

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 170
5516209

BETWEEN JOSUE DOMINGO
Applicant

AND MENG SUON and NGAN
HENG trading as TOWN &
COUNTRY FOODS
Respondent

Member of Authority: Andrew Dallas

Representatives: Nathan Santesso, Advocate for the Applicant
Michael Meyrick, Counsel for the Respondent

Investigation Meeting: 24 February 2016 at Hamilton

Determination: 31 May 2016

DETERMINATION OF THE AUTHORITY

- A. Meng Suon and Ngan Heng trading as Town and Country Foods (Town and Country) failed to pay Mr Domingo wages, holiday pay and public holiday pay.**
- B. Town and Country must pay Mr Domingo within 28 days of the date of this determination the following sums:**
- (i) \$2,464.00 gross in unpaid wages;**
 - (ii) \$2,560.40 gross in unpaid holiday pay;**
 - (iii) \$1,920.00 gross unpaid public holiday pay;**
 - (iv) \$1,000.00 as penalties for breaching his employment agreement; and**
 - (v) \$71.56 being the Authority's filing fee.**
- C. There is no order for costs.**

Employment Relationship Problem

[1] Josue Domingo was employed by Meng Suon and Ngan Heng trading as Town and Country Foods (Town and Country) as a baker between February 2013 and February 2014. Town and Country is a bakery and café in Te Kuiti.

[2] Mr Domingo was recruited from the Philippines and was provided with an individual employment agreement by an immigration agent. His agreement stated he was required to work 40 hours per week. However, Mr Domingo claimed he actually worked 76 hours per week. His hourly rate was \$15.00 per hour under this employment agreement. However, wage and time records ultimately provided by Town and Country suggested Mr Domingo was paid \$16.00 per hour.

[3] Town and Country provided Mr Domingo with accommodation and food.

[4] Mr Domingo claimed he was not paid holiday pay or public holiday pay. He sought payment of both. Mr Domingo also claimed not to have been able to take breaks during his employment with Town and Country. He sought compensation for this.

[5] Mr Domingo sought a penalty for breach of his employment agreement and interest on outstanding entitlements.

The Authority's investigation

[6] During the investigation meeting I heard evidence from Mr Domingo, Mr Little and Ms Heng. Mr Suon provided a witness statement but did not attend the investigation meeting. Consequently, his witness statement was set aside. Evidence was heard from Ms Heng with the assistance of an interpreter.

[7] Several documents were provided to the Authority including Mr Domingo's employment agreement and some of his bank statements. Mr Domingo's wage and time records were also provided together with calculations of outstanding entitlements claimed to be owed.

[8] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I do not refer in this determination to all the evidence received during my investigation of Mr Domingo's employment relationship problem.

[9] While I have not explicitly referred to all the submissions of counsel in this determination, I have fully considered them.

Issues

[10] The following are the issues for determination.

- (i) Is Mr Domingo owed wages by Town and Country?;
- (ii) Is Mr Domingo owed holiday pay by Town and Country?;
- (iii) Is Mr Domingo owed public holiday pay by Town and Country?;
- (iv) Should Mr Domingo be compensated for untaken rest breaks?;
- (v) Should penalties be imposed on Town and Country for breach of Mr Domingo's employment agreement?;
- (vi) What quantum of penalties, if any, should be imposed on Town and Country?;
- (vii) Should the Authority exercise its discretion to award all or part of any penalties to Mr Domingo?;
- (viii) Should Mr Domingo be awarded interest on unpaid entitlements?; and
- (ix) Should either party contribute to the costs of representation to the other?

Claim for unpaid wages

[11] On 23 July 2014, Mr Domingo, through a representative, requested his wage and time records from Town and Country. These were not forthcoming. The records were eventually produced following a direction of the Authority to do so in November 2015.

[12] The records were prepared and maintained by a third party accounting service. Upon review they did not comply with all the requirements of s 130 of the Act.

[13] According to the records, Mr Domingo worked 160 hours per month and was paid \$16.00 per hour. This equated to him receiving \$531.20 net per week into his bank account. Bank statements supplied by Mr Domingo reflected this.

