

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

2022 NZERA 321
3135885

BETWEEN	ANGELICA SOSA Applicant
AND	AMICI GROUP LIMITED (IN LIQUIDATION) First Respondent
	KRESHNIK FEJZULLAHU Second Respondent

Member of Authority:	Andrew Gane
Representatives:	Michelle Pollak, representative for the Applicant Mohammad Shabani for the Respondents
Investigation Meeting:	31 March 2022
Further information and submissions received:	7 April 2022 from the Applicant 13 April from the Respondent
Determination:	13 July 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Sosa was employed by AMICI Group Ltd (in liquidation) (AGL (in liq)) at its restaurant from March 2019 to 28 February 2021. She brings a claim before the Authority to recover arrears of wages, holiday pay, public holiday pay and sick pay from the period she was employed as restaurant manager, 11 November 2019 to 28 February 2021. She also seeks orders to recover these arrears personally from Mr Fejzullahu the sole director and fifty per cent shareholder of AGL (in liq) because, she says they arise from breaches of minimum employment standards which AGL (in liq) cannot pay because it did not pay her when her employment ended, it has subsequently

gone into liquidation and Mr Fejzullahu was a person involved in the breaches. She also claims a penalty against him for aiding and abetting breaches of her employment agreement, interest on the arrears and costs.¹

[2] AGL (in liq) does not consent to proceedings to continue - the liquidators have advised there is no money for creditor distribution.

[3] Mr Fejzullahu says he is not a person involved because there is insufficient connection between his actions and Ms Sosa's loss. He disputes AGL (in liq) owes Ms Sosa arrears and says Ms Sosa is mistaken in her claims. He also claims that the written employment agreement entered into by the parties was only for immigration purposes and did not reflect the true nature of the employment relationship.

The Issues

[4] The issues for investigation and determination are:

- (i) what if any arrears are owed to Ms Sosa?
 - a. has AGL (in liq) defaulted in paying those arrears?
 - b. is Mr Fejzullahu a person involved in AGL (in liq)'s breaches of employment standards?
- (ii) if so, should leave be granted to Ms Sosa to recover the arrears of minimum standards from Mr Fejzullahu personally?

The Authority's investigation

[5] The parties attended an investigation meeting on 31 March 2022. At the close of the meeting a timetable was set with the agreement of the parties to file written submissions and Mr Fejzullahu was directed to file a substantive affidavit setting out his financial position including accounts and financial records relevant to the matter. Mr Fejzullahu filed affidavits on 4 and 6 April 2022.

[6] 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. In determining this matter the Authority has

¹ AGL went into voluntary liquidation on 6 August 2021 after Ms Sosa's employment was terminated.

carefully considered all the material before it, including all evidence of the parties and their submissions.

Background

[7] Ms Sosa was employed by AGL (in liq) in its restaurant from March 2019 to 28 February 2021. She also worked at an affiliated cafe and bar from time to time. She was promoted to the position of general manager on 11 November 2019 and signed a written individual employment agreement (IEA). Schedule 1 of the IEA includes the following clauses relevant to this matter:

Position Title	General Manager
Hours of work	30- hours per week
Salary	\$22.50 per hour
Annual Leave	4 weeks per year
Primary Objectives	Manager Restaurant General Operations

[8] On 2 January 2021 Mr Fejzullahu advised Ms Sosa he was planning on closing the restaurant down on 29 January 2021 as the business was not making any money. He stated he had emailed Ms Sosa giving three weeks' notice of termination. Ms Sosa's IEA required that she receive one month's notice of termination. Mr Fejzullahu produced a copy of the alleged email as evidence. Ms Sosa denied having ever received the email. When Ms Sosa arrived at work and met with Mr Fejzullahu on 2 February 2021 Mr Fejzullahu informed her that her last day of work was 29 January 2021.

[9] On 16 February 2021 Ms Sosa's representative wrote to AGL (in liq) as her employer raising a personal grievance and seeking remedies and arrears and a contribution to costs. Ms Sosa filed a statement of problem against AGL (in liq) on 7 April 2021 and named Mr Fejzullahu as a second respondent.

[10] AGL (in liq) went into voluntary liquidation on 6 August 2021. As AGL (in liq) is in liquidation without consent from the liquidator or an order of the High Court the proceedings against AGL (in liq) in relation to Ms Sosa's personal grievance claim cannot continue.

[11] On 1 February 2022 Ms Sosa filed an amended statement of problem seeking orders now before the Authority.

Discussion

i) What if any arrears are owed to Ms Sosa?

