

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 336
3138843

BETWEEN

JASON SHAND
Applicant

AND

VIETNEW CORPORATION
LIMITED T/A SAIGON
RESTAURANT & BAR PALMY
Respondent

Member of Authority: Michael Loftus

Representatives: Kelly Coley, advocate for the Applicant
Jeremy McGuire, counsel for the Respondent

Investigation Meeting: On the papers with input up to and including 20 July 2022

Date of Determination: 20 July 2022

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 13 July 2022 I issued a determination in which I concluded Mr Shand had a personal grievance as he had been unjustifiably dismissed.¹ I also concluded he was due unpaid wages but did not have enough information to quantify the amount owing. The parties were asked to try and agree the amount but leave was reserved for a return to the Authority in the event they were unable to do so.

[2] Mr Shand has since quantified the amount sought and says he is due \$1,874.97 gross.

¹ *Shand v Vietnew Corporation Limited* [2022] NZERA 318

[3] That said the parties have been unable to agree that is correct and Mr Shand now asks the Authority determine the issue. In accepting the request I note the Authority has been a party to correspondence between Ms Coley and Mr McGuire which confirms an impasse.

[4] Appended to the request is a further one asking I defer the timeline for an exchange on costs given they continue to be incurred. In the circumstances that is a rationale which warrants acceptance.

Discussion

[5] As well as concluding Mr Shand had established something was due, the original determination also recorded that this was a situation in which s 132 of the Employment Relations Act 2000 (the Act) allowed me to accept his claim unless the respondent could disprove it. That must apply to the claim in its entirety and while the hours Mr Shand was claiming to have worked was known there is the possibility that once it knew the amount sought and how it was calculated, Vietnew might be capable of bringing that into question.

[6] It has been given an opportunity to do so but can't.

[7] There is nothing untoward about Mr Shand's calculation and Vietnew has no wages and time record nor any others that might shed light on the issue. Indeed, Vietnew goes so far as to state in an e-mail dated 19 July that "... it never knew [the hours] had been worked at the time as Mr Shand never told Mr Do." That was one of the reasons the claim was accepted in principle. Vietnew could offer no evidence contradicting it and it now concedes it can add nothing more.²

[8] It appears from the correspondence that Vietnew is still implying the reason it cannot contradict the claim is that Mr Shand failed to either maintain or produce relevant wages and time records. This is a line that was enunciated at the original investigation and which has been rejected. The duty to maintain such records is the employers – not the employees.³

[9] Given the absence of anything which might suggest Mr Shand's calculation is inaccurate, I accept it. As already said, I also accept the request the dates originally set for an exchange on costs be amended.

² E-mail McGuire to the Authority dated 20 July 2020

³ Section 130(1) of the Employment Relations Act 2000

Orders and Costs

[10] As a result the orders paragraph, paragraph [65] of the original determination, is deleted and replaced with:

[65] As a result I order the respondent, Vietnew Corporation Limited, pay Jason Shand:

- (a) \$6,200.00 (six thousand, two hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and.
- (c) A further \$1,874.97 (one thousand, eight hundred and seventy four dollars and ninety seven cents) gross being wages due as a result of Vietnew's failure to pay the minimum wage on occasions.

[11] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mr Shand may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this, and not the earlier,⁴ determination. From that date Vietnew will 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.⁵

Michael Loftus
Member of the Employment Relations Authority

⁴ Above n 1

⁵ www.era.govt.nz/assets/Uploads/practice-note-2.pdf