

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2020] NZERA 11  
3057292

BETWEEN	DEBRA SAPPHIRE First Applicant
AND	CHALLOTE ELLIOT Second Applicant
AND	NATALYA MAYNARD Third Applicant
AND	PAORA SMITH Fourth Applicant
AND	CALEB MCKENZIE Fifth Applicant
AND	NGAIRE DOLMAN Sixth Applicant
AND	MAREE CAMPBELL Seventh Applicant
AND	SMITH & CO HOSPO LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Graeme Ogilvy, advocate for the Applicants  
Nil for the Respondent

Investigation Meeting: 14 January 2020 at Wellington

Record of Oral  
Determination: 14 January 2020

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**ORAL DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] This is a claim for unpaid wages, holiday pay and kiwissaver contributions. There is also a claim three of the applicants had student loan repayments deducted from their pay which was not forwarded to the Inland Revenue Department as they should have been. Costs are also sought.

[2] There were also claims Smith & Co be ordered to provide copies of both the applicant's employment agreements and time and wage records. While these have not been provided the applicants agree subsequent events, namely the hearing of their claims, effectively supersedes the need for such orders. Both these and a claim for penalties are now withdrawn.

[3] The respondent's position is unknown as it has made no attempt to participate in Authority's process. This raises the question of whether or not I should proceed.

[4] The respondent is a company and must therefore have an address for service.<sup>1</sup> Smith & Co's is 1287 Kaipara Coast Highway, RD4, Kaukapakapa. The evidence satisfies me the relevant documents, including a notice of investigation meeting, were sent to that address and delivery was acknowledged by signature at 3.25pm on Tuesday 19 November 2019.

[5] The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicants.<sup>2</sup> Smith & Co should therefore be aware of the consequences of non-attendance. Given neither notice of or an explanation for Smith & Co's absence and a history of uncooperative behaviour I consider it appropriate to continue. An employer cannot avoid its obligation to pay its staff by simply ignoring a claim it has not done so.

## **Background**

[6] Smith & Co operated a restaurant/bar in Paraparaumu. The applicants were employed there. On 12 February 2019 the business closed. Staff were dismissed without warning or notice, though the dismissals are not being challenged.

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<sup>1</sup> Section 192(1) of the Companies Act 1993

<sup>2</sup> Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

[7] Each applicant claims to have been due wages for time worked prior to dismissal which was not paid, along with holiday pay. The holiday pay takes the form of payment of both annual leave and days in lieu of having worked public holidays.

[8] The applicants each claim kiwisaver contributions were deducted from their pay but neither that, nor the corresponding employer contribution, was forwarded to the Inland Revenue Department as required.<sup>3</sup>

[9] Three of the applicants say Smith & Co also deducted student loan repayments but failed to forward the money to the Inland Revenue Department as it should have done.<sup>4</sup> There was originally a fourth such claim but that has now been withdrawn.

[10] Finally the applicants say they should receive a payment in lieu of notice. Six applicants seek two weeks wages in this regard while Mr McKenzie seeks four.

[11] The applicants initially raised their concerns via texts from Ms Elliott and the claims were formalised through Mr Ogilvie by letter dated 13 March 2019. A reply to the text implied payment would be made but there has been no further response.

## **Discussion**

[12] The evidence before me, which is not challenged by Smith & Co, includes both documentary and oral input from the applicants. It leads me to accept each was employed by the respondent and this is confirmed by both payslips and an e-mail from one of the respondents directors produced at the investigation. The evidence also leads me to accept each applicant is owed outstanding wages and holiday pay.

[13] I also accept the applicants had kiwisaver deductions taken from their pay. That means there was then an obligation on the employer to match those amounts and forward both sums to Inland Revenue. I am satisfied that has not occurred.

[14] The evidence also leads me to accept three of the applicants had student loan repayments deducted from their pay which was not forwarded to Inland Revenue.

[15] Finally I comment about the amount each applicant's seeks. While there is an element of estimation in the sums none of the claims appears inordinate. I also note wage and time records were sought but not forthcoming. In such circumstances s 132

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<sup>3</sup> Section 93(1) of the Kiwisaver Act 2006

<sup>4</sup> Section 36 of the Student Loan Scheme Act 2011

of the Employment Relations Act 2000 allows me to accept the claim as quantified by the applicants. I will order payment accordingly.

[16] Turning now to the claim for wages in lieu of notice. As already noted the applicants asked Smith & Co provide copies of their employment agreements but these have not been forthcoming. That said both Ms Sapphire and Mr McKenzie retain copies of theirs. Ms Sapphires records a two week notice period payable by the employer in all circumstances but serious misconduct which is not an issue here. Mr McKenzie has a slightly altered version which required four weeks' notice.

