

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 372  
3022733

BETWEEN                      A LABOUR INSPECTOR OF  
   THE MINISTRY OF  
   BUSINESS INNOVATION  
   AND EMPLOYMENT  
   Applicant

A N D                              ATOMIC CAFÉ LIMITED  
   Respondent

Member of Authority:      T G Tetitaha

Representatives:            A Dumbleton, Counsel for Applicant  
   No appearance by the Respondent

Investigation Meeting:     6 April 2018

Submissions Received:     6 April and 15 June 2018 and 29 March 2019 from  
   Applicant

Date of Determination:     21 June 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. I order payment by Atomic Café Limited to the Labour Inspector of \$9,601.84 being the total amount of annual leave calculated as owed to 22 former employees. Payment is to be made within 28 days of this determination.**
- B. I order payment by Atomic Café Limited to the Labour Inspector of \$2,388.00 being the total amount of alternative holiday owed to 5 former employees. Payment is to be made within 28 days of this determination.**
- C. I order Atomic Café to pay a penalty of \$5,000 into the Authority's Crown Bank Account within 28 days. Costs reserved.**

**Employment relationship problem**

[1] The Labour Inspector alleges Atomic Café Limited has failed to comply with an improvement notice. It seeks a compliance order and penalties for those failures. It also seeks to recover wage arrears owed to employees by way of a separate application.

**Respondents absence**

[2] The respondent has failed to take any steps to defend this matter. In the circumstances I intend determining this matter in its absence.

**Improvement Notice**

[3] An improvement notice was issued to Atomic Café Limited on 27 October 2016 (IN). The applicant alleges Atomic Café has failed to comply with the IN and seeks compliance orders. The IN states Atomic Café Limited failed to comply with the following Acts:

- Section 6 Minimum Wage Act 1983 (MWA) by failures to pay employees at a rate equal to or greater than minimum wage for all hours worked;
- Section 4 Wages Protection Act 1983 (WPA) by the deduction of money from 4 employees wages without written consent as required by the WPA;
- Section 130 Employment Relations Act 2000 (ERA) failures to keep compliant wage and time records;
- Section 81 Holidays Act 2003 (HA) failures to keep compliant holiday and Leave records;
- Section 27 HA failures to pay employees annual leave in the pay period related to the employees final week of employment and to pay annual leave upon termination;
- Section 57 HA failures to provide employees with alternative leave days when public holidays have been worked;

- Section 60 HA failures to pay employees for accrued alternative leave days upon termination;
- Section 16 HA failures to correctly provide employees with four weeks annual leave;
- Section 65 ERA failures to provide employees with employment agreements that comply with this section;
- Section 69OJ ERA failures to provide employees with employment agreements that comply with this section requiring an employee protection provision.

[4] The LI seeks orders for compliance with the IN, penalties for breaches of minimum code legislation and wage arrears allegedly owed to various employees as a result of the breaches.

## **Law**

[5] An improvement notice may be issued upon the following terms:

### **223D Labour Inspector may issue improvement notice**

(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.

(2) An improvement notice issued under subsection (1) must state—

- (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and
- (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and
- (c) the nature and extent of the employer's failure to comply with the provision; and
- (d) the steps that the employer could take to comply with the provision; and
- (e) the date before which the employer must comply with the provision.

(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

(4) An improvement notice may be issued—

- (a) by giving it to the employer concerned; or
- (b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

(5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.

(6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

[6] The Authority has the power to order compliance “where any person has not observed or complied with any provision of” an improvement notice.<sup>1</sup> The power to order compliance is discretionary and may be subject to “such terms and conditions as the Authority thinks fit”:

### **137 Power of Authority to order compliance**

(1) This section applies where any person has not observed or complied with—

(a) any provision of—

...

(iib) an improvement notice that section 223D(6) provides may be enforced by compliance order; or

...

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

(3) The Authority must specify a time within which the order is to be obeyed.

