

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 130
5593142

BETWEEN LILLIAN KANE AND
THIRTEEN OTHERS
Applicant

AND EKETAHUNA INN FAMILY
RESTAURANT LIMITED
First Respondent

AND LAURA ALDWORTH
Second Respondent

Member of Authority: M B Loftus

Representatives: Jills Angus Burney, Counsel for Applicants
Nil for Respondent

Investigation Meeting: 19 October 2016 at Masterton

Submissions Received: At the investigation meeting

Determination: 19 October 2016

**ORAL DETERMINATION OF
THE EMPLOYMENTS RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicants each seek to recover unpaid wages, holiday pay and reimbursing allowances. Each applicant also seeks interest on the above amounts.

[2] The respondents' positions are unknown as neither has participated in the Authority's process.

Non-appearance of parties and identity of employer

[3] Neither respondent was present or represented at the investigation meeting. That raised the question of whether or not I proceed in their absence especially as I have reason to believe neither is aware of the scheduling of this investigation. I say this on the basis of the applicants' evidence and my resulting conclusion Ms Aldworth, the first respondent's sole director and shareholder, is trying her best to be uncontactable.

[4] With respect to the first respondent, Eketahuna Inn Family Restaurant Limited (EIFRL), I note companies are required to have an address for service.¹ In this instance the notified address is 42 Main Street, Eketahuna 4900. That address is also EIFRL's registered office. It is clear from the evidence of some of the applicants who still work at the address the Authority's documents have been served there.

[5] Given the provisions of the Employment Relations Authority Regulations 2000 I conclude EIFRL has therefore been properly served.² The fact the documents cannot be forwarded to EIFRL's principles does not, in my view, detract from that. It is a company's duty to ensure its address for service is operable and it cannot avoid its responsibilities by failing in its duties.

[6] Turning to Ms Aldworth. She was earlier tracked to a Palmerston North address where the Statement of Problem was personally served. Since then she has left that address. Her whereabouts are currently unknown and it is clear the notice of investigation meeting has not been served on her. I would therefore be forced to conclude the claim against her cannot proceed at present but that is no longer an issue. The applicants discussed the issue and decided to proceed against the company alone. That is a decision with which I concur as the evidence would inevitably lead me to conclude EIFRL was the employer.

[7] While claim against Ms Aldworth is now discontinued the evidence suggests it worth advising her of the existence of ss 142W and 142Y of the Employment Relations Act 2000 and the fact there is, I suspect, a chance she may yet be asked to personally cover the awards I am about to be make.

¹ Section 192(1) of the Companies Act 1983

² Regulation 16(3)(iii) of the Employment Relations Authority Regulations 2000

[8] The whereabouts of two of the applicants, Zoe Oliver and Ben Matthews, are also unknown. Neither was present at the investigation and neither tendered evidence in support of their claims. It follows that their claims are dismissed.³

Determination

[9] EIFRL operated a restaurant and accommodation business in Eketahuna. It employed each of the applicants over varying periods between 17 August 2015 and the businesses closure on 25 October 2015.

[10] Initially there were no employment agreements but this was later rectified for some of the applicants. All but one of the applicants was to be paid \$17 an hour. The exception, Hayley McKenna, was on \$18 an hour.

[11] Unfortunately there were problems with payment from the start though the applicants kept working on the basis they knew and trusted Ms Aldworth. She both promised payment and gave an indication of goodwill by forwarding various sums to each applicant on an ad-hoc basis.

[12] There were no wages and time records though the problems with payment meant the applicants developed a habit of keeping their own records. It is these they have used as the basis of their respective claims.

[13] The applicants were also asked to assist the business by paying for services or products on EIFRL's behalf, again with the promise of repayment. It is these repayments to which the reimbursement claims pertain.

[14] I have now had an opportunity to question the applicants. Having done so I conclude each to be credible and their claims valid. That means, for two reasons, I conclude each is owed the amount claimed and will order payment accordingly.

[15] The first reason is having questioned the applicants EIFRL's absence allows me to issue a determination in their favour without obtaining information from the respondent.⁴

[16] The second is s 132 of the Employment Relations Act 2000. Section 132(2) essentially provides where there is evidence, as there is here, that the employer failed

³ Regulation 21(2) and note 1 to Form 8 of the Employment Relations Authority Regulations 2000

⁴ Regulation 21(2) and note 2 to Form 8 of the Employment Relations Authority Regulations 2000

to maintain a wages and time record as required by s 130 I may accept the claim as valid unless the respondent can prove otherwise. EIFRL's absence means there is no such evidence.

