

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 309
3048533

BETWEEN	JAYDA PARKER First Applicant
AND	JOEL HAYMAN Second Applicant
AND	RICO SYMES-PATERSON Third Applicant
AND	SARAH TURNER-THOMPSON Fourth Applicant
AND	PP HAWERA LIMITED First Respondent
AND	MATTHEW ADRIAN HUGHES Second Respondent

Member of Authority: Michael Loftus

Representatives: Sarah Law, counsel for the Applicants
Nil for respondents

Investigation Meeting: On the papers up to and including 17 May 2019

Date of Determination: 27 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a claim for unpaid wages and holiday pay. Interest is sought and the applicants also ask the respondents be penalised for their failure to keep and supply wages and time records.¹

¹ Sections 130 and 135 of the Employment relations Act 2000

[2] The respondents position is unknown as neither has made any attempt to participate in the Authorities process which raises the question of whether or not I should proceed. For the following reasons I consider it appropriate to do so.

[3] The first respondent is a company. Companies are required to have an address for service.² PP's is 26 Wellington Street, Hawera which happens to be an accountant's office. The evidence satisfies me the relevant documents were served upon, and accepted at, that address at 8.36am Wednesday 17 April 2019.

[4] The second respondent is PP's sole director and shareholder. As with a company a director is required to maintain an address at which documents can be served if necessary.³ Mr Hughes' is 57 Victoria Street, Hawera and I am satisfied the relevant documents were delivered there at 10.19am on Wednesday 17 April 2019.

[5] As a result of the respondents previous inaction the papers advised that if they continued to ignore the application it would be determined on papers already lodged with the Authority with those papers including affidavits from each of the applicants.

[6] There has been no response with respect to the papers served on PP. Those sent to Mr Hughes were returned with a note advising that was because PP's business was now under new management. That is a response which shows an ignorance of the law and suggests Mr Hughes has inadequate knowledge of his duties as a director.

[7] Ignorance does not provide a defence and in the circumstances I consider it appropriate to continue, as advised was possible, on the papers. An employer cannot avoid its obligation to pay its staff by simply ignoring a claim it has not done so.

Background

[8] PP operated a Pita Pit franchise in Hawera and as already said the applicants complain they have not been paid for work performed. Two were engaged in February 2018 and two in March. Each had what purports to be a casual employment agreement under which their hours are described to be *as required*. That said each applicant claims the employment was, in reality, something other than casual.

[9] On 12 June each applicant received an identical text. It read:

² Section 192(1) of the Companies Act 1993

³ Section 387A(1)(b) of the Companies Act 1993

Hi all, it is with regret that i now inform all of you who work for PP Hawera Ltd all shifts from now are cancelled until further notice, the store will close at 8pm tonight at this stage i am unsure if it will re open, please direct any questions that you don't know to me i will be back in touch once i know more, thank you

[10] As it transpired the franchise had been sold and PP had ceased operating it. Not addressed, however, was the fact each applicant says wages remained unpaid as did holiday pay. Based upon their view the employment was something other than casual each also seeks a further two weeks pay as recompense for notice.

Discussion

[11] With respect to wages and holiday pay the claims are as follows. Ms Parker seeks \$1198.38 gross; Mr Hayman \$634.26; Mr Symes-Patterson \$697.95 and Ms Turner-Thomson \$674.79.

[12] Having considered the affidavits, the supporting documentation and PP's lack of response or denial I accept the claims are valid. With respect to amount I note each, when raising his or her claim, sought a copy of their wages and time record but this was not forthcoming. In such circumstances s 132 of the Employment Relations Act 2000 (the Act) allows me to accept the claim as quantified by the applicants. I will order payment accordingly.

[13] There is then the claim for unpaid notice. In support the applicants each try to convince me s/he was not casual and is therefore entitled to reasonable notice. Three claim part time status based on regular weekly hours. The fourth accepts her hours were variable but notes they were never less than 25 week and regularly more.

[14] The evidence leads me to sympathise with the view the applicants were not casual given regular hours imply part time status. Similarly there are clauses in their employment agreements which contradict casual status but one of those requires the parties give 24 hours notice of cessation. While that does not sit well with the concept of casual employment where notice is effectively given in respect to each engagement on commencement, it does specify a notice period the parties agree is reasonable.

[15] Read literally the clause provides for 24 hours pay and does not relate to a consecutive period of time (ie: a calendar day). Applying that provision to each of the applicants' hourly rates (and adding holiday pay thereto) I conclude that in lieu of

notice Ms Turner-Thomson should have received \$434.16 gross while the others get \$427.68 gross.

[16] Mr Hayman also seeks a further \$33.65 being his Kiwisaver contribution on the amount claimed. I find the claim a little overstated as it includes Kiwisaver on two weeks notice. I also note he would not receive the money but that it would be credited to his Kiwisaver account. Suffice to say membership of Kiwisaver means any payment ordered should be accompanied by the employer contribution.

[17] Turning to the penalty application. The applicants each ask PP be penalised for its failure to keep or provide wages and time records.⁴ A penalty for the same infraction is sought against Mr Hughes as a *person involved*.⁵

[18] The evidence, and particularly contemporaneous correspondence, leads me to conclude the alleged breach has occurred in respect to each of the applicants. It is a breach that may attract a penalty. In the absence of any argument in opposition I consider a penalty warranted.

[19] Matters the Authority should consider when deciding the level of penalty are prescribed in s 133A of the Act and here I note the following.

