

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 227
3147121

BETWEEN	WENDY DUONG First Applicant
AND	RAJBIR KAUR Second Applicant
AND	SHEERO JOGA INVESTMENTS LIMITED Respondent

Member of Authority: Sarah Kennedy

Representatives: Graeme Ogilvie, advocate for the Applicants
No appearance for the Respondent

Investigation Meeting: 10 May 2022

Submissions Received: 11 May 2022 from the Applicant

Date of Determination: 31 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Wendy Duong and Rajbir Kaur (the applicants) were employed by Rakesh Kumar to work at Abode café in Lower Hutt. Mr Kumar was acting on behalf of Sheero Joga Investments Limited (Sheero Joga) which is currently a registered company with the Companies Office and Mr Kumar is a director and shareholder.

[2] On 18 April 2021, Mr Kumar told both applicants the café was closing immediately and there was no more work. Mr Kumar's email to Ms Duong was provided to the Authority and its records:

I regret to inform you that the cafe is closed due to lack of funds. Mr X has agreed to keep the cafe open and is wanting to keep you on as a barista at the cafe. Please contact him ...he has accepted to purchase all chattels so we may pay all staff of overdue wages and overdue bills. Mr X will open the café again within one or two weeks I hope. If you have any questions please feel free to email me.

[3] There was a suggestion that someone else would take over the café but this never eventuated. No overdue wages or final pay were paid to either applicant. Both applicants are seeking payment of wage arrears for the last two weeks they worked, and the four weeks' notice period, and holiday pay.

The Authority's investigation

[4] An in-person investigation meeting was held on 10 May 2022 with Ms Kaur attending from India by Zoom and Ms Duong from Wanganui by Zoom. There was no attendance from the respondent.

[5] I am satisfied that the notice of investigation meeting was served to Sheero Joga's address for service as advised to the Authority. Included in that notice Sheero Joga received, was advice that if the respondent did not attend the investigation meeting, the Authority may without hearing the evidence from the respondent, issue a determination in favour of the applicant.

[6] The Authority has the power to proceed if any party without good cause fails to attend and may act fully in the matter before it, as if that party had duly attended or been represented.¹ No reason was provided by the respondent for non-attendance and the investigation meeting proceeded on this basis.

[7] For the Authority's investigation, written witness statements were lodged from Ms Duong and Ms Kaur, and they both answered questions under affirmation from me. Mr Ogilvie made submissions on their behalf.

[8] 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 the orders made. It has not recorded all the evidence and submissions received.

¹ Employment Relations Act 2000, Schedule 2, clause 12.

Rajbir Kaur

[9] Ms Kaur says she met with Mr Kumar on 18 April 2021 and he told her the business was in liquidation and closing. He later contacted her to say she could work for the new owner, but she says because of her visa, that was not an option she could take. She sent him texts about her final pay and the wages she was owed but he did not reply and nor did he reply to the letters her advocate sent on her behalf.

[10] Ms Kaur had been employed since 19 June 2019, firstly as a supervisor and then cafe manager. On review of her individual employment agreements, Ms Kaur was paid \$22.00 per hour and she was employed for 32 hours a week. She says that in the last two weeks the café was open (4-17 April 2021) she was not paid for her work. For those two weeks she claims she is owed 64 hours at \$22.00 per hour, which amounts to \$1,408.00 (gross).

[11] Ms Kaur's employment agreement provides for a four week notice period. Based on her evidence and the email Ms Duong received, Ms Kaur's employment was terminated without any notice being given on 18 April 2021. She is claiming \$2,816.00 (gross) for the notice period.

[12] Ms Kaur also says she was not paid any holiday pay when her employment ended, and she did not take all her holiday leave while she was working at Abode Café. She calculates the holiday pay she is owed as follows:

- (a) On 19 June 2020 she earned four weeks annual leave. She took two weeks of paid annual leave over the Christmas 2019 period. She says she is still owed the balance of two weeks' leave for her first completed year of service which she says amounts to \$1,408.00 (gross).
- (b) The remaining period of her employment was 43 weeks (19 June 2020 to 18 April 2021). Adding the four weeks' notice period brings that to 47 weeks. $47 \times \$704 = \$33,088$. Eight per-cent of that is \$2,647.00 and she claims that amount as her annual leave entitlement for her uncompleted second year of service.