[12] As set out above, Ms Sosa's employment agreement provides she will be paid every week for 30 hours at the agreed hourly rate of pay at \$22.50. An examination of the pay records provided and Ms Sosa's bank account records show wage payments received from AGL (in liq) were made at the rate of \$22 per hour.

[13] In evidence Ms Sosa stated she was not aware that she was being underpaid until sometime in mid-2020 when she requested and got access to some of her payslips. At this time, she raised the underpayment issue with Mr Fejzullahu who was responsible for calculating and paying wages on behalf of the company, but he did not address this breach and, I find, knowingly continued to pay her 50 cents less than her contractual hourly rate.

[14] At the investigation meeting Mr Fejzullahu said Ms Sosa's pay rate was \$22 per hour not the rate of \$22.50 specified in the IEA and alleged that the IEA had been drafted by Ms Sosa's lawyer to support her visa application and both parties had no intention to implement the agreement.

[15] Ms Sosa strongly denied this allegation and when questioned Mr Fejzullahu was unable to provide any corroborating evidence to support his allegation.

[16] On this issue I find that AGL (in liq) and Ms Sosa are bound by the terms and conditions of the written IEA they have both signed.

Wage arrears

[17] Ms Sosa's payslips for the period 11 November 2019 to 29 January 2021 and examination of Ms Sosa's bank records support that Ms Sosa was paid at only \$22 for every hour worked in this period. Ms Sosa never consented to this underpayment which is an unlawful deduction.² Ms Sosa was underpaid at a rate of 50 cents per hour for 1,668.42 ordinary hours, 205.61 annual leave hours, 8 public holiday hours and 30 hours sick leave being all the hours she was paid for in the period 17 November 2019 to 31 January 2021 amount to **\$1,032.45 (gross)**.

² Wages Protection Act 1983, s4.

[18] Ms Sosa was also not paid her 4 weeks' notice period when her employment was terminated being **\$2,700 (gross)**.

[19] An examination of Ms Sosa Ms Sosa's payslips contrasted against her bank account records for the period 11 November 2019 to 29 January 2021 show Ms Sosa was also underpaid for the following pay periods:

Ending 5 January 2020 -	\$239.58
Ending 10 May 2020 -	\$0.35
Ending 17 May 2020 -	\$0.18
Ending 5 July 2020 -	\$3.00
Ending 25 October 2020 -	<u>\$482.80</u>
Total owed	\$725.91

Sick leave arrears

[20] Ms Sosa's payslips for the period 11 November 2019 to 29 January 2021 show AGL (in liq) owes her five hours of sick leave at \$22.50 per hour for underpayments in the pay period ending 9 February 2020 equating to **\$123.75** gross. AGL (in liq) breached section 71(1) of the Holidays Act 2003 when it failed to pay the Applicant sick leave based on her relevant daily pay.

Holiday pay arrears

[21] Ms Sosa's payslips show she received paid annual leave hours each week on a "pay as you go" basis. It is unclear how these hours were worked out as they are not always calculated at 8% of her gross earnings for the relevant week and she did not receive payment for annual leave in every pay week. I am satisfied there were 15 weeks out of 64 that Ms Sosa did not receive holiday pay.

[22] AGL (in liq) breached section 16 (1) of the Holidays Act 2003, and clause 12 of Ms Sosa's IEA, when it failed to provide her with four weeks annual leave per annum during her tenure, instead opting to pay her annual leave as a casual with her weekly pay, when Ms Sosa did not meet the criteria in section 28(1) of the Holidays Act 2003 as she was a permanent employee.

[23] Section 28(4) of the Holidays Act 2003, stipulates:

If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[24] For the period 11 November 2019 to 28 February 2021 (including her unpaid notice period of four weeks), Ms Sosa did not receive her contractual and statutory entitlement to four weeks annual leave per annum. She did receive some "pay as you go" holiday pay, however she had not agreed to this in her IEA in breach of the s 28(1) of the Holidays Act 2003. Pursuant to s 28(4) of the Holidays Act 2003, Ms Sosa is owed annual leave for the period 11 November 2019 to 29 January 2021. This equates to 26 days annual leave, based on a tenure of approximately one year, 15 weeks and four days.

[25] Ms Sosa is owed four weeks annual holiday pay for the period 11 November 2019 to 11 November 2020 plus annual leave from 11 November 2020 (including one months' notice she should have received) to 28 February 2021.

[26] Based on 4 weeks per annum at base pay rate only Ms Sosa was entitled to be paid **\$3,510 (gross)** holiday pay from 11 November 2019 to 28 February 2021.

