letter proposed further deductions, dealt with later in this decision, before offering a net sum. Cheques sent by the company's solicitors to settle on the proposed terms were returned. The end result was uncertainty about what had been paid, if anything, to Inland Revenue. It was unclear if tax had already been paid or if the solicitors were proposing a way to address the tax liability in the absence of an IR330 form.

[23] The Authority's determination was that gross sums were ordered to be paid. The sums owed for wages in this judgment are also gross amounts and any issue about taxation will need to be taken up with Inland Revenue;

Deductions

[24] Talbot Agriculture sought deductions from what it owes for the following:

(a) Three cash payments totalling $1,100 paid to Mr Wate by directors of the company on 13 May, 29 June and 19 July 2016.

(b) Reimbursement for the cost of petrol for Mr Wate's travel between Temuka and Christchurch, estimated to be $960.

(c) Rental for the property occupied by Mr Wate in Temuka, formerly the home of the late Mr Talbot senior, the father of the shareholders and directors of the company, valued at $2,800.

(d) Electricity while using the late Mr Talbot home, valued at $600.

[25] None of those claims can be taken into account. To attempt to do so would breach the Wages Protection Act 1983. Even if that had not been the case the claims faced insurmountable difficulties. The cash payments were paid by two directors and there was no evidence that the money belonged to the company. Furthermore, the payments were pleaded as not being wages giving rise to an issue about what they were and why they could be claimed back. Responsibly, Mr Caldwell acknowledged the company had taken varying positions about these payments and the claim could not be vigorously pursued.

[26] There was no evidence of an agreement over petrol reimbursement. There was an embryonic agreement that Mr Wate would pay rent on occupying the late Mr Talbot's home, but it never crystallised into a formal rental agreement and no amount for rent was agreed. On the face of things the company was seeking reimbursement of a rental debt that, if it existed, was not owed to it but to Mr Talbot's estate. When this problem was raised with Mr Caldwell he indicated that he might be in a position to call further evidence about the ownership of the property but, after discussion, elected not to pursue that subject any further.

[27] There is no basis for any deduction from the amounts owed to Mr Wate.

Lost remuneration

[28] Section 123(1)(b) of the Act gives the Court power to order reimbursement to an employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Section 128(2) enables the Court to order the employer to pay to the employee, or former employee, the lesser of a sum equal to the lost remuneration or for three months ordinary time remuneration.[8]

[29] The Authority ordered Talbot Agriculture to pay Mr Wate three months gross pay as reimbursement for lost wages. Talbot Agriculture disputed that remedy. It said Mr Wate did not prove he had suffered any loss and, because this was a full hearing of the whole matter, he was required to do so for the Authority's order to stand.

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[8] Subject to Employment Relations Act 2000, s 124.

[30] Mr Caldwell submitted that there was no evidence from Mr Wate that he had suffered any loss, pointing out that such a conclusion had already been reached by the Court in the substantive judgment:[9]

> The way in which Mr Wate's evidence was presented was as a commentary on each of the briefs of evidence for Talbot Agriculture's witnesses. It was disjointed and lacked a coherent narrative. Mr Wate did not give evidence about his lost remuneration, or the impact on him of being dismissed beyond that it was distressing.

[31] The conclusion I was invited to reach was that there was no basis for an award to Mr Wate of three months ordinary time remuneration.

[32] At the resumed hearing, Mr Horan was asked to identify the evidence supporting making an award of lost remuneration in Mr Wate's favour. He was unable to assist. Instead, his response was twofold. First, he invited the Court to draw an inference that, as a migrant worker, Mr Wate must have been unemployed for a period of time while waiting for an alteration to his visa so he could work somewhere other than Talbot Agriculture. Mr Horan's reliance on the Immigration Act 2009 was not helpful. There was no evidence about what Mr Wate did, or did not do, when he realised his employment was in jeopardy. It is possible he was unemployed after the notice of dismissal took effect. It is possible that he may have begun a search for new employment when the company's dissatisfaction with him first emerged so that he could move on without undue hardship. There was no evidence either way.

[33] The second part of Mr Horan's response was that he was in a position to present more evidence, in the form of further documents, that could support this claim. This response came as a surprise because advance notice that this course of action might be pursued was not given. It was inconsistent with directions for this hearing, which were that it would be on a submissions-only basis. Those directions followed a telephone directions conference in which Mr Horan participated and where he gave no indication that he might seek to call more evidence. This response also clashed with the indication given to Mr Caldwell earlier in the hearing, that he was unlikely to be successful in applying to call further evidence about the ownership of the Temuka property occupied by Mr Wate.

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9 *Talbot Agriculture Ltd v Wate*, above n 2, at [65].

[34] An adjournment was taken so that Mr Horan could consider the position and decide if he wanted to apply for leave to call further evidence. One consequence of a successful application would have been the company being provided with adequate time to consider the proposed evidence and to respond to it. Another consequence would have been the company reconsidering seeking leave to call further evidence about the ownership of the property occupied by Mr Wate. Surprisingly, given the significance of this evidence to Mr Wate's claim, when the hearing resumed Mr Horan declined to apply to call further evidence.

[35] Talbot Agriculture's statement of claim not only made an election to challenge the whole matter, its pleading placed in issue the Authority's awards of compensation. The challenge fairly and squarely put Mr Wate on notice that he needed to prove his case again.[10] Given the absence of evidence about any lost remuneration, extremely reluctantly, I have reached the conclusion that Talbot Agriculture's argument is correct and this remedy cannot be granted.

[36] The next issue was whether any contributory conduct should be taken into account in fixing the amount payable. Mr Wate did not contribute to his dismissal and no deduction from the remedies is warranted.

[37] The final issue was Talbot Agriculture's concern about the costs awarded by the Authority. It was ordered to pay costs of $4,500 to Mr Wate.[11] That determination was not challenged, but Mr Caldwell said it should, nevertheless, be set aside because the substantive judgment had set aside the determination on which the costs were based.

[38] I do not accept that submission. The costs determination cannot be set aside in the absence of a challenge to it. In any event, the Authority's determination was only set aside on a technical basis, that while Mr Wate had been unjustifiably dismissed and was entitled to compensation, the remedies needed to be reconsidered. That is a long

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10 See for example *Abernethy v Dynea New Zealand Ltd (No 1)* [2007] ERNZ 273; *Vice-Chancellor of University of Otago v ASG* [2014] NZEmpC 113, [2014] ERNZ 701; and *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212, (2013) 11 NZELR 240.

11 *Wate v Talbot Agriculture Ltd* [2017] NZERA Christchurch 216.

way short of finding that costs should not have been imposed. The reality is that Mr Wate succeeded in the Authority and was entitled to costs.

Outcome

[39] Talbot Agriculture is ordered to pay Mr Wate the following sums:

(a) Wages for the period of 10 May to 11 June 2016 of $3,050.

(b) Holiday pay on the sum in [39](a) of $244.

(c) Wages for the period of 12 June to 29 July 2016 of $6,750.

(d) Holiday pay on the sum in [39](c) of $540.

(e) The award by the Authority of $10,000 for compensation under s 123(1)(c)(i) of the Act is confirmed (that sum having already been paid to Mr Wate by order of the Court from funds held by the Registrar).

[40] The amounts in paragraph [39] are to be paid by the Registrar to Mr Wate from the funds held on interest bearing account together with accumulated interest. Any balance is to be returned to Talbot Agriculture.

[41] I am satisfied that this case is one where the parties should bear their own costs.

K G Smith
Judge

Judgment signed at 3.55 pm on 11 March 2020