[14] In contrast to the records, Mr Domingo said he worked 12 hours per day Monday to Saturday. He said he also worked four hours on Sunday. This was strongly denied by Ms Heng. She said he worked 40 hours a week between Monday and Saturday but remained in or about the shop at other times or came and went as he pleased.

[15] Mr Little, who Mr Domingo lived with during the latter period of his employment, gave evidence, in attempted corroboration of the claim, about what he observed as Mr Domingo's daily routine. Unfortunately, Mr Little's evidence was inconsistent and erratic. Consequently, it was of little assistance to the Authority.

[16] Evidence from another employee, Corazon Narvasa who was at Town and Country at the same time as Mr Domingo, and who perhaps worked the same hours, may have been able to assist his claim. Unfortunately, she did not provide a witness statement.

[17] Despite Mr Domingo's claim about the hours he worked whilst employed by Town and Country, there was insufficient evidence before the Authority to make a finding on this. Given the significant gulf between the parties and the fact Mr Domingo had access to wage and time records before he lodged an amended Statement of Problem, witness statements and a subsequent affidavit, it was not appropriate to apply s 130(2) of the Act.

[18] However, during the investigation meeting Ms Heng stated that Mr Domingo did perform extra cleaning duties on a daily basis in the afternoon. She said this was half an hour per day. She appeared to claim this work was undertaken to set off the costs of Mr Domingo's food and board.

[19] Section 7 of the Wages Protection Act 1983 provides that wages must be paid in money. There was no evidence of a service tenancy and Mr Domingo's employment agreement did not deal with these matters. There was also no evidence the parties had reached agreement about the value of the food and board, how this amount would be added to Mr Domingo's gross wages and what appropriate deduction would be made for it.

[20] I find, based on Ms Heng's evidence, that Mr Domingo worked an extra half hour per day undertaking cleaning duties. He should have received remuneration in the form of wages for this. Mr Domingo is owed unpaid wages.

[21] The amount owed as unpaid wages for this extra cleaning work is: \$8.00 multiplied by 6 days equals \$48.00 per week multiplied by 52 weeks equals \$2496.00. This amount is then reduced by \$32.00 for the four days that Mr Domingo did not perform these extra duties.

[22] Town and Country must pay Mr Domingo \$2,464.00 gross as unpaid wages.

Rest breaks

[23] Mr Domingo sought compensation for rest breaks he claimed he was unable to take throughout the course of his employment with Town and Country.

[24] In support of the claim, Advocate for Mr Domingo referred to the determination of the Authority in *Duffy v Kindercare Learning Centres Limited* [2013] NZERA Christchurch 64. However, unlike *Duffy*, Ms Heng strongly resisted Mr Domingo's claim that he was unable to take rest breaks in her oral evidence.

[25] Mr Domingo's claim about rest breaks did not feature in either his witness statement or an affidavit he subsequently lodged with the Authority. Evidence from Ms Narvasa may have assisted Mr Domingo here, but this was not forthcoming.

[26] There is insufficient evidence to make a finding about Mr Domingo's access to rest breaks and, accordingly, I decline to do.

Claim for holiday pay

[27] Mr Domingo claimed never to have been paid holiday pay. Holiday pay was dealt with in clauses 10 and 36 of Mr Domingo's agreement.

[28] The monthly wage and time records provided by Town and Country all state in notation "[t]he Annual Holiday Pay is 4 weeks per full working year or 8% of Total Gross wages earned". However, no calculations are provided and there is no other evidence before the Authority that Mr Domingo ever received holiday pay. According to the bank statement he provided for the period 31 January 2014 to 1 March 2014, covering the final period of this employment Town and Country, he was paid \$531.20 on 7 February 2014. This was the only payment he received from Town and Country in February 2014.

[29] Mr Domingo was paid \$16.00 per hour which was \$1.00 more than the amount specified in his employment agreement. However, there was nothing in Mr Domingo's wage and time records, employment agreement or in other evidence before the Authority that such a payment was, or could be, made in accordance with s 28 of the Holiday Act 2003.

