

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2018] NZERA Auckland 409  
3014873**

BETWEEN                      LUIS REYES  
   Applicant  
  
AND                              AARAM CLEANING LIMITED  
   T/A CAR CARE NEW ZEALAND  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Applicant in person  
   Anrudh Ram, Representing the Respondent  
  
Investigation Meeting:        18 December 2018 at Auckland  
  
Determination:                21 December 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Luis Reyes, claims that he is owed monies by the Respondent, Aaram Cleaning Limited t/a Car Care New Zealand (Aaram) specifically unpaid wages in respect of additional hours worked and not paid, and unpaid sick leave.

[2]     Mr Reyes further claims that he was unjustifiably disadvantaged by Aaram:

- (i)     not supplying ACC with the information it requested concerning his earnings as a consequence of which he did not receive any ACC compensation for his loss of earnings during the period of his injury;
- (ii)    not remitting PAYE to the IRD on his behalf as a consequence of which he did not receive any ACC compensation for his loss of earnings during the period of his injury; and
- (iii)   failing to file the required forms as agreed to Immigration New Zealand (INZ) after Mr Reyes returned to Mexico as a result of which he failed to obtain a work visa.

[3] Aaram denies that it agreed to pay Mr Reyes for working any additional hours and that as his injury was non-work related, it did not consider it needed to pay him.

### **Issues**

[4] The issues for determination are whether or not Mr Reyes:

- is owed unpaid wages by Aaram
- is owed sick pay entitlement by Aaram
- was unjustifiably disadvantaged in his employment by Aaram:
  - not responding to ACC when requested to do so
  - not remitting PAYE on his behalf to IRD
  - failing to file the required forms to INZ

### **Background**

[5] Mr Rekha Ram is the sole director and shareholder of Aaram which is a small business. Aaram had been removed from the Companies Office Register but was restored for the purposes of this action.

[6] Mr Reyes commenced employment with Aaram as a Car Detailer/Groomer on 23 February 2016. At that time he was in receipt of a one year work visa. Mr Reyes work visa expired on 23 February 2017 and he was issued with an interim work visa which was to be valid either until a decision was made on a work visa, or for a maximum period of six months from 23 February 2017.

[7] Mr Reyes was provided with an individual employment agreement by Aaram which both parties signed on 24 January 2016 (the Employment Agreement).

[8] The Employment Agreement set out at clause 3.1 that it was a fixed term employment agreement commencing upon issue of a work visa and ending in one year. His hours of work were 40 per week, 8.00 a.m. to 5.00 p.m. Monday to Friday and he was initially paid an hourly rate of \$16.00 which increased to \$17.00 per hour after he had been employed a short time.

[9] Mr Reyes was required to groom client vehicles and travelled to client locations using the company car available for that purpose.

[10] Mr Reyes said that he worked four additional hours during each week throughout the period of his employment, but did not receive any additional remuneration for the additional hours worked.

[11] Mr Ram denies that Aaram agreed to Mr Reyes working additional hours or to paying him for doing so, and stated that in fact he had recurrent issues with Mr Reyes's timekeeping during his employment, as supported by copies of text messages which he provided to the Authority.

*Injury January 2017*

[12] Mr Reyes suffered a non-work related injury on 25 January 2017 which resulted in a broken foot. He had returned to work for a short time following the accident, but he was unable to continue working.

[13] Mr Reyes said Aaram had made him no sick leave payments during his period of absence; however Mr Ram disputed this and said that Aaram had made a payment in respect of sick leave to Mr Reyes when he had sustained an arm injury as a result of which he was unable to work.

[14] Mr Reyes had claimed for weekly wage compensation from the Accident Compensation Commission (ACC). As recorded by ACC, he was held to be fully unfit for work from 25 February to 26 March 2017.

[15] When Mr Reyes's accident was reported to ACC it sent the requisite form to Aaram asking it to complete it in order that ACC could confirm Mr Reyes's earnings. However despite repeated requests on 10, 16, 17 and 21 March 2017, Aaram failed to comply and complete and return the form to ACC.

[16] Mr Ram said he had sent some information to ACC, however there is no evidence of that in the ACC notes which have been provided.

*End of employment*

[17] Mr Reyes's mother had been admitted to hospital on or about March 2017 and on 23 March 2017 Mr Reyes left New Zealand to return to Mexico and visit her.

