

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 582
3141781

BETWEEN

STEVEN RUSTON
Applicant

AND

AJW CONTRACTING AND
EARTHWORKS LIMITED
First Respondent

AND

WILLIAM SAMUEL LEWIS OSWALD
Second Respondent

Member of Authority: Philip Cheyne

Representatives: Peter McRae, counsel for the Applicant
William Oswald, advocate for the First Respondent and
Second Respondent in person

Investigation Meeting: 26 November 2021 at Nelson

Submissions Received: 17 December 2021 from the Applicant

Determination date: 23 December 2021

SECOND DETERMINATION OF THE AUTHORITY

A. William Samuel Lewis Oswald is to pay Steven Ruston \$2,683.98.

Employment relationship problem

[1] In an earlier determination, I ordered AJW Contracting and Earthworks Limited to pay \$2,763.80 (without deduction) in holiday pay and \$20.18 in interest to Steven Ruston. The company was also ordered to pay penalties and costs.

[2] The second respondent, Mr Oswald, is the sole director and shareholder of the company. I reserved the claim under s 142W of the Employment Relations Act 2000 against Mr Oswald personally for the holiday pay owed to Mr Ruston and interest.¹ Mr Ruston had leave to pursue the claim by notice to the Authority on 14 December 2021, if the company had not paid him the arrears of holiday pay and interest by 13 December 2021.

[3] Mr Ruston lodged a notice on 17 December 2021 asking the Authority to hold Mr Oswald liable for the unpaid holiday pay and interest. The notice was served on Mr Oswald and he was given until 22 December 2021 to reply to the Authority. Nothing has been received from Mr Oswald.

[4] I extend time from 14 December to 17 December 2021 to allow Mr Ruston to continue the claim against Mr Oswald as a person involved in the company's default in payment of holiday pay and for interest. There is nothing to suggest any prejudice to Mr Oswald by the delay. However, Mr Ruston would be deprived of a substantive right against the person involved in the company's breach of employment standards, if I did not extend time. It is in the interests of justice to extend time.

[5] The notice states that the company paid Mr Ruston \$100.00 of the sum ordered on about 10 December 2021 by direct credit. In response to Mr McRae's demands, Mr Oswald apparently advised that \$100.00 was all that the company could pay before 31 January 2022 or February 2022.

[6] I find from this information that AJW Contracting and Earthworks Limited is unable to pay the arrears of holiday pay owed to Mr Ruston. The default arose in about March 2021 when the employment ended. Non-payment of any of the undisputed amount from then until a token payment in December 2021 supports the view that the company is unable to pay the arrears. There are already findings that the default is a breach of employment standards and that Mr Oswald is a person involved in that default.

[7] Mr Ruston is entitled to leave to recover the holiday pay and interest from Mr Oswald.

¹ See *Labour Inspector v Fernando* [2020] NZEmpC 66.

[8] There will be an order against Mr Oswald for the arrears of holiday pay and interest, less the \$100 paid by the company on 10 December 2021. The unpaid balance is \$2,683.98. There is no reason to delay Mr Ruston's ability to enforce the order against Mr Oswald, by setting a future date for payment.

Philip Cheyne
Member of the Employment Relations Authority