### **138 Further provisions relating to compliance order by Authority**

(1) The power given to the Authority by section 137(2) may be exercised by the Authority—

(a) of its own motion; or

(b) on the application of—

(i) any party to the matter; or

(ii) *Repealed*.

(iii) in the case of sections 223C, 223D(6), and 225(4)(c), a Labour Inspector.

(2) Before exercising its power under section 137(2) in relation to a person who is not a party to the matter, the Authority must give that person an opportunity to appear or be represented before the Authority.

(3) Any time specified by the Authority under section 137 may from time to time be extended by the Authority on the application of the person who is required to obey the order.

(4) A compliance order of the kind described in section 137(2)—

(a) may be made subject to such terms and conditions as the Authority thinks fit (including conditions as to the actions of the applicant); and

(b) may be expressed to continue in force until a specified time or the happening of a specified event.

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<sup>1</sup> Section 137(1)(a)(iib) ERA.

(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

(5) Where the Authority makes a compliance order of the kind described in section 137(2), it may then adjourn the matter, without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.

(6) Where any person fails to comply with a compliance order made under section 137, the person affected by the failure may apply to the Court for the exercise of its powers under section 140(6).

[7] When considering the making of compliance orders the Authority's statutory role requires compliance with the principles of natural justice, promotion of good faith behaviour and furthering of the objects of the ERA. The Authority is expressly empowered to act "as it thinks fit in equity and good conscience" but "must not do anything that is inconsistent with this Act".<sup>2</sup> The Authority's role guides the exercise of its powers to grant remedies such as compliance orders.

[8] Section 223D(2) sets out the minimum matters an IN must state. This information is required to meet the principles of natural justice and to show good faith behaviour. Failure of an IN to meet the requirements of s223D may affect the exercise of any discretion to grant compliance orders.

[9] There is no specific power to amend an IN in the ERA in absence of a notice of objection under s223E ERA. However s223G ERA allows the LI to withdraw an IN and "does not prevent another improvement notice being served in relation to the same matter." Any refusal of remedies due to a failure to meet the statutory requirements for an enforceable IN does not prevent the LI from reissuing a compliant notice for the same matter.

### **Has there been a failure to meet s6 Minimum Wage Act?**

[10] Before ordering compliance or penalties, there must be proof of the particulars alleged in the IN. The IN states s 6 MWA was breached "as the employer failed to pay employees at a rate equal to or greater than minimum wage for all hours ... worked". The IN then states for nine months between 22 April 2014 and 3 February 2015 an employee was paid less than minimum wage.

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<sup>2</sup> Section 157 ERA.

[11] Further detail is set out in paragraph 4.1.1 and 4.1.2 under the heading “Nature & Extent of Failure” below:

4.1.1 [MM] was incorrectly paid at a rate below Minimum Wage between 22<sup>nd</sup> of October 2014 and 3<sup>rd</sup> of February 2015. This led to him being underpaid a gross total of \$362.15 during this period.

4.1.2 Similar underpayments are likely to affect other employees who were paid the starting out wage as this error has be [sic] identified as a potentially systematic. It was found during a phone conversation that Peter was not fully aware of the full conditions relating to the starting out wage meaning that this error may have occurred in the payment of other employees.

[12] An Audit Report dated 30 August 2016 (AR) sets out more detail about the breach. However the AR is not referred to in the IN at all. This raises issues about the sufficiency of the particulars in the IN and natural justice considerations. In this case it is the AR that sets out the detail of the failures not the IN. This is unfair for an employer seeking to remedy failures if these are not detailed. This is required by s223(2) ERA. It may affect the willingness of the Authority to order compliance and other remedies.