Public holiday pay arrears

[27] AGL (in liq) breached section 49 of the Holidays Act 2003, when it failed to pay Ms Sosa the public holiday pay she was entitled to for the period 11 November 2019 to 29 January 2021 as follows:

(i) Four hours underpayment for the two public holidays in the pay period ending 12 January 2020 where she did not receive payment based on her relevant daily pay for those two days which was unworked amounted to 4 hours being \$90 gross.

(ii) 13 public holidays she did not work during her tenure with AGL (in liq), but that fell on her usual days of work (Monday to Friday each week) being:

(a) 2019: Christmas Day and Boxing Day;

- (b) 2020: nine public holidays including (Waitangi Day, Good Friday, Easter Monday, Anzac Day, Queens Birthday, Labour Day, Christmas Day and Boxing Day);
- (c) 2021: New Year's Day and the day after.

[28] Ms Sosa is entitled to no less than her relevant daily pay or average daily pay for the relevant public holidays and this equates to of \$1,755.00 (gross).

[29] The \$1,755.40 gross plus the \$48.60 gross for the underpayment of 2 hours in January 2021 comes to a total of **\$1,804,00 (gross)**.

[30] Ms Sosa gave evidence that she raised her concerns verbally with Mr Fejzullahu about all of the underpayments and issues with holiday pay on an "as you go" basis. He would refer her to Antonio (a manager) or an accountant, who referred her back to Mr Fejzullahu. They told her Mr Fejzullahu made all the decisions and they could not rectify the numerous underpayments of wages. I accept this was the case.

[31] I find that AGL (In liq) underpaid Ms Sosa the above amounts in breach of the statutory duty to pay annual holiday pay.

ii) Has AGL (in liq) defaulted in paying the arrears?

[32] On 21 January 2022 Ms Sosa's representative wrote to the liquidator setting out in a creditors claim form wage arrears owing to Ms Sosa. On 9 February 2022 the liquidator responded advising there was no money for creditor distribution. AGL (in liq) has therefore defaulted in paying those arrears which I have found are due and owing.

iii) Is Mr Fejzullahu a person involved in AGL (in liq)'s breaches of employment standards?

[33] 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.

[34] Mr Fejzullahu's involvement in the breaches are now to be considered.³ Mr Fejzullahu is the sole director and 50% shareholder of AGL (in liq). In Mr Fejzullahu's 14 March 2022 witness statement he admits that he opened the restaurant Ms Sosa worked at, and that he was a director of the company that ran the business. In oral evidence Mr Fejzullahu told the Authority that he was the boss and made the hiring, work rosters and schedules, payment of wages and holiday pay decisions on AGL (in liq)'s behalf as the managing director, and that he alone had the sole right to make those decisions.

[35] The evidence showed he had at least aided, abetted, counselled or procured the underpayment of the wages provided for in the employment agreement. I am satisfied he is a person involved in a breach of employment standards under s 142W(1) of the Act and an officer of the company under s 142W (2) of the Act.

iv) Should Ms Sosa be granted leave to recover arrears of wages and holiday pay from Mr Fejzullahu personally?

[36] The Authority was asked to grant leave to recover arrears in wages from Mr Fejzullahu. Leave is granted on the basis that it is clear that Mr Fejzullahu as a director of AGL (in liq) was a person involved in a breach in terms of s 142W of the Employment Relations Act 2000. The evidence showed he had at least aided, abetted, counselled or procured the underpayment of the wages provided for in the employment agreement. Further, there had already been evidence that AGL (in liq) would be unable to pay the arrears in wages or other monies. I am satisfied having found arrears are owed by AGL (in liq) which are unlikely to be paid and Mr Fejzullahu is a person involved in the breaches which gave rise to the arrears, it is appropriate for leave to be granted for Ms Sosa to recover. Mr Fejzullahu has provided two affidavits and gave evidence to the Authority as to his impecuniosity and I have considered this in coming to my decision. Mr Fejzullahu is a person involved in the breach within the meaning of s 142W of the Act and that the grounds for granting leave to Ms Sosa are made out under s 142Y of the Act.

³ Employment Relations Act 2000, s 142W.

v) Can Ms Sosa recover the wages or other money AGL (in liq) owes her from Mr Fejzullahu?

