

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 707
3067452

BETWEEN	NICHOLAS COWLEY Applicant
AND	THE AGRI COMPANY LIMITED First Respondent
AND	JONATHAN DENIZE Second Respondent

Member of Authority: Robin Arthur

Representatives: Kate Henry, counsel for the Applicant
No attendance for the Respondent

Investigation Meeting: On the papers

Determination: 13 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nicholas Cowley sought orders for arrears of wages, penalties and a finding that Jonathan Denize was a person involved in breaches of employment standards.

[2] His application related to work as a chef between March and June 2019. He said he was employed by The Agri Company Limited (Agri), whose sole director and shareholder is Mr Denize.

[3] Mr Cowley's initial application was against Agri only. Agri did not lodge a statement in reply. Mr Cowley then lodged an amended application that included two new and additional claims against Mr Denize personally. The Authority arranged for a professional process server to serve Mr Denize with that application. The documents served advised him of the opportunity to lodge a statement in reply and to participate

in a case management conference on 12 December 2020. He was asked to provide a telephone number on which to contact him or any appointed representative. He was also advised that the Authority could proceed to exercise its powers (including to make enforceable orders) in the absence of one or more parties.¹

[4] Mr Denize did not provide a telephone number to contact him for the conference call but sent the Authority an email denying that Agri or he ever employed Mr Cowley. He wrote that “all Agri did as a company was supply payroll services” to the restaurant business in which Mr Cowley had worked. He said, on that basis, Mr Cowley’s claims were “all incorrect” and there was no need to attend the phone conference.

[5] The case management conference scheduled for 12 December went ahead without Mr Denize participating or being represented. I told Mr Cowley’s representative that I would proceed to determine his application ‘on the papers’, without holding an investigation meeting. In the absence of a statement in reply from Agri and Mr Denize, Mr Cowley’s statement of problem and information from documents attached to it have been accepted as unchallenged evidence.

Identity of the employer

[6] Mr Cowley worked full-time on terms he agreed orally with Mr Denize. He was provided with payslips headed with the words “Paid by The Agri Company Limited”. Based on those payslips and his dealings with Mr Denize, Mr Cowley said Agri was his employer. In the absence of a written employment agreement and any tested or substantiated evidence to the contrary from Agri, Mr Cowley’s evidence that Agri was his employer has been accepted.

Arrears of wages and holiday pay

[7] The payslips showed Mr Cowley was paid \$26 an hour, comprising \$24 an hour with a further payment of \$2 an hour.

[8] He was not paid for his last week of work. He said he was owed \$1,540.50 for 59.25 hours.

[9] Along with this failure to pay his final pay, he was not paid annual holiday pay. The \$2 an hour further payment included in his ordinary pay appeared to be ‘pay as you

¹ Employment Relations Act 2000, s 173(2).

go' holiday payment which is permitted under some circumstances under s 28(1) of the Holidays Act 2000 (the HA). Those circumstances did not apply to Mr Cowley's working arrangement. He was not on a fixed term employment agreement of the type permitted under s 66 of the Employment Relations Act 2000 (the ER Act) and he was not working so intermittently that it would have been impracticable to provide him with annual leave.

[10] Accordingly Mr Cowley was entitled to holiday pay on the total amount of his earnings at the end of his employment. On total earnings of \$13,089.60 he was owed \$1047.17 in holiday pay.

[11] He was also entitled to interest on those amounts, from 19 June 2019 until the amounts due to him in arrears of wages and holiday is paid.

Penalties

[12] The account given in Mr Cowley's statement of problem clearly established the liability of Agri and Mr Denize to penalties.

[13] Mr Cowley sought penalties against Agri for five breaches of statutory obligations:

- (i) not providing an intended employment agreement to review;²
- (ii) not providing a written employment agreement;³
- (iii) not paying his final pay;⁴
- (iv) not paying his holiday pay with his final pay;⁵ and
- (v) not providing wage and time records and holiday and leave records when requested.⁶

[14] Mr Cowley also sought a penalty against Mr Denize for aiding and abetting breaches of his employment agreement by not paying his wages and holiday pay when due.⁷ Mr Denize had verbally agreed the terms of employment with Mr Cowley, was his sole point of contact with Agri and was responsible for decisions that resulted in the failure to pay wages and holiday pay due to Mr Cowley.

² Employment Relations Act 2000, s 63A(3).

³ Employment Relations Act 2000, s 65(4).