[17] Add to that the evidence of Ms Elliott who was employed in an administrative role. She says one of her duties was to provide new recruits with a copy of their agreement and with the exception of Mr McKenzie these were consistent with that produced by Ms Sapphire. This evidence is supported by that of the other applicants.

[18] It follows I accept Smith & Co had a contractual duty to pay a notice period and the applicants evidence it failed to do so is uncontested. A payment in lieu of notice will therefore be ordered.

[19] Finally there are costs. The applicants seek \$3,000 as a contribution toward those incurred. While the hearing only took an hour it had to be prepared for as if it would be defended. There is also the fact the respondent's failure to participate in the process or respond to queries amplified the time required to prepare making it inconsistent with such a short hearing. I therefore conclude the claim, which is only about two thirds of the Authority's accepted daily tariff, is reasonable.

## **Conclusion**

[20] 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. I also accept further monies are due in respect to kiwisaver and student loan repayments that have been deducted from the wages due to the applicant's but not forwarded to Inland Revenue.

[21] As a result I make the following orders.

[22] The respondent, Smith & Co Hospo Limited, shall make the following payments in respect to unpaid wages, notice and holidays:

- a. \$1,078.92 (one thousand and seventy eight dollars and ninety two cents) gross to the first applicant, Debra Sapphire; and
- b. \$4,998.52 (four thousand, nine hundred and ninety eight dollars and fifty two cents) gross to the second applicant, Challote Elliott; and
- c. \$3,263.18 (three thousand, two hundred and sixty three dollars and eighteen cents) gross to the third applicant, Natalya Maynard; and
- d. \$6,448.48 (six thousand, four hundred and forty eight dollars and forty eight cents) gross to the fourth applicant, Paora Smith; and
- e. \$11,095.42 (eleven thousand and ninety five dollars and forty two cents) gross to the fifth applicant, Caleb MacKenzie; and
- f. \$4,851.00 (four thousand, eight hundred and fifty one dollars) gross to the sixth applicant, Ngaire Dolman; and
- g. \$2,353.12 (two thousand, three hundred and fifty three dollars and twelve cents) gross to the seventh applicant, Maree Campbell.

[23] Smith & Co Hospo Limited is to pay \$7,295.92 (seven thousand, two hundred and ninety five dollars and ninety two cents) to the Inland Revenue Department being kiwisaver contributions to be distributed to the applicants accounts as follows:

- a. \$132.96 (one hundred and thirty two dollars and ninety six cents) to the first applicant, Debra Sapphire; and
- b. \$1,183.66 (one thousand, one hundred and eighty three dollars and sixty six cents) to the second applicant, Challote Elliott; and
- c. \$389.24 (three hundred and eighty nine dollars and twenty four cents) to the third applicant, Natalya Maynard; and
- d. \$1,872.24 (one thousand, eight hundred and seventy two dollars and twenty four cents) to the fourth applicant, Paora Smith; and
- e. \$1,731.00 (one thousand, seven hundred and thirty one dollars) to the fifth applicant, Caleb MacKenzie; and

- f. \$1,374.46 (one thousand, three hundred and seventy four dollars and forty six cents) to the sixth applicant, Ngaire Dolman; and
- g. \$612.36 (six hundred and twelve dollars and thirty six cents) to the seventh applicant, Maree Campbell.

[24] Smith & Co Hospo Limited is to pay a further \$2,375.28 (two thousand, three hundred and seventy five dollars and twenty eight cents) to the Inland Revenue Department being student loan repayments to be credited to applicants as follows:

- a. \$374.88 (three hundred and seventy four dollars and eighty eight cents) to the second applicant, Challote Elliott; and
- b. \$188.28 (one hundred and eighty eight dollars and twenty eight cents) to the third applicant, Natalya Maynard; and
- c. \$1,812.12 (one thousand, eight hundred and twelve dollars and twelve cents) to the fourth applicant, Paora Smith.

[25] Smith & Co Hospo Limited must also pay Mr Ogilvie the sum of \$3,000 (three thousand dollars) as recompense of the applicants costs.

[26] The payments specified in paragraphs [22] to [25] inclusive are to be made no later than 4.00pm Tuesday 11 February 2020.

[27] In closing I advise the respondent and its directors of two further points. The first is as the bulk of this determination's orders involve unpaid wages, holiday pay and other monies due to the applicants the directors may be held personally liable for the debt should Smith & Co fail to pay.<sup>5</sup> The second is continuing failure may result in further consequences that could potentially include the imposition of fines, the sequestration of property and/or imprisonment.<sup>6</sup>

Michael Loftus  
Member of the Employment Relations Authority

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<sup>5</sup> Sections 142W and 142Y of the Employment Relations Act 2000

<sup>6</sup> *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]