[13] In respect of the failure to pay minimum wage the AR states:

**Minimum wage**

A review of [MM] Wage and Time records reflect that he commenced employment on 22<sup>nd</sup> of April 2014. As he was under the age of 18 at this time as per section 4A(1) of the Minimum Wage Act 1983 the starting out wage was correctly applied. He was paid \$12.00 per hour, a rate exceeding the minimum training wage requirement. The training wage continued at this rate for over nine months until 3<sup>rd</sup> of February 2015. Section 4A(1) of the Minimum Wage Act stipulates that an employee who is paid the starting out wage must not receive this wage for more than six months after their employment has commenced. [MM] was on the starting out wage for a period of time that exceeded this six month limit meaning that it is of my opinion that the employer breached section 6 of the Minimum Wage Act 2003. This error led to [MM] being underpaid a total of \$362.16. This will need to be paid to the employee.

[14] Unfortunately s4A(1) MWA does not stipulate “that an employee who is paid a starting out wage must not receive this wage for more than six months after their employment has commenced.” Section 4A(1) only allows the Governor General to prescribe a starting out wage for a defined class of employees.

[15] It is s4A(3)(a)(i) MWA that restricts payment of the minimum starting out wage to this defined class of employee to the earlier of the completion of 6 months “continuous employment” or when they cease to meet 1 or both criteria under s4A(1)(a) and (b):

#### 4A Prescribed minimum starting-out rates of wages

(1) The Governor-General may, by Order in Council, prescribe 1 or more minimum starting-out rates of wages payable to 1 or more classes of workers who—

- (a) are aged 16, 17, 18, or 19 years; and
- (b) are not involved in supervising or training other workers; and
- (c) are defined in the order by reference to the age (or range of ages) of the workers and 1 or more of the following factors:
  - (i) the length of time, being a period of not less than 6 months, that the workers have been continuously paid 1 or more specified social security benefits (the continuous social assistance period):
    - (ii) the length of time, being a period of not more than 6 months, that the workers have been in continuous employment with—
      - (A) any employer (excluding, if the order defines the class of workers by reference to the factor specified in subparagraph (i), any employment undertaken by the worker before the continuous social assistance period):
      - (B) the worker's current employer:
    - (iii) that the workers are employed under contracts of service that require the workers to undergo training, instruction, or examination (as specified in the order) for the purpose of becoming qualified for the occupation to which their contracts of service relate.

(2) A rate prescribed under subsection (1) must not be less than 80% of the minimum adult rate prescribed under section 4 and may be prescribed as—

- (a) a monetary amount; or
- (b) a percentage of the minimum adult rate.

(3) If a minimum starting-out rate is prescribed under subsection (1) by reference to a factor specified in subsection (1)(c)(i) or (ii) (or both), an employer of a worker to whom that rate applies—

- (a) may pay the worker in accordance with that rate only until the earlier of—
  - (i) the date on which the worker has completed 6 months' continuous employment (or any shorter period of continuous employment specified in the order) with any employer or the worker's current employer (as the case requires):
  - (ii) the day before the date on which the worker ceases to satisfy 1 or both of the criteria in subsection (1)(a) and (b); and
- (b) then must pay the worker no less than the minimum adult rate prescribed under section 4.

...

[16] The AR also states “an employee who is paid the starting out wage must not receive this wage for more than six months after their employment has commenced.” This is an incorrect statement of the above law. The essential element to be proven is that MM must have 6 months “continuous employment.” This element or s4A(3)(a)(i) MWA has not been referred at all in the IN or AR. This is concerning because s223D(2)(a) requires the IN must state “the provision the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with.” The LI believes this was sufficiently inferred in the IN. With respect I do not agree.

[17] The evidence is inconclusive that MM was “continuously employed” for the six month period alleged. His wage and time record shows he worked variable shifts throughout his employment. The hours of work range from 5 to 33 hours and he does

not work every week. There are periods he is not working at all for two weeks to a month during the time he is alleged to have been in 6 months continuous employment. Given the definition of continuous employment in s16(2)(vi) HA excludes periods of unpaid leave of more than one week, this may not be continuous employment or the dates may need to be adjusted to exclude those periods MM was not at work. MMs work pattern also suggests this may have been casual employment. I do not have a copy of MMs employment agreement on file.

