

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 58  
5529926

BETWEEN MLETE ASFAW  
Applicant

AND ETHIOPIA RESTAURANT AND  
BAR LIMITED trading as THE  
MEETING TREE ETHIOPIAN  
RESTAURANT AND  
TAKEAWAY  
Respondent

Member of Authority: Michele Ryan

Representatives: The Applicant in person  
No appearance from or on behalf of the Respondent

Investigation Meeting: 5 June 2015 at Wellington

Determination: 15 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Mlete Asfaw lodged a statement of problem with the Authority on 17 November 2014. She says she began working part time as a waitress for the respondent, Ethiopia Restaurant and Bar Limited t/a The Meeting Tree Ethiopian Restaurant and Takeaway (“Ethiopia Restaurant and Bar Limited” or “the restaurant”) on 2 January 2014. She was 16 years old at the time. She finished working at the restaurant on 16 May 2014, by which time she was 17 years old. She was never given a written employment agreement but says she is owed wages.

[2] A statement in reply was filed by Ethiopia Restaurant and Bar Limited’s sole director, Mr Dagaga Gammachu, on 8 December 2014.

[3] The parties were directed to mediation but did not resolve their differences.

[4] On 25 March 2015 the Authority sought to conduct a case management conference call with the parties. Mr Gammachu was not present for the call and a Notice of Investigation Meeting was sent to each of the parties the same day. Both parties were advised that an investigation meeting was set down for 10am Friday 5 June 2015. The restaurant was additionally directed to provide relevant wage and time records.

[5] Ms Asfaw provided a written statement to the Authority on 15 April 2015.

[6] By email on 30 April 2015 Mr Gammachu provided information in response to Ms Asfaw's claim. In a later email dated 6 May 2015 he advised "*Definitely I can attend the meeting*".

[7] Neither Mr Gammachu nor anyone else on behalf of the restaurant attended the Authority's investigation meeting on 5 June 2015. The Authority called Mr Gammachu's contact number at 10.20am but the call went unanswered. On a second call at 10.55am the answerer did not identify herself but denied Mr Gammachu's availability. No good cause has been shown as to why there was no appearance by or on behalf of the restaurant. Pursuant to clause 12 of Schedule 2 of the Act, I proceeded with the investigation as if the restaurant had duly attended or been represented.

### **Summary of relevant facts and events**

[8] Although the information Mr Gammachu sent to the Authority was not affirmed, I have pieced together from those documents, Ms Asfaw's evidence, and information from the Companies Register, that Ethiopia Restaurant and Bar Limited was established by a small number of Ethiopian immigrants as a joint business venture and incorporated on 9 December 2013. Mr Gammachu was recorded as the sole director, and along with two other individuals, a shareholder. Ms Asfaw's mother and another individual became additional shareholders on 20 December 2013.

[9] Mr Gammachu's written statement of 5 May 2015 states there was an agreement amongst the five shareholders that each would volunteer an additional family member to assist in the development of the restaurant. He says in this way Ms Asfaw was not an employee of the restaurant, rather, that she was elected by her mother to help out.

[10] Ms Asfaw does not accept Mr Gammachu's account. She says Mr Gammachu approached her sometime before 2 January 2014 and offered her a waitress position at the rate of \$10.00 (cash) per hour. She says she was told that when the restaurant started to generate an income she would be paid. Ms Asfaw accepted the offer. She consistently worked Thursday and Friday evenings from 5pm to 11pm and undertook occasional shifts when other staff were not available. Although she was unsure of the exact date, Ms Asfaw says in late March 2014 she was paid \$480 in cash but that this sum did not cover all the hours she had worked.

[11] By early April 2014 disagreements emerged between differing shareholders. Mr Gammachu says he says he was removed as a director on 2 April 2014 and that Ms Asfaw's mother and another shareholder took up that position until they left the restaurant in June 2014 pursuant to an agreed settlement arrangement.

### **Determination**

[12] The inferences I understand Mr Gammachu wishes the Authority to take from his information are firstly that he had no control over whether and/or when Ms Asfaw worked between April 2014 and mid-June, and therefore cannot be liable for wages. Secondly, that the settlement arrangement with Ms Asfaw's mother impliedly included Ms Asfaw.

