

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 222
3128754

BETWEEN

CHLOE NEL
Applicant

AND

CA31 LIMITED
First Respondent

CHRISTINE DHARI
Second Respondent

Member of Authority: Marija Urlich

Representatives: Paul Mathews, representative for the Applicant
No appearance for the First or Second Respondent

Investigation Meeting: 18 May 2021

Determination: 24 May 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 13 October 2020 (the primary determination) the Authority found CA31 Limited had unjustifiably dismissed Ms Nel.¹ The company was ordered to pay Ms Nel lost wages, a sum of compensatory damages, arrears of wages and holiday pay, interest on the arrears and costs.

[2] By application lodged on 14 December 2020 Ms Nel seeks to enforce those orders against CA31 Limited by way of compliance order.² She also seeks orders to

¹ *Nel v CA31 Limited* [2020] NZERA 412.

² Employment Relations Act 2000, s 137.

recover personally from Ms Dhari the arrears of wages, holiday pay and interest on those sums.³ Ms Nel seeks costs in respect of this application.

The Authority's investigation

[3] CA31 Limited and Ms Dhari have not filed statements in reply and have not sought leave to do so. I am satisfied they have been served with the notice of investigation meeting, minute dated 31 March 2021 setting out directions and Ms Nel's application dated 14 December 2020. CA31 Limited was served with these documents at its address for service at 9.40am on 19 April 2021. Ms Dhari was served with these documents, along with a copy of the primary determination, on 20 April 2021 at 7.03pm. At the investigation meeting there was no appearance on behalf of CA31 Limited or Ms Dhari.

[4] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Compliance order against CA31 Limited

[5] Ms Nel confirmed she had not received any payment from CA31 Limited for any of the awards made in her favour. Those awards were:

- (i) wage arrears of \$708.00;
- (ii) compensation under s 123(1)(c)(i) of \$12,000.00;
- (iii) holiday pay of \$1796.00;
- (iv) filing fee of \$71.56; and
- (v) calculation of interest on wage and holiday pay arrears total sum of \$2504.00 from 16 August 2019 until the date payment is made in full;
- (vi) costs of \$1500.00.⁴

³ Employment Relations Act 2000, s 142Y.

⁴ [2020] NZERA 412 at [30] and [34].

[6] I accept that there has been a failure to comply with the primary determination and exercise my discretion under s 137(1)(b) of the Act to order compliance with the awards contained therein.

[7] Within seven days of the date of this determination CA31 Limited is ordered to comply with the primary determination and pay Chloe Nel the awards contained therein including calculation of interest.

Is Ms Dhari a person involved in CA31 Limited's breaches of employment standards?

[8] Given the findings made against CA31 Limited in the primary determination and its failure to date in paying the awards made in Ms Nel's favour it is appropriate to consider Ms Nel's application for leave to recover against Ms Dhari.

[9] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or Court) and, to the extent the employer is unable to pay the money owing.

[10] The first matter the Authority must be satisfied of is whether there has been default in payment of the holiday pay and wage arrears. I am satisfied this is the case. Ms Nel has not received any of the awards made in her favour in the primary determination.

[11] Next, I must be satisfied the default involves a breach of employment standards.⁵ Employment standards include the requirement to pay holiday pay under the Holidays Act 2003 and pay the minimum wage under the Minimum Wage Act 1983. I am satisfied this is the case – Ms Nel's holiday pay entitlement of \$1796.00 and wage arrears of \$708.00 calculated at the applicable minimum wage remain outstanding.

[12] Ms Dhari's involvement in the breach is now to be considered.⁶ Ms Dhari is the sole director and shareholder of CA31 Limited.⁷ As recorded in the primary determination she was directly knowingly concerned in, or party to, the breach of the

⁵ Employment Relations Act 2000, s 5.

⁶ Employment Relations Act 2000, s 142W.

⁷ [2020] NZERA 412 [4].

failure to pay Ms Nel her holiday pay and wage arrears.⁸ I am satisfied she is a person involved in a breach of employment standards under s 142W of the Act.

[13] CA31 Limited must be unable to pay the holiday and wage arrears.⁹ It remains on the Companies Register. Information provided to the Authority in respect of Ms Nel's original claim, including information provided by Ms Dhari on behalf of CA31 Limited, makes clear CA31 Limited had limited assets and significant debt.¹⁰ In addition, CA31 Limited has failed to make any payment to Ms Nel including the arrears of wages and holiday pay to date. I am satisfied there is reasonable grounds for concluding CA31 Limited is unable to pay the holiday and wage arrears owing.

Should Ms Nel be granted leave to recover arrears of wages and holiday pay from Ms Dhari personally?

[14] Ms Dhari has proposed no reason why leave should not be granted to recover the holiday pay and wage arrears directly from her. I am satisfied the grounds for granting leave to Ms Nel are made out. Ms Nel is granted leave to bring a claim to recover her holiday pay and wage arrears against Ms Dhari under s 142Y of the Act.

Can Ms Nel recover the wages or other money CA31 Limited owes her from Ms Dhari?

[15] Yes. Given the above findings Ms Nel can recover the wage arrears and holiday from Ms Dhari personally.

[16] If CA31 Limited fails to comply with the order in full at [7] above within the set timeframe Ms Dhari is liable to pay Ms Nel the arrears of wages and holiday pay within a further 14 days of that expiry of that timeframe.

Interest

[17] In the event CA31 Limited fails to comply as ordered it is appropriate that Ms Nel is able to recover interest on the arrears and that Ms Dhari, given her knowing involvement in the breaches of employment standards, is liable for payment of that

⁸ Ibid, [13] and [14].

⁹ Employment Relations Act 2000, s 142Y(2)(b).

¹⁰ [2020] NZERA 412, [4] and [11] – [14].

interest calculated from date of the grant of leave, being the date of this determination, until the arrears are paid in full. Interest is to be calculated using the civil debt calculator on the Ministry of Justice website.

Orders

[18] Within 7 days of the date of this determination CA31 Limited must comply with the primary determination for which compliance orders have been made and pay Chloe Nel \$16,075.56 and calculate interest on arrears.

[19] If CA31 Limited fails to comply within 7 days, within a further 14 days Christine Dhari must pay Chloe Nel arrears of wages of \$708.00 and holiday pay of \$1796.00 due and owing and calculate and pay interest on those arrears from date of this determination until those sums are paid in full.

Costs and reimbursement of filing fee

[20] Ms Nel is entitled to a contribution to the costs of representation incurred in seeking compliance with the determination and to recover wage arrears and holiday pay from Ms Dhari personally.

[21] CA31 Limited and Ms Dhari are ordered on a joint and several basis to pay Ms Nel \$500 as a contribution towards those costs and the filing fee of \$71.56. In making this award I have taken into account the Authority's usual daily tariff for costs and that the investigation meeting ran for approximately 30 minutes in total.¹¹

Marija Urlich
Member of the Employment Relations Authority

¹¹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.