[18] If this is the case then MM may not have been in continuous employment and therefore was not entitled to receive the applicable adult minimum training wage as alleged. His work pattern needs to be investigated further.

[19] There is also an issue about the amount of debt owed. MMs wage and time record is attached to the IN. It shows he was paid in excess of the applicable starting out wage of \$11.40 per hour<sup>3</sup> from 22 April to 28 October 2014 the only 6 month period the LI states he should have received the starting out wage. This gives rise to an issue of overpayment.

[20] The LI sought payment of arrears of \$362.16. The calculation is set out in exhibit 14 to the IN. It is assumed s4 Minimum Wage Order 2014 and the adult minimum wage of \$14.25 was applied from 28 October 2014.

[21] There is evidence by 30 November 2016 the respondent wrote to the LI stating the debt should have been reduced to \$59.25. It did not give any details about how this calculation arose. The respondent appears to be seeking to offset overpayments against any wages owed to MM. The overpayments based upon the LI's calculations in the IN exhibit 14 are \$225.55. This reduces the debt payable to \$136.62.

[22] However there is evidence MM may have been paid the debt owed. The IN attaches MM's Employee Pay Summary Report that shows he received a payment of \$1,463.55 net on 1 March 2016. This payment may explain the respondent's view the debt was substantially less. This is especially given the LI's calculations end at 3 February 2015. There is no further correspondence between the parties explaining their respective views about the debt (if any) owed to MM.

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<sup>3</sup> Section 5 Minimum Wage Order 2014 that prescribed a Minimum starting-out rate of \$11.40.

[23] Given there is evidence prior to the issue of the IN that MM may not have been continuously employed as at 28 October 2015 and the debt was disputed, I am not persuaded there has been a failure to meet s6 MWA in the manner set out in the IN.

**Did the respondent breach Section 4 Wages Protection Act 1983 by failing to obtain written consent to make deductions?**

[24] The IN states s 4 WPA was breached “as the employer failed to deduct money from employees wages in accordance with the [WPA]”. Under the heading “reasonable grounds” the IN states the LI analysed the wage and time record and interviewed four employees whom confirmed the deductions were made to pay for food and drink that employees had purchased from the café. It is inferred no written consent to the deduction was provided.

[25] Section 4 WPA states:

**4 No deductions from wages except in accordance with Act**

Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[26] While this section may generally refer to the failure, it is in fact s5 WPA that the respondent may have been non-compliant with:

**5 Deductions with worker's consent**

(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—

- (a) with the written consent of the worker (including consent in a general deductions clause in the worker’s employment agreement); or
- (b) on the written request of the worker.]

(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker’s employment agreement without first consulting the worker.]

(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—

- (a) Within 2 weeks of receiving that notice, if practicable; and
  - (b) As soon as is practicable, in every other case,—
- cease making or vary, as the case requires, the deductions concerned.

[27] The LI interviewed four employees all of whom confirmed there was a mutual agreement for deductions from their wages for food and drink they bought from the café.

[28] The LI gave evidence at hearing the employees wrote down the food or drink taken for the respondent director to make the appropriate deduction from their wages. In my view this is sufficient to comprise a written request by employees for the deduction to be made under s5(1)(b) WPA. Further the LI is not seeking to recover the money deducted because the employees consented to it occurring.

[29] I am not persuaded this was a failure to meet the requirements of s4 WPA. I decline to grant any compliance order or penalty in respect of this matter.

**Has there been a failure to keep records that comply with s130 ERA?**

[30] Paragraph 2.1.3 IN states there was a breach “as the employer failed to keep wage and time records that contained all mandatory aspects as required by [s130 ERA]”. Under “Nature & Extent of Failure” the IN states employer, employees and any other relevant person “would be unable to review a complete version of these records” and this could “disadvantage employees should the employer fail to provide employees with their minimum employment entitlements.” The IN has little (if any) detail about the exact nature of these failings and therefore the remedy required.