[17] The applicants also seek interest on the amount each is owed. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt EIFRL has, by failing to make payments properly due, continued to have use of money rightfully belonging to the applicants. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument. The current rate is 5%⁵ but there is some difficulty calculating the amount given payments were of varying amounts due at various times. For simplicity and given the applicants agreement I have chosen to use the final day, 25 October 2015, as that upon which the monies should have been paid and interest accrued from.

[18] The applicants also seek a contribution toward their costs in the amount of \$3,180. Normally the Authority will use a daily tariff approach when addressing a costs claim.⁶ The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[19] While the investigation was relatively quick – some two hours - that was only because the respondent did not attend. Had it done so a day could well have been required and the investigation had to be prepared for accordingly. To that I add the fact considerable cost has been incurred as a result of the respondent's lack of cooperation and a conclusion the total sought is reasonable. Given the circumstances I consider this a situation where costs should be awarded in full.

Conclusion and costs

[20] The claims of two of the applicants, Zoe Oliver and Ben Matthews, are dismissed, as are all claims against the second respondent, Laura Aldworth.

[21] The remaining claims against the first respondent, EIFRL, will, for the above reasons, succeed and the applicants are each owed the amount claimed.

[22] Eketahuna Inn Family Restaurant Limited is therefore ordered to pay the following amounts:

⁵ Judicature (Prescribed Rate of Interest) Order 2011 (2011/177)

⁶ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

- (a) \$3,237.35 (three thousand, two hundred and thirty seven dollars and thirty five cents) gross to the first applicant, Lillian Isobel Kane. This includes unpaid wages (\$2,516.00 gross), reimbursement of expenses (\$570.00) and interest (\$151.35); and
- (b) \$1,836.39 (one thousand, eight hundred and thirty six dollars and thirty nine cents) gross to the second applicant, Casey Cox. This includes unpaid wages (\$1,750.54 gross) and interest (\$85.85); and
- (c) \$2,617.10 (two thousand, six hundred and seventeen dollars and ten cents) gross to the third applicant, Lisa Marie Henare. This includes unpaid wages (\$2,494.75 gross) and interest (\$122.35); and
- (d) \$2,621.56 (two thousand, six hundred and twenty one dollars and fifty six cents) gross to the fourth applicant, Ann Cecilia Oswald. This includes unpaid wages (\$2,499.00 gross) and interest (\$122.56); and
- (e) \$6,463.61 (six thousand, four hundred and sixty three dollars and sixty one cents) gross to the fifth applicant, Hayley Jane McKenna. This includes unpaid wages (\$5,896.25 gross), reimbursement of expenses (\$265.18) and interest (\$302.18); and
- (f) \$3,848.42 (three thousand, eight hundred and forty eight dollars and forty two) gross to the sixth applicant, Shannon McKenna. This includes unpaid wages (\$3,525.71 gross), reimbursement of expenses (\$142.79) and interest (\$179.92); and
- (g) \$2,951.48 (two thousand, nine hundred and fifty one dollars and forty eight cents) gross to the seventh applicant, Jessy Millar. This includes unpaid wages (\$2,813.50 gross) and interest (\$137.98); and
- (h) \$1,014.95 (one thousand and fourteen dollars and ninety five cents) gross to the eighth applicant, Jaunita Snowdon. This includes unpaid wages (\$967.50 gross) and interest (\$47.45); and
- (i) \$2,284.29 (two thousand, two hundred and eight four dollars and twenty nine cents) gross to the ninth applicant, Levi Kelly. This includes unpaid wages (\$2,177.50 gross) and interest (\$166.29); and

- (j) \$823.50 (eight hundred and twenty three dollars and fifty cents) gross to the tenth applicant, Justus Kelly. This includes unpaid wages (\$785.00 gross) and interest (\$38.50); and
- (k) \$356.68 (three hundred and fifty six dollars and sixty eight cents) gross to the eleventh applicant, Shelton Ihaka. This includes unpaid wages (\$340.00 gross) and interest (\$16.68); and
- (l) \$936.27 (nine hundred and thirty six dollars and twenty seven cents) gross to the twelfth applicant, Savannah Antoinette Clifton. This includes unpaid wages (\$892.50 gross) and interest (\$43.77); and
- (m) A further \$3,180.00 (three thousand, one hundred and eight dollars) to Jills Angus Burney as a contribution toward the applicant's costs.

[23] EIFRL should note only the wage component is taxable. Only it should have PAYE deducted and forwarded to the Inland Revenue Department prior to payment.

[24] The above payments are to be made, in full, no later than 4.00pm on Wednesday 2 November 2016.

M B Loftus
Member of the Employment Relations Authority