[13] Therefore, Ms Kaur claims:

- (a) \$1,408.00 - two weeks unpaid wages;

- (b) \$2,816.00 - four weeks' wages for her notice period;
- (c) \$1,408.00 - annual leave for her first year of service; and
- (d) \$2,647.00 annual leave for the second year of service.

[14] The total amount claimed by Ms Kaur is \$8,279.00 (gross).

Wendy Duong

[15] At the time her employment was terminated on 18 April 2021, Ms Duong had been employed from 11 January 2021 as a café assistant. On review of her individual employment agreement, she was paid \$20.00 per hour and she worked a minimum of 34 hours a week. She says she was not paid for the work she did in the last two weeks the café was open (4-17 April 2021). For those two weeks she claims for 67 hours at \$20.00 per hour, which is \$1,340.00 (gross).

[16] Ms Duong provided bank statements confirming the last wage payment she received was on 12 April 2019 and her last payslip showing that payment was for the week ending 4 April 2021.

[17] Ms Duong's employment agreement provides for a four week notice period. Based on her evidence and the email she received from Mr Kumar, her employment was terminated on 18 April 2021 without any notice being given. She is claiming \$2,720.00 (gross) for the notice period.

[18] She also says that she was owed holiday pay when her employment ended because she did not take any holidays during her period of employment. She was employed for ten weeks and worked 33.5 hours per week.

[19] Ms Duong claims:

- (a) \$1340.00 - two weeks (67 hours) unpaid wages;
- (b) \$2720.00 – four weeks wages for her notice period;
- (c) \$860.00 – annual leave payment for 538 hours worked.

[20] The total amount claimed by Ms Duong is \$4920.00 (gross).

Discussion

[21] I am satisfied on the evidence of both applicants that their employment ended abruptly on 18 April 2021 and that they were entitled, in accordance with their individual employment agreements, to four weeks' notice. In addition, they say Mr Kumar had not paid them for their last two weeks of work. Mr Kumar's email conversation with Ms Duong confirms he accepts there were unpaid wages and Ms Duong's bank statements and pay slips corroborate this.

[22] It also follows that they are both entitled to holiday pay under the Holidays Act 2003, that in the ordinary course of events would have been paid in a final payment when the employment relationship ended. Because no final payment was made, they did not receive any holiday pay.

[23] They engaged an advocate who wrote to Mr Kumar on their behalf on 5 May 2021 and 26 July 2021, seeking payment of the overdue amounts and copies of their wage, time and holiday records. There was no response and they lodged a statement of problem in the Authority on 29 July 2021 seeking payment of the monies they say are owed to them.

[24] I am satisfied on the evidence provided to the Authority that Ms Kaur and Ms Duong are owed unpaid wages and holiday pay by their former employer Sheero Joga, that they are entitled to in accordance with their individual employment agreements and the Holidays Act 2000.

Costs

[25] The applicants are both seeking a contribution to their actual costs of \$2,300.00 each. The Authority's notional daily tariff rate is \$4,500.00 for the first day. While the hearing was only two hours, their advocate submits that when the respondent does not attend the hearing, the hearing time is not relevant. He says preparation time is not reduced by the non-attendance on the day of the other party and in the present case a large part of the preparation involved the detailed checking of bank records and the calculations for each part of the claims.

[26] It is also submitted that because the wage, time and holiday records were never provided, this necessitated more work in preparation for the investigation meeting.

[27] As the applicants have been successful, they are entitled to a contribution towards costs. I estimate that had the respondent attended, the matter would have taken no more than half a day. Accordingly, Sheera Joga Investments Limited is ordered to pay costs of \$2000 to each applicant.

Orders

[28] Sheero Joga Investments Limited is ordered to pay Rajbir Kaur the amounts set out above at [13] which comes to a total of \$8,279.00 (gross).

[29] Sheero Joga Investments Limited is ordered to pay Wendy Duong the amounts set out above at [19] which comes to a total of \$4920.00 (gross).

[30] Sheero Joga Investments Limited is ordered to pay \$2000.00 to Ms Kaur and \$2000.00 to Ms Duong in costs.

Sarah Kennedy
Member of the Employment Relations Authority