[18] Prior to leaving Aaram, he had discussed the situation with Mr Ram and it had been understood and agreed by both parties that Mr Reyes would be returning to his employment in due course.

[19] While he was in Mexico Mr Reyes said he was most concerned when he was informed by ACC on 19 May 2017 that it had been advised by the Inland Revenue Department (IRD) that its records showed no evidence that Aaram had paid PAYE on behalf of Mr Reyes throughout the period of his employment, nor had Mr Reyes paid any tax contributions himself.

[20] As a consequence ACC explained to Mr Reyes that he did not meet the criteria for weekly compensation as these required that he was a wage earner at the date of his accident to receive weekly compensation.

[21] Mr Ram confirmed that Aaram had made no PAYE payments in respect of Mr Reyes, but explained that the reason was that the accountant to whom he had paid an amount in respect of Mr Reyes's PAYE contributions to be remitted to the IRD had been found guilty of tax fraud and theft and imprisoned in October 2017. As a result the PAYE contributions monies he had provided to the accountant had been stolen.

[22] Mr Ram said he is liaising with the IRD in order to make the necessary payments however this had not occurred at the date of the Investigation Meeting.

[23] Mr Reyes had telephoned Immigration New Zealand from Mexico to ascertain the status of his work visa and was told not to return to New Zealand until the work visa had been approved. His understanding was that this was because Aaram had not submitted the requested documentation to Immigration New Zealand.

[24] Mr Ram denied this and said he had sent documentation to Immigration New Zealand as requested.

**Is Mr Reyes owed unpaid wages by Aaram?**

*(a) In respect of four additional hours worked weekly?*

[25] During his employment Mr Reyes received salary payments direct to his bank account not only from Aaram, but from Staaram Mechanical Services Limited (now removed from the Companies Office register) and from a Mr U Kumar. In addition Mr Reyes said he received cash payments from and on behalf of Aaram.

[26] Mr Ram explained that the wage payments to Mr Reyes were made from associated businesses and by cash contributions from himself and from family members when Aaram was unable financially to meet the salary payments to Mr Reyes.

[27] As a result of this mixed method of payment and the fact that Aaram, in breach of s130 of the Employment Relations Act 2000 (the Act) did not keep wage and time records, it is difficult to calculate what monies, if any, might be outstanding to Mr Reyes.

[28] This situation is compounded by the fact that Mr Reyes was in receipt of cash payments on occasion, of which there is no record.

[29] In addition Mr Reyes did not provide any record of the additional hours he claimed to work and I note the evidence of Mr Ram concerning Mr Reyes's timekeeping.

[30] In all the circumstances I find that Mr Reyes has failed to establish his claim for unpaid wages for the additional four hours a week he claimed to have worked throughout his employment.

[31] I determine that Aaram does not owe Mr Reyes monies in respect of four additional hours worked weekly during his employment.

*(b) In respect of two weeks worked by Mr Reyes but not paid by Aaram*

[32] Mr Reyes also claims that he was not paid for the two weeks prior to his ceasing work due to his injury on 25 February 2017.

[33] In respect of the claim for non-payment of wages for time worked, the bank statements provided by Mr Reyes show that the last date of a salary payment into Mr Reyes's bank account was made by Staaram Mechanical Services Limited on 20 January 2017. There was no further payment to Mr Reyes's bank account after that date.

[34] The final payment by Staaram Mechanical Services Limited on 20 January 2017 was in a sum in excess of two weeks wages to Mr Reyes. On the basis that Mr Reyes returned to work for a four week period between 25 January and 25 February 2017 I accept that there was a shortfall in the wages owed to Mr Reyes, unless he was paid in cash during that period of which there is no evidence before the Authority.

[35] Accordingly I determine that Mr Reyes is owed two weeks salary by Aaram.

**Is Mr Reyes owed sick pay entitlement by Aaram?**

[36] Mr Reyes was entitled to 5 days sick leave in accordance with clause 8.3 of the Employment Agreement which accords with the provision in s 65(2) of the Holidays Act 2003.

[37] Mr Reyes said that prior to the injury to his foot on 25 January 2017 he had not taken any sick leave.

[38] Mr Ram said Mr Reyes had taken sick leave during his employment following his incurring an injury to his arm, in respect of which Mr Reyes had provided a medical certificate.

