SALARIES AND SEASONS – AN EMPLOYMENT LAW PERSPECTIVE
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Farmers featured in a few more headlines following *Whyte v Feeney* [2013] NZERA Wellington 106, [1] a case involving salaries and seasonal working hours. Breaches of the Minimum Wage Act 1983 (MW Act), inadvertent or otherwise, are keeping lawyers and Labour Inspectors busy. Employers - take notice. Proactively managing your obligations under the MW Wage Act beats blindly hoping for the best and risking an employee complaining to an Inspector and possibly penalties.

Seasons and Salaries

Swings and roundabouts operate in lots of workplaces but farms especially require flexibility and staff who willingly work longer hours when needed. Taking time off at a later point may seem like a sensible solution, but can't help an employer meet its obligations under the MW Act. Knowing your obligations when it comes to seasons and salaries helps prevent being surprised by wage claims and other liabilities.

Whyte v Feeney clarified an employer's obligations under the MW Act in the farming environment. In this case the employee worked on a dairy farm for about two years working variable and seasonal hours. During the dry season (about 12 weeks between May, June and July) he worked between 38 and 40 hours each week. Outside of the dry season he worked during most four week periods, 60 hours a week for three weeks then 40 hours for the fourth week. His employer paid him a salary of between $30,000 and $32,000. Comparable hourly rate? By my calculations the employee's hourly rate ranged between around $9.60 at worst and $16.19 at best.

The employee complained to the Ministry of Business, Innovation and Employment that his employer paid him less then the minimum wage. A Labour Inspector (Inspector) investigated this and also whether the employer had kept appropriate time, wage and leave records and what if any arrears were owed. The employer failed on all counts resulting in a shortfall of over $6,000. The Inspector sent a demand notice requiring payment which the employer objected to.

The Employment Relations Authority (Authority) considered the employer's objection and identified two issues: Whether the employer had paid at least the minimum wage every week (they hadn't), and whether the employer could use any salary payments made during the dry season and that exceeded the minimum wage to meet any shortfall during other weeks (they couldn't). Salaries are special right? Wrong:

> … (P)ayment by way of salary cannot be used as a mechanism to avoid the rates set out in a Minimum Wage Order. An employer is not able to look towards salary provisions in an employment agreement and say it is able to average out salary payments made for weeks requiring less work against weeks where hours of work are of a duration that the payment is below minimum rates (31).

[1] See for example, Press Release "Dairy farm visits show majority of farmers breaching employment laws" from the Ministry of Business, Innovation and Employment on 28 April 2014: http://www.mbie.govt.nz/news-and-media/news-from-around-mbie/dairy-farm-visits-show-majority-of-farmers-breaching-employment-laws

Due to the level of salary paid and the long hours worked (except during the dry season), the employer could not escape paying less than the minimum wage for most of the year. The Authority determined that the Inspector had correctly concluded that the employer had breached the MW Act and remained liable for the shortfall between what they had paid, and the minimum wage rate associated with each and every hour worked.

Average Sleepover?

It is not the first time compliance with the MW Act has confronted the Courts. *Whyte v Feeney* applied the principles from a case that related to an employee, Mr Dickson, who worked for Idea Services Limited (ISL) as a Community Support Worker providing care and support to people with disabilities living in the community: *Idea Services Ltd v Dickson* [2009] ERNZ 372. As well as working with service users during the day, Mr Dickson would stay the night performing what was known as a "*sleepover*." ISL paid Mr Dickson an hourly rate of $17.66 for time spent actively engaged with services users (typically after 6am and before 10pm each day). ISL paid an allowance of $34 for each sleepover (for around 8 hours overnight).

Mr Dickson claimed he ought to be paid at least $12.50 per hour for each and every hour worked during a sleepover (the applicable minimum wage rate at the time). Mr Dickson had previously argued successfully that the MW Act applied to sleepovers because they were work. [2] ISL tried to argue that by averaging out payments made each fortnight, Mr Dickson received at least the minimum wage – allowing it to "*set off the $17.66 per hour Mr Dickson received for his shift work against the $3.50 per hour or so he received for sleepovers*" (5).

The Court concluded that ISL agreed to pay Mr Dickson by the hour and therefore must pay at least $12.50 per hour of the sleepover. ISL could not lawfully use the higher hourly rate paid for hours worked outside sleepovers during a fortnightly pay period to discharge its obligations to pay the minimum wage during sleepovers. The Court acknowledged the outcome would be "… *undoubtedly of broad application and significance*" (103) and was upheld on appeal. [3]

More recently in *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 the plaintiffs, matrons or house mistresses at school hostels (supervisors) claimed they were entitled to be paid at least the minimum wage for sleepovers despite being paid a salary year round and working during school term times only (generally 40 weeks of the year). All were paid in equal weekly instalments and in some cases, an allowance of around $25 for performing a sleepover.