[13] I note however that the Companies Register records Mr Gammachu as the sole director of Ethiopia Restaurant and Bar Limited, without interruption, from the date of incorporation up to and including the date of the Authority's investigation meeting.

[14] Next, without evidence which expressly records Ms Asfaw as a party to the arrangement referred to above, Mr Gammachu is not able to successfully argue that Ms Asfaw's claims are, by association, settled. No evidence of that kind was furnished and I accept Ms Asfaw's evidence that she was not involved in her mother's arrangements.

### ***Was Ms Asfaw an employee***

[15] I do not accept that Ms Asfaw's relationship with the restaurant can be fairly characterised as that of a volunteer on grounds that her mother had a shareholding in Ethiopia Restaurant and Bar Limited. Ms Asfaw provided coherent evidence that she was offered wages in exchange for work. She agrees that she worked alongside her

mother but says she did not work in substitution of her mother as was the practice of some of the other shareholders and their respective family members.

[16] Mr Gammachu's written statement, in part, acknowledges that in March 2015 the shareholders agreed that those involved in the restaurant including family members would be paid and that on this basis he began making plans to introduce employment agreements for those individuals who worked at the restaurant. I view this evidence as a concession that Ms Asfaw was regarded as an employee and there appears to be no dispute that she was paid backdated wages in March.

[17] On the information provided I find it more likely than not that Ms Asfaw was employed by the restaurant.

***Who is liable for the payment of wages***

[18] Ethiopia Restaurant and Bar Limited has its own status and corresponding commitments which are separate to the responsibilities of its directors and/or shareholders. Any dispute about who held the position of managing director at material times relevant to Ms Asfaw's claims does not alter the fact that Ethiopia Restaurant and Bar Limited is a distinct legal entity, and that it has legal obligations including for example, payment of wages if it has employees. Ethiopia Restaurant and Bar Limited is liable for Ms Asfaw's wages.

***What wages are owed***

[19] Section 132 of the Employment Relations Act states that where any claim is brought before the Authority for the recovery of wages (or other money payable to the employee), in the absence of clear records, the Authority may, unless the employer proves the claims are incorrect, accept the claims as proved.

[20] Wage and time records were not produced by the restaurant. Nor did it supply information to prove that Ms Asfaw's claims are incorrect.

[21] Ms Asfaw's evidence is that she worked from 2 January until 16 May 2014 on Thursday and Friday evenings for six hours each shift. Ms Asfaw provided copies of timesheets dated from 6 March 2014 onwards. Based on the records provided and her testimony I accept her claim and I find she worked 258.25 hours in total. Although there was an agreement between the parties that Ms Asfaw would be paid \$10.00 per

hour, when her employment began she was a ‘starting-out worker’ as defined by clause 3 of the Minimum Wage Order (No: 2) 2013, and entitled to be paid \$11.00 per hour (the minimum rate of pay for that category of employee at that time). On 1 April 2014 the hourly rate for a starting-out worker increased to \$11.40.<sup>1</sup>

[22] I have applied the relevant Minimum Wage Order rates when quantifying Ms Asfaw’s claims.

- (a) Ms Asfaw worked 150 hours at the rate of \$11.00 per hour<sup>2</sup> and 108.25 hours at the rate of \$11.40 per hour<sup>3</sup>.
- (b) Ms Asfaw was paid \$480. She is entitled to the difference between the sum she was paid and the sum equal to the hours of work she performed. I calculate this sum to be \$2,404.05 (gross).
- (c) Ms Asfaw is also entitled to be paid holiday pay associated with her employment.<sup>4</sup> That sum is \$230.95 (8% of her total earning).

### **Orders**

[23] Ethiopia Restaurant and Bar Limited is to pay Ms Asfaw the sum of \$2,635 (gross) which comprises outstanding wages owed and holiday pay entitlement.

### **Costs**

[24] Costs are not at issue. Ms Asfaw was entirely self-represented and in these circumstances it is unnecessary to make an order for costs.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>1</sup> Pursuant to Minimum Wage Order 2014

<sup>2</sup> \$1,650 (gross)

<sup>3</sup> \$1,234.05 (gross)

<sup>4</sup> Pursuant to s.23(2) of the Holidays Act 2003