[20] The Act has been amended in recent times to increase penalties for failures such as this and there have been other changes which confirm such conduct should be both discouraged and penalised. There are 4 breaches but each is identical and occurred simultaneously. Why the breaches occurred is not readily apparent given PP's failure to participate but the evidence would suggest it is attributable to poor judgment and a failure to ascertain the extent of an employer's responsibilities.

[21] The nature and extent of the loss is quantified by the wage claims and there is no evidence PP has attempted to address or rectify either the issues or the losses. Indeed the contrary appears true with evidence the company is about to be wound up. There is little evidence to show the employees were especially vulnerable and finally I note there is no evidence PP is guilty of similar failures in the past.

⁴ Section 130(4) of the Employment relations Act 2000

⁵ Sections 142W and 142X of the Employment relations Act 2000

[22] The above leads me to conclude one global penalty appropriate and a perusal of recent determinations leads me to consider \$5,000 appropriate. There is no application the penalty be payable to the applicants so it goes to the Crown.

[23] Turning to the claims against Mr Hughes personally. His identification as a respondent was expressed as being for two purposes – the transfer of liability for the wages in the event PP failed to pay and for the purpose of imposing penalties on the grounds he was a person involved.⁶

[24] That he was a person involved is clear. He was, and remains, PP's sole director and the evidence shows he was the personification of PP.⁷ All failures attributable to PP are the result of decisions made and implemented by Mr Hughes. As PP's sole director he was also an officer of the company against whom a penalty for being involved may be imposed.

[25] With respect to the issue of transferring liability for unpaid wages to a director I note there is a precondition and that is the company has either failed or is unable to pay. While the attempts to remove the company indicate a distinct possibility PP will not pay that is yet to occur. Suffice to say that if PP does fail to pay I grant leave for the applicants to return and seek a transfer of liability under s 142Y.⁸

[26] Turning to the penalty application against Ms Hughes. The factors to be considered in ascertaining amount are again those specified in s 133A and discussed above. With one difference the conclusions are the same. Mr Hughes has in my view aggravated the situation by trying to avoid the issue on the spurious ground the franchises' management had changed. As already said that shows an ignorance of the law. PP was the employing entity and incurred the liabilities discussed here. It remains extant so retains responsibility notwithstanding its divestment of the franchise. It cannot just assign liability to another legal entity which was never the employer.

[27] Having considered the issues and this additional factor I conclude Mr Hughes should pay a penalty of \$1500 in respect to each breach. In separating the breaches I note the Court's comments about to whom a penalty should be payable, the fact it was

⁶ Section 142W(1) of the Employment Relations Act 2000

⁷ Section 142W(3)(a) of the Employment Relations Act 2000

⁸ Section 142Y(2)(a) of the Employment Relations Act 2000

the applicant's who had to bring this case and evidence about the nature and extent of their losses.⁹ Having done so I conclude two thirds should be payable to each applicant and the remainder to the Crown.

[28] There is then the claim for interest. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt PP 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 amount is determined under the Interest on Money Claims Act 2016 and calculated via a tool on the Ministry of Justice's website.

Conclusion

[29] For the above reasons I conclude the applicants are, as claimed, owed various amounts for unpaid wages, pay in lieu of notice and holiday pay. Interest is also payable and penalties have been imposed. As a result I make the following orders:

- a. The first respondent, PP Hawera Limited, is to pay the first applicant, Jayda Parker, outstanding wages totalling \$1626.06 (one thousand, six hundred and twenty six dollars and six cents) gross plus a further \$52.93 (fifty two dollars and ninety three cents) being interest; and
- b. PP Hawera Limited is to pay the second applicant, Joel Hayman, outstanding wages totalling \$1061.94 (one thousand and sixty one dollars and ninety four cents) gross plus a further \$34.57 (thirty four dollars and fifty seven cents) being interest; and
- c. PP Hawera Limited is to pay to Joel Hayman's Kiwisaver account the employer contribution due on the amount ordered pursuant to (b) above; and
- d. PP Hawera Limited is to pay the third applicant, Rico Symes-Patterson, outstanding wages totalling \$1125.63 (one thousand, one hundred and twenty five dollars and sixty three cents) gross plus a further \$36.64 (thirty six dollars and sixty four cents) being interest payable; and

⁹ *Nicholson v Ford* [2018] NZEmpC 132 and s 133A(d) of the Employment Relations Act 2000

- e. PP Hawera Limited is to pay the fourth applicant, Sarah Turner-Thomson, outstanding wages totalling \$1108.95 (one thousand, one hundred and eight dollars and ninety five cents) gross plus a further \$36.10 (thirty six dollars and ten cents) being interest payable; and
- f. PP Hawera Limited is to pay to the Crown, via the Authority, penalties totalling \$5,000.00 (five thousand dollars); and
- g. The second respondent, Matthew Hughes, is to pay a penalty of \$1,500.00 (fifteen hundred dollars) to each of the four applicants with two thirds (one thousand dollars) payable to the applicant and the balance (five hundred dollars) payable to the Crown, via the Authority.

[30] The payments specified in paragraph [29] above are to be made no later than 4.00pm Friday 28 June 2019.

[31] In closing I caution the respondents that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court¹⁰ they potentially include the imposition of fines, the sequestration of property and/or imprisonment in Mr Hughes' case. Conversely a certificate of determination may be obtained and the matter pursued in the District Court. That might ultimately lead to liquidation of the company and/or bankruptcy for Mr Hughes.¹¹

[32] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

¹⁰ Sections 139 and 140 of the Employment Relations Act 2000

¹¹ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross EmpC* Auckland AC36A/09, 11 November 2009 at [5]