The supervisors successfully argued that the MW Act applied to employees who are paid salaries. The supervisors also successfully claimed that despite only working for around 40 weeks of the year, any payments received during the 12 or so weeks where little or no work was required of them, could not be used to satisfy their employer's minimum wage obligations during weeks they did work.

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[2] *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC)

[3] In *Idea Services Ltd v Dickson* [2011] NZCA 14 the Court of Appeal upheld the Employment Court's decision noting that other cases alleging averaging is a lawful practice would have to be addressed as and when they came before the Court (46). Parliament addressed the issue of sleepovers in the health and disability sector by passing the Sleepover Wages (Settlement) Act 2011

The Court seemed very keen to ensure the MW Act applied to all employees irrespective of their unique payment arrangements:

> It would be outrageous that an employee could be paid less than a MW Act equivalent, simply because his or her remuneration was expressed, at the employer's stipulation, as an annual salary. The Court should strive for an interpretation that would avoid such an egregious and cynical undermining of the philosophy of minimum code legislation (52).

Although the Court seems to have rejected the concept of averaging quite strongly, it has accepted that some situations required a practical averaging approach where the MW Act fails to provide for a sensible solution. For example, the Court allowed ISL to average the $34 allowance over the course of the sleepover but not the pay packet over the entire fortnightly pay period. [4] Similarly the Authority has accepted that a bonus could be averaged over the six month period to which it related. [5] We would recommend exercising caution before averaging accommodation allowances and other payments in light of the sacred status the Court clearly ascribes to the MW Act.

Minimum Wage Act and Order

The MW Act actually says very little about cash. It enables the Governor-General to set minimum rates of pay for all employees aged 16 and over. [6] The Minister of Labour reviews rates annually and must make recommendations as to any changes. We generally see the rates increase on 1 April each year.

The Act does not state the rates – Minimum Wage Orders do. The Minimum Wage Order 2014 came into force on 1 April 2014 and its most recent amendment (Minimum Wage Amendment Order 2014) on 26 June 2014 (Order). The Order applies minimum rates to:

- Adults (employees aged 16 or over):
- Employees "*starting out*" - someone between the ages of 16 and 19 who is not involved in supervising or training others and meets at least one of the following criteria:
    - Is 16 or 17 and has not worked continuously for their current employer for 6 months:
    - Is 18 or 19 and has:
        - Received a specified social security benefit (such as jobseeker support) for at least 6 months:
        - Not worked continuously for any employer for 6 months after receiving a benefit:
    - Is between 16 and 19 years of age and has been employed on the condition that they complete training or study to become qualified for the job they are doing (at least 40 credits per year of an industry training programme that leads to a qualification registered on the New Zealand Qualifications Authority Framework):
- "*Trainees*" - Employees who are at least 20 years old, not supervising or training others and employed on the condition that they complete training or study to become qualified for the job they are doing (but requires at least 60 credits per year).

The Order expresses rates in a few different ways but we ultimately end up with the same result: the "*minimum rates of wages payable*" to a worker are described in an hourly, daily or fortnightly basis. For example, an adult worker paid by the hour or by

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[4] 69-70, *Idea Services Ltd v Dickson* [2009] ERNZ 372

[5] 48, *Labour Inspector v Clutha Licensing Trust* Employment Relations Authority, Christchurch, Member Doyle, 0/11/2010, CA217/10, File No 5274800

[6] Employees under the age of 16 are not entitled to the minimum wage

piecework, is entitled to be paid $14.25 per hour; an adult worker paid by the day, $114 per day and $14.25 per hour for each hour worked in excess of 8 hours per day; a worker paid by the week, $570 per week and $14.25 per hour for each hour exceeding 40 worked per week; and in all other cases, at least $1,140 per fortnight and $14.25 per hour for each hour exceeding 80 worked per fortnight (previously the Order only referred to a maximum timeframe of a week). Starting out workers and trainees are entitled to 80% of the applicable rate.

The section in the MW Act that gets the most air time is section 6:

> **6 Payment of minimum wages**
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> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

Other important sections in the MW Act include:

- Section 7 that sets a default percentage for any deductions made to the minimum wage for any board or lodgings supplied to the employee by the employer (15% and 5% respectively). [7] Parties presumably may agree to more although we would suggest caution before doing so.
- Section 8A that requires employers to keep wage and time records that set out the employee's name, age (if under 20), contact and employment details, hours and days of work, wages paid and method of calculation. A Labour Inspector can request records covering the preceding 6 years. Wages and time records cover off similar obligations under section 130 of the Employment Relations Act 2000 (ERA).
- Section 10 that sees employers liable to a penalty for failing to pay the minimum wage. Any penalty would be recoverable by a Labour Inspector and imposed by the Authority under the ERA. An employer is liable to a penalty imposed by the Authority of up to $20,000 per breach ($10,000 in respect of individuals).
- Section 11 that enables an employee to recover wages or other money owed to them under the MW Act despite having accepted or agreed to work for less.

