

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 402
3060893

BETWEEN

JANIS KARKOSSA
Applicant

AND

DAN COMBER T/A LUCA
CAFE
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
No appearance for the Respondent

Investigation Meeting: 08 July 2019

Oral Determination: 08 July 2019

Written Record Issued: 08 July 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dan Comber trades a café in Mount Maunganui called Luca Café. Janis Karkossa was employed by Mr Comber as a part-time barister.

[2] After working two days, Mr Karkossa tendered his resignation. He claims he has not received payment for the two days he worked as well as his two hour trial period. He claims wage arrears.

The process

[3] No Statement in Reply was filed by Mr Comber. This was despite the Authority providing him with an extension of time to file this and warning him,

through the issue of a minute, that if he failed to file a Statement in Reply by the extended date then the Authority would proceed to investigate the Applicant's claim.

[4] Following Mr Comber's failure to file a Statement in Reply a second minute was issued. The minute advised, inter alia, that pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Mr Comber would require the leave of the Authority to reply or respond to Mr Karkossa's application. Mr Comber was also advised that if an application for leave was filed this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply. Accompanying this minute was the notice of investigation meeting that set down the time and location for the investigation meeting.

[5] No application for leave was received from Mr Comber.

[6] On 5 July 2019 a person, who I am told is Mr Comber's partner, emailed the Authority advising that she was unwell and could not attend the investigation meeting. In response to this email the Authority advised her that if Mr Comber wished to be heard he must file a Statement in Reply or, at the very least, he or someone with knowledge of the facts must appear at the investigation meeting and provide evidence. She was advised that if this was not possible, because she was unwell, then she should file a medical certificate with the Authority prior to the investigation meeting. At the same time she was told Mr Comber must explain why he had not previously provided the Authority with a Statement in reply and with the documents directed. She was told that upon receipt of this information I would then decide whether to proceed with the investigation meeting or to adjourn it.

[7] The Authority received no further contact from Mr Comber or his partner prior to the investigation meeting and there was no appearance for or on his behalf at the investigation meeting. In addition, he failed to comply with directions made in the Authority's second minute to provide a copy of Mr Karkossa's wage and time records, his leave and holiday records, his payslip and the applicable roster.

[8] As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act as fully in the matter before me as if Mr Comber had duly attended or been represented.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Issues

[10] The issues for determination are:

- a. Has there been a default in payment of wages to Mr Karkossa?
- b. If so, what monies are payable by Mr Comber to Mr Karkossa?

Relevant background facts

[11] Mr Karkossa applied for a job working at Mr Comber's café in or about early April 2019. Following discussions between the parties, Mr Comber asked Mr Karkossa to work a trial period. The trial period took place on Friday 13 April 2019 from 10 am to 12 pm. Thereafter Mr Comber contacted Mr Karkossa and offered him a permanent part-time position.

[12] Mr Karkossa signed an individual employment agreement (IEA) on 19 April 2019. The copy of the IEA that I have viewed does not contain Mr Comber's signature however I am satisfied, based on email correspondence that I have viewed, that Mr Karkossa was employed by Mr Comber on the terms contained therein.

[13] In terms of hours and days of work, the IEA provided:

The normal days of work and hours of work for this position are between ten (10) and (45) hours per week, Monday through to Sunday inclusive, as directed by us according to the requirements of the Café, and as per the roster. Please note the roster is posted one week in advance, setting out your specific hours for the week ahead, and is located in the Café's kitchen.

[14] The remuneration section of the IEA was left blank. Mr Karkossa said that there was no discussion about what amount he would be paid.

[15] Following execution of the IEA Mr Karkossa worked from 9 am to 2.30 pm on 20 April 2019 (8.5 hours) and from 6.30 am to 1.30 pm on 21 April 2019 (7 hours). No meal breaks were taken on these days.

[16] Following his shift on 21 April 2019 Mr Karkossa exchanged text messages with Mr Comber. I have viewed these messages. Mr Karkossa advised Mr Comber

that he wanted to look for another job and asked him to pay him for the hours that he had worked. Mr Comber responded advising:

Of course I'll pay you brother thank you and sorry it didn't work out for you.

[17] Later that evening Mr Comber queried whether Mr Karkossa would be working the following night. Mr Karkossa responded he would not.

[18] On 26 April 2019 Mr Karkossa sent Mr Comber another text setting out the hours and times that he had worked on his trial day and 20 and 21 April 2019. Mr Comber responded advising him that he wanted to review his contract as he felt he had abandoned his employment with about 8 hours notice. He went on to advise that he didn't want to pay him anything but, once he knew his legal rights, he would get back to him. He did not do this and no payment of the outstanding wages was paid.

Issue 1: Has there been a default in payment of wages to Mr Karkossa under the IEA?

[19] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.¹

[20] Having questioned Mr Karkossa, and in the absence of evidence to the contrary, I am satisfied he is owed wages by Mr Comber for working 17.5 hours being the total hours he worked on 13, 20 and 21 April 2019.

[21] In the absence of an agreement as to Mr Karkossa's hourly rate of pay, I apply the minimum wage payable under the Minimum Wage Act 1983, namely \$17.70.

[22] Multiplying 17.5 hours by the hourly rate of \$17.70 I reach a figure of \$309.75 gross.

[23] Mr Comber is ordered to pay to Mr Karkossa the sum of \$309.75 gross for wage arrears. In addition I order him to pay Mr Karkossa the sum of \$24.78 being the holiday pay he is entitled to receive calculated at the rate of 8% of his earnings.² Payment of these sums must be made within 14 days of the date of this determination.

¹ Employment Relations Act 2000, s 131.

² Holidays Act 2003, s 23.

Costs

[24] Mr Karkossa was not represented and therefore does not claim legal costs. However Mr Karkossa has paid the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Mr Comber. I order Mr Comber to pay the sum of \$71.56 to Mr Karkossa within 14 days of the date of this determination.

Outcome

[25] The overall outcome that I have reached is:

- a. Dan Comber is ordered to pay to Janis Karkossa the following amounts within 14 days of the date of this determination:
 - i. The sum of \$309.75 gross for wage arrears;
 - ii. The sum of \$24.78 for holiday pay due on the wage arrears;
 - iii. The sum of \$71.56 being the Authority's filing fee.

Certificate of Determination

[26] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Mr Karkossa be provided with a certificate of determination, sealed with the seal of the Authority. This certificate is to record that, within 14 days of the date of this determination, Dan Comber is ordered to pay the following amounts to Mr Karkossa:

- a. The sum of \$309.75 gross for wage arrears;
- b. The sum of \$24.78 for holiday pay due on the wage arrears;
- c. The sum of \$71.56 being the Authority's filing fee.

Jenni-Maree Trotman
Member of the Employment Relations Authority