[31] Given s130(1) ERA has several other sections that were not breached, the failure to name the relevant subsections of s130 ERA that were breached in the IN does not assist any employer in determining what the requirements for compliance were. Any compliance order would have to be with the matters set out in the IN. I cannot order compliance with a document that is not part of the IN.

[32] The details of the provisions breached are set out in the AR only:

**Wage and Time records**

I have determined through reviewing the employers Wage and Time records that the employer has failed to keep Wage and Time records that are compliant with section 130(1) b, d, e, g and h of the Employment Relations Act 2000 as the employer has failed to include the following in all the employees Wage and Time records:

- If the employee’s employment agreement is an individual or collective agreement
- The hours worked by the employee daily
- The method used to calculate employee’s wages

For employer failed to include the following for [MM]:

- The age of the employee if the employee is aged 20 years or younger

The employer also neglected to include the following for five of the seven examined employees:

- The kind of work employees were employed to do

[33] Section 130 ERA does not stipulate the wage record must be comprised in a single document. Section 130(1A) ERA states the wage record must be kept in written form or “in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.”

[34] S130(1)(b) ERA requires the wage record include MMs age because he was aged below 20 years. It goes without saying that MM ought to have known his age and did not require any written record to be kept. The respondent should have known his age because it was required to file an IR346 that records a new employee’s date of birth and it paid MM a starting out wage for persons aged between 16 to 19 years. From the evidence no-one including in particular the employee were not disadvantaged or harmed by the fact there was no written record of MMs age. The employer and employee knew MMs age and this could have been easily converted to written form pursuant to s130(1A) ERA. I am not persuaded there was a failure to meet the requirements of s130(1)(b) ERA in these circumstances.

[35] The kind of work the employees undertook appears to have been noted on their employee information forms from the example provided. The employee was noted therein as a chef. It was accepted several employment agreements contained a description of the work. This should be sufficient to meet the requirements of the Act. These employees were not disadvantaged by the fact there was no separate written record. This information could have been easily converted to written form pursuant to s130(1A) ERA if required. I am not persuaded there was a failure to meet the requirements of s130(1)(d) ERA.

[36] The only employment agreement produced clearly shows these employees were employed on individual agreements. The employees would also have known because they received and signed the same document. These employees were not disadvantaged by the fact there was no separate written record. This information could have been easily converted to written form pursuant to s130(1A) ERA if required. I am not persuaded there was a failure to meet the requirements of s130(1)(e) ERA.

[37] Section 130(1)(g) ERA was amended with effect from 1 April 2016. These alleged breaches relate to records kept prior to this date. Legislation cannot be given retrospective effect. Therefore the LI cannot require an employer to recreate payroll records that were previously compliant.

[38] Further the LI accepted at hearing that she had seen rosters that showed hours of work for these employees. Although she had concerns about their accuracy she did not give any evidence to support her views. Neither the IN or AR refer to rosters or give information showing the hours of work were inaccurate. In these circumstances the rosters are a sufficient record of employees' hours of work. This information could have been easily converted to written form pursuant to s130(1A) ERA. I am not persuaded there has or is any failure in respect of s130(1)(g) ERA.

[39] In terms of s130(1)(h) ERA the net wages paid and information showing the method of calculation were set out in the payroll record produced on 29 November 2015 before the IN was issued. The hourly rate for the employee can be ascertained by dividing the hours worked by the gross pay. The gross pay, PAYE deducted and net pay was also set out. Other than the hourly rate paid, sufficient information for calculating the employee's net pay was set out in the wage and time record. I am not persuaded there was a failure to meet s130(1)(h) ERA.

[40] I am not persuaded this was a failure to meet the requirements of s130 ERA. I decline to grant any compliance order or penalty in respect of this matter.

