

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 129
5428134

BETWEEN

NICHOLAS HAY
Applicant

AND

B & A LIMITED TRADING
AS 'GATHER BAR AND
CAFÉ'
Respondent

Member of Authority: P R Stapp

Representatives: Nicholas Hay in person
No appearance for the Respondent

Investigation Meeting: 16 October 2013 at Wellington

Determination: 17 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hay is seeking the payment of wages not paid by B & A Limited trading as Gather Bar and Café in Wellington ("B & A"). Mr Balu Amargalinggam is a director of B & A. B & A is still registered. Although Mr Amargalinggam indicated that a statement in reply to the employment relationship problem would be filed, none had been received before a telephone conference at Wellington on 14 October 2013. He did not attend the Authority's investigation meeting and did not file documents he was requested to bring. The arrangements for the investigation meeting were made to accommodate Mr Amargalinggam's work commitments. More on this later.

[2] Mr Hay is seeking a total \$4,145.81 unpaid wages for various hours of work at \$13.50 per hour. The records show that his pay was \$13.50 per hour for variable hours each week. His claim is made up of a claim for \$3,780.54 in the hand and where tax apparently has been paid to IRD. Next he has claimed a missing week of

pay of \$437.40 (\$365.27 after tax and deductions) for 30 hours work. B & A has breached the requirement under the Employment Relations Act 2000 to provide an employment agreement for Mr Hay. Mr Hay's ASB bank statements, IRD Summaries of earnings and 5 payslips assist to confirm the rate of pay and hours of work. Mr Hay has relied upon a reconciliation of these sources to claim that has not been paid his full entitlements for his work and the hours he submitted to A & B during his employment. He has been underpaid during his employment and not paid for one week ending 18 November 2012.

[3] Prior to the investigation meeting there has been no formal reply and response from B & A and Mr Amargalinggam on Mr Hay's claims. The company is no longer trading as the Gather Bar and Café. It is apparently insolvent and there is no money to pay creditors. It is not yet in liquidation as it is still registered. Mr Amargalinggam was requested to provide details of the financial situation of the company, but did not do so prior to the telephone conference. It would have been reasonable for him to involve his accountant, but for whatever reason chose not to do so. Prior to the Authority's investigation meeting an unsolicited email from a lawyer provided some information about B & A's affairs, and I accept it is no longer trading and has financial difficulties and issues. B & A up until the conference call has failed to assist the Authority in investigating the matter, and failed to assist Mr Hay to resolve the employment relationship problem. B & A has failed to respond to reasonable requests for information and to abide by reasonable timeframes.

[4] I have considered mediation as I must do under s 159 of the Employment Relations Act. There has been no mediation provided. Mr Hay properly and reasonably attempted to arrange mediation with the Ministry of Business, Innovation and Employment (MBIE) himself, but without any success because B & A would not attend. Mediation will not be constructive, I hold, because there has been no statement in reply from B & A in the required time, B & A's failure to provide information as requested, and its failure to respond to Mr Hay's attempts to arrange mediation with the assistance of MBIE. I also hold that B & A's conduct potentially puts Mr Hay at the risk of more time and delay to have his employment relationship problem resolved. This is contrary to the objectives of the Act. S 159A of the Act for treating matters that have not been to mediation without priority does not apply because the respondent is avoiding mediation and has failed to assist and the application is ready for a hearing. The applicant is shortly to leave New Zealand.

Therefore I have been prepared to treat the matter with urgency. B & A did not seek leave to reply and respond to the claim. This would not have been unreasonably withheld if Mr Amargalinggam attended the investigation meeting and wanted to be heard. Beforehand he was requested to provide time sheets and any wage time and holiday records for Mr Hay, but has not supplied them.

[5] B & A failed to appear at the Authority's investigation meeting. It was on notice of the meeting and I am satisfied Mr Amargalinggam knew about the meeting. Although he advised the office that he was likely to be late, after a reasonable time, he had failed to appear. As there has been no good cause for the respondent's failure to attend I decided to act fully in the matter as if B & A Limited had attended or been represented (see clause 12 Schedule 2 of the Employment Relations Act).

[6] Mr Amargalinggam accepted that Mr Hay is owed the week's wages claimed in the sum of \$437.40 gross (\$365.27 net), but denies that Mr Hay is owed the unpaid wages claim of \$3,780.54 (by telephone conference dated 14 October 2013).

Issues

[7] Is this a matter to enter judgment for an order for payment of outstanding wages, and if so how much?

The facts

[8] Mr Hay was employed by B & A Limited at its Gather Bar and Café on the Terrace in Wellington. He was employed from sometime in August 2012 until late April 2013. He had no written employment agreement. He received 5 (five) payslips during his employment and he says that he submitted weekly details of his time working on excel timesheets. He was paid variable amounts of wages and should have been paid fortnightly, but was paid irregularly. B & A's accountants were responsible for the payments and remittances to IRD. The payslips show aggregate earnings that suggest there were more than 5 payslips. Mr Hay says he has no knowledge of the details and the whereabouts of any other payslips, which he says he has not received. Mr Hay has calculated from the information he has produced that he should have been paid \$11,457.23 based on his hourly rate and the hours he submitted to his employer at the time that he had worked per week. There is clearly a difference

according to Mr Hay's records and spread sheet and what he was paid and the amounts he should have been paid. He actually received only \$7,676.69 after tax and deductions for student loan. His claim is that he is owed \$3,780.54 in the hand not paid by B & A. In addition, he claims that he was not paid \$437.40 gross for one week's work (\$365.27 in the hand (net of tax)). The week has been missed from the records, but in any event Mr Amargalingam accepts that money is owed to Mr Hay (telephone conference held on 14 October 2013). I accept Mr Hay's claim.

[9] Since B & A is still registered an order for the recovery of wages is permissible. As B & A is no longer trading, and has financial issues Mr Hay may have difficulties enforcing the judgment, but at least Mr Hay has an order as a creditor for the sums owing in any enforcement matter.

Determination

[10] Mr Hay is entitled to \$4,145.81 based on the information that he has included in his claim without any reply and response from B & A Limited. I accept Mr Hay's claim is accurate based on the reconciliation he has done with the records available and the time he says he worked. Even if the company has no money that is not a reason not to make an order on wages owing and this becomes a liability on the company until the payment can be made in the future.

Orders of the Authority

[11] B & A Limited is to pay Nicholas Hay:

- i. \$365.27 in the hand (net of tax and deductions) for a week's wages.
- ii. \$3,780.54 (net of tax and deductions) unpaid wages.

[12] B & A Limited is to pay Mr Hay the filing fee of \$71.56

P R Stapp
Member of the Employment Relations Authority