[39] Mr Reyes denied he had taken any sick leave in connection with an arm injury and there was no evidence in the form of a medical certificate or wage and time records provided to the Authority in support of Mr Ram's claim.

[40] Mr Reyes did not take sick leave following his accident in January 2017 but the ACC forms confirm that he was fully unfit to attend work at Aaram during the period 25 February to 26 March 2017.

[41] I determine that Mr Reyes is owed five days sick leave entitlement by Aaram.

**Was Mr Reyes unjustifiably disadvantaged in his employment by Aaram:**

**(i) Not responding to ACC in respect of Mr Reyes?**

[42] While Mr Ram's evidence is that he had responded to ACC it is clear from the ACC records provided to the Authority that he repeatedly failed to do so.

[43] However I find that whilst this failure by Aaram to respond may have delayed matters, it was the failure by Aaram to remit the PAYE payments to the IRD on behalf of Mr Reyes that resulted in ACC declining to make weekly compensation payments to Mr Reyes, and I address this issue below.

**(ii) Not remitting PAYE in respect of Mr Reyes to the IRD?**

[44] During the period of Mr Reyes's employment with Aaram, no PAYE payments had been made to the IRD by Aaram as his employer as statutorily required.

[45] Mr Ram said that Aaram had given the monies to be remitted as PAYE to the IRD to its accountant who had fraudulently kept the money. Mr Ram provided evidence of a press report in support of this explanation.

[46] I observe that Mr Reyes's wage payments were being sent to his bank account from several different sources, including Staaram Mechanical Services Limited and Mr U Kumar, in addition to him being paid in cash on occasion.

[47] I find this would adequately explain why no PAYE was being remitted to the IRD in respect of Mr Reyes apart from any alleged fraudulent action by Aaram's accountant. Nor does it appear that Mr Reyes was making his own arrangements in respect of the cash payments which were being made to him by Aaram.

[48] As a result of the failure by Aaram to ensure that PAYE was properly remitted to the IRD Mr Reyes was unable to establish that he was a wage earner to ACC. Therefore he was not eligible to receive the weekly compensation payable by ACC during the four week period he was fully unfit to work.

[49] I determine that Mr Reyes was unjustifiably disadvantaged as a result of Aaram not remitting PAYE to the IRD.

**(iii) Failing to file the required forms to Immigration New Zealand in respect of Mr Reyes?**

[50] Mr Reyes was employed by Aaram in accordance with a work visa which expired on 23 February 2017. Thereafter he was employed in accordance with an interim work visa which, until he was issued with a further work visa, would have covered his employment until August 2017.

[51] The interim work visa stated:

Your interim visa will expire if you leave New Zealand. It does not give you the ability to re-enter New Zealand after you leave.

[52] Mr Reyes left New Zealand on 23 March 2017 which caused the interim visa to expire.

[53] Mr Ram said he had provided the required information to Immigration New Zealand, however he explained his belief that Aaram had not been responsible for the non-issue of a further work visa to Mr Reyes by producing a copy of a letter dated 19 April 2017 which had been sent to Mr Reyes by Immigration New Zealand. Mr Reyes confirmed he had received the letter.

[54] The letter notified Mr Reyes that his application for a work visa had been rejected on grounds which were independent of information provided by Aaram.

[55] I determine that Mr Reyes was not unjustifiably disadvantaged as a result of Aaram not filing the required forms to Immigration New Zealand.

## **Remedies**

[56] I summarise below the remedies ordered:

- **I order that Aaram pay to Mr Reyes the sum of \$1,360.00 gross as two weeks unpaid salary.**
- **I order that Aaram pay to Mr Reyes the sum of \$680.00 gross as sick leave pursuant to s 65(2) of the Holidays Act 2003.**

[57] I have found that Mr Reyes was unjustifiably disadvantaged in his employment by Aaram not remitting PAYE on his behalf to the IRD, which in turn excluded him from receiving weekly compensation payments from ACC during the four week period of his absence from work.

- **I order that Aaram pay to Mr Reyes the sum of \$3,500.00 as compensation pursuant to s.123(c)(i) of the Act.**

[58] All payments ordered are to be made within 28 days of the date of this determination.

## **Costs**

[59] While costs are reserved, I note here that, subject to his submissions, Mr Reyes represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

## **IRD**

[60] I direct that a copy of this determination is forwarded to the Commissioner of the IRD.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**