### **Section 81 Holidays Act 2003**

[41] Paragraph 2.1.4 IN states there was a breach "as the employer failed to keep holiday and leave records that contained all mandatory aspects as required by [s81 HA]" and repeats this under the heading "reasonable grounds" and "Nature & Extent of Failure". Under "Nature & Extent of Failure" the IN states employer, employees and any other relevant person "would be unable to review a complete version of these records." It is further alleged this could "disadvantage employees should the employer fail to provide employees with their minimum employment entitlements." The IN has little (if any) detail about the exact nature of these failings and therefore the remedy required.

[42] The content of the AR sets out the exact sections that have been breached and therefore the action required to remedy namely s81(2)(b),(c),(g),(h),(i),(j),(k) and (p). Given 81 ERA has several other sections that were not breached, the failure to name the relevant subsections that were breached within the IN does not assist any employer in determining what the requirements for compliance were. Any compliance order would have to be with the matters set out in the AR not the IN. Given the AR does not form part of the IN this presents difficulties for enforcement purposes. I cannot order compliance with a document that is not part of the IN.

[43] I am also concerned about the alleged breaches. The AR states the failures arise as follows:

**Holiday and Leave Records**

It is of my opinion that the employer failed to comply with section 81(2)(b),(c),(g),(h),(i),(j),(k) and p of the Holidays Act 2003 as after reviewing the Holiday and Leave records they reflected that the following sections were not included:

- The date employment commenced
- The days on which each employee works
- The date that Annual Leave and Sick Leave was taken
- Payments for Annual Leave and Sick Leave
- The dates of and any payments for public holidays worked
- The number of hours worked on each public holiday
- The date an employee became entitled to an alternative holiday
- The amount paid to an employee for remaining Alternative Leave balances upon termination

[44] Section 81(3) states the holiday and leave record must be kept in written form or “in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.” An employer is not required to keep the holiday leave record in a single form. It is only required to keep it in a form that can be “easily accessed and converted into written form.”

[45] The “employee information” form produced for one employee shows the start date with the respondent. This record can form part of the holiday leave record or be accessed and converted into a written form for the purposes of a separate record if required. I am not persuaded there was a failure to meet s81(2)(b) HA.

[46] Section 81(2)(c) HA was amended with effect from 1 April 2016. These alleged breaches relate to records kept prior to this date. Legislation cannot be given retrospective effect. Therefore the LI cannot require an employer to recreate holiday leave records that were previously compliant. Similarly to paragraph [39] above,

there were rosters showing hours of work. I am not persuaded there has been a breach of s81(2)(c) HA.

[47] The body of the AR only also refers to s81(2)(o) HA being breached by the failure to record the date of termination. This is not noted in the IN. There is evidence in the wage record of the last date of payment for work. This is sufficient to meet the requirements of s81(3) HA that this information can be “easily accessed and converted into written form.” This is evidenced by the wage records.

[48] I am not persuaded this was a failure to meet the requirements of s81 ERA. I decline to grant any compliance order or penalty in respect of this matter.

**Has there been a breach of s27 HA by failure to pay employees annual leave upon termination?**

[49] Section 27(1) HA requires payment for annual leave “in the pay that relates to the period during which the holiday is taken” or when “the employee’s employment has come to an end.” If the employment has ended “the employer must pay in the pay that relates to the employee’s final period of employment” (s27(2) HA).

[50] The IN states s27 has been breached “as the employer failed to pay employees annual leave on termination.” The IN referred to “at least one employee had not been paid annual leave on termination” (para 3.1.10). It goes on to state two employees JC and CQ were paid two months and seven weeks respectively after they last worked. Another, HL was not paid at all resulting in an underpayment of \$3,721.30. Further it is believed 22 employees have not been paid a gross total of \$6,596.11 in annual leave. The calculation of the annual leave owed is attached to the statement of problem seeking payment of wage arrears.