The ERA expressly gives employees or their representative a right to request and obtain immediate access to or a copy of records relating to them for the preceding 6 years. An employee may bring a claim for wages or other money they are entitled to under their employment agreement and not just the MW Act. [8] Significantly for cases involving disputes over when an employee worked (and perhaps a human tendency to recall differently depending on your interests), if an employer fails to keep or produce records (and that prejudices an employee's ability to bring an accurate claim for wages), an employee's claims will be accepted as proven unless an employer can prove otherwise. [9]

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[7] See *Johns v Rasseluberg* Employment Relations Authority, Auckland AA57/01 25 May 2001 (Member R A Monaghan) where a restaurant worker claimed payment for 5 weeks work that her employer said was accounted for by providing accommodation and meals. The Authority determined that due to no agreement being entered into regarding deductions for the accommodation and meals provided ("board" as opposed to solely "lodgings" that did not include meals), the maximum that could be deducted for same under the Minimum Wage Act 1983 was 15%

[8] Section 131 ERA

[9] Section 132 ERA

When the Inspector Calls

The ERA empowers an Inspector to investigate an employer's compliance with employment legislation including the MW Act and Holidays Act 2003. An Inspector can enter a workplace, conduct interviews and view and copy any time, wage and leave records and employment agreements. [10] Although no person can be required to answer questions that tend to incriminate, an employer risks penalties for failing to cooperate with an Inspector without reasonable cause.

Among other powers, an Inspector can issue a demand notice that requires an employer to pay money to an employee if a breach has occurred. [11] An employer must have a chance to comment on a complaint before the notice is issued but after being issued, as in *Whyte v Feeney*, an employer can only object by filing in the Authority within 28 days of being served. The Authority determines whether the whole or part of the wages or other money is due to the employee and the amount. [12] Any determination becomes a judgment debt that can be enforced like any order or judgment made by the Authority by filing it in the District Court. [13]

An Inspector can also obtain an employee's written agreement to do something by a deadline – called an enforceable undertaking. [14] An Inspector who finds a breach might seek an undertaking that the employer rectify the breach or pay money owed to an employee. An undertaking may only be withdrawn or varied with Inspector's consent. An Inspector can enforce it in by Authority by obtaining a compliance order. Failing to honour an undertaking can result in penalties.

Alternative, an Inspector may issue an improvement notice if they believe on reasonable grounds that an employer is breaching obligations. The notice states that basis and details of the obligation believed to have been breached, and the steps an employer must take in order to comply with its obligations and a deadline for doing so. Once issued, a notice may be enforced in the Authority and a compliance order issued. Similar to a demand notice, and employer may object to the Authority within 28 days of being served. Failing to comply can cause the Authority to impose penalties.

Consistent with their function of supporting employers by informing, educating and assisting with implementing compliant systems and practices, it is heartening to hear it reported that Inspectors have tended to seek enforceable undertakings or issue improvement notices upon finding breaches, rather than demand notices. [15]

[10] Section 229 ERA
[11] Section 224 ERA
[12] Section 226(1) ERA
[13] Section 141 and 226 ERA
[14] Sections 223B to 223C
[15] See for example John Anthony's report "Dairy farmer flouting employment laws" that 31 farms found in breach resulted in 22 enforceable undertakings and one improvement notice being issued: http://www.stuff.co.nz/taranaki-daily-news/news/9987667/Dairy-farmers-flouting-employment-laws

Getting it Right

Undoubtedly famers and their staff work harder than anyone. The challenges facing rural and often isolated workplaces when recruiting staff can make working longer hours seem like the only solution, especially when you get busy. Before you do, work out who you need, when and how much you can pay. Calculate what the minimum wage rates will be for every hour, day, week and fortnight and cater for this in the employment agreement.

Don't overstate or underestimate how many hours your employee will work. Make it a requirement that they complete and submit accurate timesheets that you check and keep copies of. Hours can and must vary to suit the needs of the farming environment but keep tabs on it. Not just for the purposes of the MW Act but also because you should consider whether working so many hours is consistent with your health and safety obligations.

If you pay a salary but it doesn't cover the equivalent hourly rate for the hours worked in any given fortnight, then top up the payment – don't wait for the employee to complain about it. You may be able to account for any allowances and bonuses but don't rely on these payments to discharge your obligations under the MW Act. And finally, keep accurate, reliable and easily accessible time, wage and leave records. If an Inspector calls, you'll be ready.