[30] During his employment, Mr Domingo said he took two days off to deal with work visa issues. He said he was required to reimburse Town and Country for taking this time off because on Mr Heng's evidence he had not worked 40 hours in the period that this occurred.

[31] The failure to either allow an employee to take leave or pay holiday pay is a serious breach of minimum employment standards. It is also a breach of Mr Domingo's employment agreement.

[32] Based on the records provided, Mr Domingo's gross weekly wage was \$640.00 giving, based on his employment of exactly 12 months, a gross annual income of \$33,280.00. His relevant daily pay was \$128.00. This amount multiplied by 20 days equals \$2,560.00.

[33] Town and Country must pay Mr Domingo \$2,560.00 as unpaid holiday pay.

Claim for public holiday pay

[34] During his employment, Mr Domingo did not work on Christmas Day and Boxing Day, 2013. He said he worked all other public holidays. Public holiday pay was dealt with in clauses 10, 36, 37 and 38 of Mr Domingo's agreement.

[35] Mr Domingo was not paid public holiday pay for Christmas Day and Boxing Day. On Ms Suon's evidence Mr Domingo was not paid because Town and Country was "closed".

[36] This was a breach Mr Domingo's agreement and also the Holidays Act 2003.

[37] Town and Country failed to produce wage and time records capable of assisting Mr Domingo in the calculation of the claim for unpaid public holiday pay. Given the concession by Ms Heng about non-payment for Christmas Day and Boxing Day, and in the absence of any other evidence to the contrary, I accept Mr Domingo's was not paid public holiday pay for ten public holidays.

[38] As stated above Mr Domingo's relevant daily pay was \$128.00. This amount multiplied by 1.5 (time and a half) equals \$192.00. This amount multiplied by 10 days equals \$1,920.00

[39] Town and Country must pay Mr Domingo \$1,920.00 gross as unpaid public holiday pay.

Penalty

[40] Mr Domingo sought a penalty for breach of his employment agreement arising out of the failure to pay holiday and public holiday pay as specified in his employment agreement.

[41] Under s 135 of the Act, the Authority has the power to impose a penalty for a breach of Mr Domingo's employment agreement. The Authority has discretion to award a penalty, in whole or part, to any person under s 136(2) of the Act. The Court in *Xu v McIntosh*¹ and *Tan v Yang and Zhang*² examined the principles to be applied in imposing a penalty. It is permissible to impose a single global penalty for multiple breaches of an employment agreement.³ The standard of proof for imposing a penalty is on the balance of probabilities.⁴

[42] Counsel for Town and Country submitted that if a penalty was to be imposed it should be at the lower end of the scale. I accept this submission.

[43] Mr Domingo, a modestly paid migrant employee, has been deprived of a significant amount of holiday and public holiday pay for a sustained period. Ms Heng believed she was relying on the professional advice of her accountant. However, against this, she required Mr Domingo to reimburse Town and Country for taking leave. It would seem unlikely her professional advice would have been to undertake such an action.

[44] Applying the principles in *Xu* and *Tan*, I find a global penalty of \$1000.00 for breaches of Mr Domingo's employment agreement is appropriate in all the circumstances.

[45] Town and Country did not oppose the payment of any penalty or penalties to Mr Domingo and I find it is appropriate that this should be paid to him.

[46] Town and Country must pay Mr Domingo \$1,000.00 as a penalty.

Claim for interest

[47] Mr Domingo claimed interest on unpaid entitlements. As the penalty imposed on Town and Country has been ordered payable to Mr Domingo, I decline to also award him interest.

¹[2004] 2 ERNZ 448

²[2014] NZEmpC 65.

³See, *Xu* at [44] and *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 at [92].

⁴*Xu* at [47]–[48] and *Tan* at [33].

Costs

[48] As Mr Domingo was represented on a “pro bono” basis, there is no order for costs. However, Town and Country must reimburse Mr Domingo \$71.56 being the Authority’s filing fee.

A handwritten signature in blue ink, appearing to read 'Andrew Dallas', written over a light blue horizontal line.

Andrew Dallas
Member of the Employment Relations Authority