[51] However when comparing the respondents leave records with the LI’s calculations both records show the same payment for annual leave owed with the exception of SA. I have considered the LI’s calculations for SA and do not believe they are correct. This is because the wage records show SA’s commencement date was 3 December 2013. Even if SA had started on 11 April 2013, the wage record shows she was not paid prior to 3 December 2013. If she was on unpaid leave, the effect of ss16(2) HA is to change the start date of continuous employment to possibly 3 December 2013. Her last day of work was 2 December 2014. Therefore 8% of her

gross wages of \$12,571.60 was \$1,005.73. Leave taken was 2.04 weeks multiplied by the LI's calculated average weekly pay (AWP) of \$238.22 leaves \$485.97 to be deducted. The leave owed to SA was therefore \$519.78.

[52] The respondent calculated her leave payable as \$631.41. There is little to show the employees were disadvantaged by the respondent's use of 8% of gross wages to calculate the amount of payment owed for their 4 weeks annual leave entitlement.

[53] Calculation of payments at or above minimum entitlements owed to employees is not in breach of the Holidays Act 2003. However I am persuaded there has been a breach of s27 HA by non-payment of annual leave upon termination whenever this occurred.

[54] Taking into account the above and reducing the amount owed to SA to \$519.78, I order payment by Atomic Café Limited to the Labour Inspector of \$9,601.84 being the total amount of annual leave calculated as owed to 22 former employees. Payment is to be made within 28 days of this determination.

[55] I decline to award interest. There is no basis for any award shown.

**Has there been a breach of s57 HA by failure to provide employees with alternative leave days when public holidays have been worked?**

[56] The IN states the employer "failed to correctly provide all employees with an entire day of alternative leave upon entitlement." The IN refers to breaches of s57 HA which sets out the requirements of when an alternative holiday may be taken. It is s56 HA that requires an alternative holiday to be provided if an employee works on a public holiday. There is also little (if any) evidence to show if employees requested alternative leave that it was refused.

[57] In the circumstances, I decline to order compliance and penalties.

**Has there been a breach of s60 HA by failure to pay employees for accrued alternative leave days upon termination?**

[58] The IN refers to alternative leave owed and not paid upon termination. Section 60 HA requires payment for alternative leave days or alternative holidays

upon termination. The calculation of the alternative holidays owed to employees is attached to the statement of problem seeking payment of wage arrears.

[59] The respondent's leave record produced shows leave owed or paid to employees. There is also little doubt all of these employees have not been paid for alternative leave accrued upon termination.

[60] In the circumstances I am persuaded there has been a breach of s60 HA by non-payment of alternative leave upon termination.

[61] I order payment by Atomic Café Limited to the Labour Inspector of \$2,388.00 being the total amount of alternative holiday owed to 5 former employees. Payment is to be made within 28 days of this determination.

[62] I decline to award interest. There is no basis for any award shown.

**Has there been a breach of s16 HA by failures to correctly provide employees with four weeks annual leave?**

[63] The IN states that nine employees did not receive their full entitlement to four weeks annual leave due to it being incorrectly calculated (para 5.1.7). However s16 only sets out the statutory entitlement to 4 weeks leave. There is no evidence to suggest these employees did not receive the opportunity to take leave. There are examples where one employee, SA did take leave.

[64] If the failure was about the calculation of the payment for annual leave, this is dealt with in different provisions, namely ss23 to 25. The respondent's annual leave records showed it was using 8% calculation for all employees. This calculation is used for those whom were not employed continuously for 12 months (s23 HA). It is also used for calculating payment of annual leave for employees whom have worked continuously for 12 months but terminate employment prior to the next years leave anniversary (s24 HA).

[65] The respondent calculation of 8% of gross wages irrespective of whether the 12 month anniversary had been reached breached s24 HA. Section 24 HA sets out the method of calculation for those whom an entitlement has arisen. However it is not s24 HA that is cited as having been breached. Further as noted above, the calculation is at or the same as the calculation made by the LI for payment of annual leave. This

is not a breach of the Holidays Act 2003 if the calculation is the same or in excess of minimum statutory requirements.