⁴ Wages Protection Act 1983, s 4 and 13

⁵ Holidays Act 2003, s 27 and s 75

⁶ Employment Relations Act 2000 s130(3) and Holidays Act 2003, s 82

⁷ Employment Relations Act 2000, s 134(2).

[15] Agri's total provisional liability to penalties for breaches of three statutes was \$60,000. Mr Denize's total provisional liability was \$10,000. Factors set in s 133A of the ER Act, applied through a methodology developed by the Employment Court, guide determination of the appropriate level of penalty in the circumstances of each case.⁸

[16] Applying those factors and that methodology, including consideration of the need to uphold employment standards and for the proportionality of penalties, the appropriate penalties were for Agri to pay \$3,000 for three breaches of the ER Act; \$1,500 for one breach of the Wages Protection Act 1983 (the WPA); and \$2,000 for two breaches of the HA. For Mr Denize's actions in aiding and abetting those breaches, amounting to breaches of the oral and implied terms of Mr Cowley's employment agreement, the appropriate penalty was \$3,000.

[17] Mr Cowley sought an order that a portion of the penalties, once recovered, be paid to him.⁹ The penalties against Agri for breaches of statutory minimum obligations are appropriately paid in full to the Crown in this case. Part of the penalty against Mr Denize for aiding and abetting breaches of Mr Cowley's agreement however may appropriately be paid to Mr Cowley, after it has been recovered by the Authority.

Involvement in breaches

[18] Mr Cowley sought a finding that Mr Denize was a person involved in a breach of employment standards as defined in s 142W of the ER Act. The significance of such a finding is that, in certain circumstances, an employee may seek leave to recover wages or other money from that person if the employing entity is unable to pay those sums.¹⁰ This provision applies where the default in the payment of wages or other money is due to a breach of employment standards.

[19] The relevant employment standards here were the failure to provide and keep a copy of an intended employment agreement, failure to pay holiday pay when due at the end of the employment, failure to pay the final pay and failing to provide a wage and time record when asked to do so. Mr Denize as the director of Agri, and in his actions

⁸ *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

⁹ Employment Relations Act 2000, s 136(2).

¹⁰ Employment Relations Act 2000, s 142Y.

in operating the business, procured those breaches. He was accordingly a person involved in a breach of employment standards under s 142W of the ER Act. This finding will enable Mr Cowley to make a further application to the Authority under s 142Y of the ER Act for leave to recover the arrears of wages, holiday pay and interest owed to him from Mr Denize personally if Agri is unable to pay those arrears.

Costs

[20] Mr Cowley has incurred costs of representation in pursuing his application and has been successful in the findings sought. As a result he is entitled to an award of costs. The investigation on the papers in this case is treated as equivalent to one quarter of the daily tariff usually applied for each day of an investigation meeting. Accordingly Mr Cowley is awarded \$1,125 as a contribution to his costs. He must also be reimbursed for the fee of \$71.56 paid to lodge his application. The respondents are jointly and severally liable for those costs and expenses.

Orders

[21] For the reasons given in this determination the following orders are made:

- A. Agri must pay the following sums to Mr Cowley by no later Friday, 24 January 2020:
 - (a) \$1,540.50 as arrears of wages; and
 - (b) \$1,047.17 as holiday pay; and
 - (c) Interest on those amounts for the period from 19 June 2019 until the date payment is made in full, calculated using the Civil Interest Debt Calculator.¹¹

- B. Agri must pay \$6,500 to the Authority as penalties for breaches of the ER Act, the HA and the WPA. Payment of the penalties must be made by no later than 24 January 2020. On recovery of these penalties, the Authority must pay that amount to a Crown Bank Account.

- C. Mr Denize must pay \$3,000 to the Authority as a penalty for breach of an employment agreement. Payment of the penalty must be made by no later than 24 January 2020. On recovery of the penalty, the Authority must pay

¹¹ See www.justice.govt.nz/fines/civil-debt-interest-calculator.

\$2,000 of that sum to Mr Cowley and transfer the remainder of \$1,000 to a Crown Bank Account.

- D. Agri and Mr Denize, jointly and severally, must pay Mr Cowley \$1,196.56 as costs and expenses. Payment of the costs and expenses must be made by no later than 24 January 2020.

[22] In respect of the payments due for wages, holiday pay, interest and costs and expenses, Mr Cowley may enforce the orders made through the civil debt procedures of the District Court under s 141 of the ER Act.

Robin Arthur
Member of the Employment Relations Authority