[37] Yes, given the above findings Ms Sosa can recover but that she succeeds in her claims against Mr Fejzullahu only to a limited extent, the following wage arrears and holiday and public holiday pay arrears from Mr Fejzullahu personally:

Hours	Gross amount owed
Sick leave 5.5 ordinary hours	\$123.75
Statutory holiday arrears four ordinary hours	\$90.00
Underpayment of 50c on 1,668.42 ordinary hours, the 205.61 annual leave hours, the 8 hours statutory holiday hours and the 30.50 sick hours (1912.53 ordinary hours total)	\$1032.45
Four week notice period	\$2,700
Holiday Pay from November 2019 to 28 February 2021 (s 23 Holidays Act 1981)	\$3,510 (calculation on termination of employment)
11 Public Holidays	\$1,804.00
Arrears	\$725.91
Total gross recoverable arrears owing	\$ 9,986.11

Penalties

[38] I must next consider whether an award of a penalty (or penalties) is warranted against Mr Fejzullahu. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁴

[39] In *Labour Inspector v Southern Taxis Ltd* the Court of Appeal observed that:

“[50] Sections 142W and 142Y allocate, as between directors and other officers on the one hand, and employees on the other hand, the risk that a company will be unable to meet its minimum obligations under employment legislation. The effect of these provisions is to impose the risk of non-performance of those obligations by the company on a director who knows all the primary facts relevant to the company’s breach, unless the director reasonably relied on information (for example, legal advice) provided by a third party, or has taken all reasonable and proper steps to ensure the company complied with the relevant provisions. A director cannot escape liability on the basis that they did not turn their mind to the legal consequences of what they knew.

⁴ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

Nor can they escape liability on the basis that they genuinely but erroneously believed that the obligations in question did not apply, unless that incorrect understanding of the position was the result of reasonable reliance on information supplied by another person.⁵

We do not consider that there is anything in the legislative history of pt 9A that supports a different approach.”

[40] The maximum penalty against an individual under s 134 of the Act is \$10,000 per breach.⁶ A defendant's ability to pay a penalty will not dictate absolutely whether one is imposed or its amount but, must be a relevant consideration among others in the circumstances of any particular case, otherwise the Authority might well find itself imposing a penalty for which there is no realistic prospect of recovery.

[41] Mr Fejzullahu, in accordance with section 134 of the Act, incited, instigated, aided, or abetted breaches of Ms Sosa’s employment agreement. Mr Fejzullahu is liable for the under payment of Ms Sosa’s wage arrears that resulted from the unlawful wage deductions by paying her less than what was agreed. Mr Fejzullahu is also liable for the under payment of Ms Sosa’s annual holiday pay that resulted from the unlawful wage deductions not forming part of her total earnings on which the holiday pay calculation was based because she was a permanent employee and not a casual employee.

[42] There is compelling evidence of direct loss suffered by Ms Sosa as a result of the breaches including financial difficulties. In addition, she has spent time and resources seeking to enforce obligations owed in law and which were clearly described and expressly agreed by the parties in the employment agreement.

[43] There is evidence before the Authority that Mr Fejzullahu may have some difficulty in paying any penalty, however given his role in overseeing the breaches of Ms Sosa’s employment standards he should be held accountable.

[44] Balancing the need to avoid setting the level of penalty at such that there would be a significant risk of non-payment by Mr Fejzullahu against the public interest to

⁵ Labour Inspector v Southern Taxis Limited [2021] NZCA 705.

⁶ Employment Relations Act 2000, s 135.

impose a penalty which acts as a deterrent to others who may contemplate engaging in such behaviour, I consider in all the circumstances that applying a penalty of 60% of total provisional breach is appropriate.

[45] Mr Fejzullahu is liable to a penalty pursuant to 134 of the Act 2000 for his breaches of the terms of the Ms Sosa IEA.

[46] Standing back, looking at that figure, including in comparison to other cases, I take a global view of the breaches of the employment standards and conclude that a fair penalty is **\$6,000** for a breach of Ms Sosa's employment agreement. Mr Fejzullahu is ordered to pay half the penalty to Ms Sosa to compensate her for the inconvenience and resources expended in pursuing this matter. The penalty is to be paid within 28 days of the date of this determination.

Interest

[47] Ms Sosa is able to recover interest on the arrears and Mr Fejzullahu, given his knowing involvement in the breaches of employment standards, is liable for payment of that interest calculated from 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.⁷

[48] Mr Fejzullahu is ordered to calculate and pay interest on total arrears ordered, using the civil debt interest calculator, within 28 days of the date of this determination.

Summary of orders

[49] Ms Sosa's claims for wage and holiday pay arrears have been upheld as have her claims for interest and an award of penalty.

[50] The Authority orders as follows:

- a) Within 28 days of the date of determination Mr Fejzullahu is ordered to pay Ms Sosa the following sums:
 - i) \$9,260.20 total gross arrears

⁷ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

ii) \$6,000 penalty half of which is to be paid to Ms Sosa and half to the Crown

b) Within 28 days of the date of determination Mr Fejzullahu is to calculate and pay Ms Sosa interest on the wage arrears, and holiday pay as awarded in paragraph [37] above.

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[52] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.

Andrew Gane
Member of the Authority