[66] I am not persuaded there has been a breach of s16 HA in these circumstances,

**Has there been a breach of s65 ERA by failures to provide employees with employment agreements that comply with this section?**

[67] The IN alleges there was a breach because the employer “failed to provide Employment Agreements that contained all mandatory aspects as required by [s65 ERA].” Paragraph 3.1.14 states “some employment agreements did not contain a description of the duties to be performed by the employee.” Paragraph 4.1.13 named 4 employees whom were affected. None of the affected employees’ employment agreements were provided in evidence.

[68] I am not persuaded there has been a breach of s65 ERA. Even if there was any breach there is no evidence of any harm or loss caused. Further I understand these employees are no longer employed. There is no ability to comply with the IN because the employees are no longer employed. I decline to make any compliance or penalty orders in the circumstances.

**Has there been a breach of s69OJ ERA by failures to provide employees with employment agreements that comply with this section requiring an employee protection provision.**

[69] The IN alleges there was a breach of s69OJ ERA because the employer “failed to provide Employment Agreements that contained an employee protection provision”. Paragraph 3.1.15 states “a review of selected employees’ employment agreements did not contain an employee protection provision”. Paragraph 4.1.14 named 1 employee who was affected. The affected employee’s employment agreement was not provided in evidence.

[70] I am not persuaded there has been a breach of s69OJ ERA given the lack of evidence. There is also no evidence of any harm or loss caused and this employee is no longer employed. There is no ability to vary his agreement to comply with the IN given he is no longer employed. I decline to make any compliance or penalty orders in the circumstances.

**Minimum wage arrears**

[71] LI has also filed an application seeking payment of wage arrears for MM and another employee JK. Given the respondent has admitted \$59.25 is owed to MM, I am prepared to order payment of wage arrears in this amount only. In respect of JK I am also satisfied she is owed \$44.42 in wage arrears.

[72] I order Atomic Café Limited to pay the Labour Inspector the amount of \$103.67. Payment is to be made within 28 days.

[73] Given the wages owed to MM were disputed, I am not prepared to make any compliance or penalty orders in respect of the non-payment. The payment sought to JK was not part of the particulars cited in support of any breach within the IN or referred to at all in the AR. I am not prepared to award penalties based upon failures that were not made notified to the respondent at the time the IN was issued.

**Compliance and penalties**

[74] The respondent no longer employs any staff. Further I understand the business has been sold. There is little point in ordering compliance in these circumstances.

[75] Section 223F ERA allows the LI to seek a penalty for failure to comply with an IN. I have found a failure by the respondent to comply with the IN by non-payment of annual and alternative leave upon termination of employment pursuant to s27 and s60 HA.

[76] Having regard to relevant law, the nature and extent of the breaches were 22 breaches of s27 HA and 5 breaches of s60 HA. The Labour Inspector seeks “a penalty” despite there being as two separate breaches of s27 and 60 HA respectively because they arise from the same failure to pay. The breach must be seen as intentional because the respondent knew the leave was owed but did not pay. The nature and extent of the losses under s27 HA were \$9,601.84 and under s60 HA were \$2,388.00. There are no other mitigating or aggravating factors. No steps to mitigate the losses have been taken. These employees are vulnerable because they are transient workers whom rely upon receiving payment when it fell due. They would not be capable of seeking payment otherwise. The respondent has not been before the Court or Authority before.

[77] The starting point would be \$20,000. The respondent alleged impecuniosity but did not provide evidence of this. For a party with a penalty appearing for the first time before the Authority a discount is appropriate. In my view a penalty of \$5,000 would meet the objects of the Act.

[78] I order Atomic Café to pay a penalty of \$5,000 into the Authority's Crown Bank Account within 28 days.

[79] Costs reserved. If the applicant seeks costs it is to file the costs submissions within 14 days.

**T G Tetitaha**  
**Member of the Employment Relations Authority**