

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 743
3191939

BETWEEN CARL SHANKS
 Applicant

AND RAY THOMAS and RUTH
 THOMAS trading as TE MATAI
 PARTNERSHIP
 Respondents

Member of Authority: Philip Cheyne

Representatives: Damien Pine, counsel for the Applicant
 Respondents in person

Submissions and
Information Received: 24 October 2023 from the Applicant
 7 November 2023 from the Respondents

Date of Determination: 13 December 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination,¹ I found that Mr Shanks had a personal grievance against his former employer Mr and Mrs Thomas trading as Te Matai Partnership. Remedies were set. I also found that Mr Shanks had established arrears of wages under the Minimum Wage Act 1983 and arrears of holiday pay under the Holidays Act 2003. Leave was reserved for Mr Shanks to provide calculations and for Mr & Mrs Thomas to reply, following which I would determine the amount of arrears owed.

¹ *Shanks v Thomas and anor trading as Te Matai Partnership* [2023] NZERA 585.

[2] Costs were also reserved to be determined following an exchange of submissions, if not agreed.

[3] I have received a memorandum and submissions for Mr Shanks and a response from Mr & Mrs Thomas.

[4] This determination resolves the arrears of minimum wages and holiday pay, together with the issue of costs.

Minimum Wage arrears

[5] Counsel's calculations are based on Mr Shanks having worked 107.75 hours in the fortnight ending Sunday 5 April 2020. Counsel has calculated that Mr Shanks should have been paid a further \$524.47 for the fortnight. Mr and Mrs Thomas did not comment on the point.

[6] Two points arise. Having rechecked the hours noted by Mr Shanks, I find that he worked 98.25 hours in the fortnight ending Sunday 5 April 2020. That was the figure first advanced by counsel, but I had suggested that Mr Shanks appeared to have worked 107.75 hours. The first figure was correct.

[7] The fortnight straddled the change in the minimum rates payable under the Minimum Wage Act 1983. Although Mr Shanks was not employed by the hour, it is appropriate to test compliance with minimum rates applicable as at the date he performed the work. Before 1 April 2020 the rate was \$1,416 per fortnight plus \$17.70 for hours in excess of 80 for the fortnight. Those rates increased to \$1,512.00 per fortnight and \$18.90 for each hour in excess of 80 per fortnight. There were 74.25 hours worked before the increase in rates and 24 hours after the increase. Minimum wages at the different rates should have been \$1,767.83. Te Matai Partnership paid Mr Shanks \$1,730.77 for the fortnight. The arrears are \$37.06.

Holidays Act arrears

[8] I note the earlier finding that Mr Shanks became entitled to annual holidays of 4 weeks on 23 March 2021. When his employment ended in August 2021, after

allowing for annual holidays taken by then, Mr Shanks was entitled to 14 days annual holidays payable at the rate of his ordinary weekly pay at the time. I agree with counsel's calculations that Mr Shanks was entitled to \$2,692.48 in accordance with s 24 of the Holidays Act 2003.

[9] Counsel's calculations of final holiday pay include three days final salary. The Partnership did not comment on that, so I take it as correct.

[10] The final payslip shows gross earnings from 23 March 2021 were \$22,462.44 after deducting the 8% holiday pay payment made at the time. Together with the payment for 14 days annual leave, Mr Shanks total gross earnings should have been \$25,154.92. Holiday pay at 8% on that figure is \$2,012.39, in accordance with s 25 of the Holidays Act 2003.

[11] Combining salary due (\$576.96) with payment for untaken annual holidays (\$2,692.48) and 8% on gross earnings after 23 March 2021 (\$2,012.39), Mr Shanks should have received \$5,281.83 in salary and holiday pay when his employment ended. He was paid \$2,601.93. There are arrears of \$2,679.90.

Costs

[12] Mr Shanks seeks costs of \$14,000.00 plus GST. The partnership submits that costs awarded to Mr Shanks should be fixed at \$4,500.00.

[13] Mr Shanks as the successful party is entitled to costs.

[14] The GST implications (if any) with respect to cost orders are not a matter for the Authority.

[15] On 30 May 2022, in correspondence between counsel for both parties, Mr Shanks agreed to accept the Partnership's offer of \$25,000.00 in settlement of his employment relationship problem. Counsel for Mr Shanks drafted a record of settlement in standard terms, had Mr Shanks sign it and sent it to counsel for the Partnership. It is apparent from correspondence in July and August 2022 between

respective counsel that the draft was never signed by or for the partnership and never became enforceable under s 149 of the Employment Relations Act 2000.

[16] The correspondence before and after the draft record of settlement establishes that the offer was on a without prejudice except as to costs basis. The offer is therefore a factor that the Authority can consider now as part of determining costs.²

[17] Mr Shanks commenced these proceedings in September 2022, after the settlement did not proceed. The investigation meeting was on 7 June 2023. Mr Shanks seeks an uplift from the Authority's usual daily tariff approach for two reasons.

No uplift for conduct

[18] It is submitted that, by not signing the draft, the Partnership unnecessarily increased Mr Shanks' costs. Counsel submits that he had to research the enforceability of the offer.

[19] No details of additional costs have been provided. Without such details, I am not able to have regard to the point.

[20] There were issues with wage and time records and some calculations after the investigation meeting which are also advanced as reasons to support an uplift from the Authority's standard daily tariff.

[21] These issues are not sufficient reason to warrant an uplift. The Partnership's office book record of work times was accepted as a record of hours from when it started in June 2020. The gap from March to May 2020 was covered by Mr Shanks' notebook. Time spent in an unsuccessful attempt to advance Mr Shanks' account of his work times after June 2020 does not justify a departure from the daily tariff. Little extra time was required to advance the claim for time worked before June 2020, based on Mr Shanks' notebook and the absence of Partnership time records. That and the

² *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

Authority's requirement for further calculations are sufficiently recognised by treating the matter as a whole day when the meeting took a little less than a whole day.

Failure to accept a reasonable settlement offer warrants an uplift in costs

[22] I am told that Mr Shanks' final costs were about \$21,000.00, so costs after the settlement offer did not proceed were approximately \$16,500.00. The submission is that the post-offer costs were avoidable and are now recoverable from the Partnership. I am asked to order costs of \$16,100.00.

[23] I must balance the principle that costs in the Authority should be modest with the principle that employment institutions should take a "steely approach" in cases pursued for vindication but which result in a monetary outcome inferior to an earlier settlement offer.³

[24] The Partnership in its submissions says that it did not sign the record of settlement because it had become clear to them "how fraudulent" the claim for minimum wage breaches was. To some extent I accepted the Partnership's position with respect to hours of work. However, Mr Shanks' employment relationship problem centred on his personal grievance claim, which was successful and which resulted in remedies well in excess of the proposed settlement. At this point, the Partnership achieved an inferior monetary outcome just to establish that Mr Shanks noted hours of work were wrong. The outcome is similar to that of the employee in the *Bluestar* case.

[25] In *Ion v Maori Investments Limited*,⁴ the Authority set an uplift at 50% of daily tariff to reflect the employee's refusal of two settlement offers, one of which was made quite early on. The offers were without prejudice except as to costs and were relevant because the employee had failed to match those offers despite continuing with the claim. The Authority had regard to other determinations in fixing that amount as the appropriate point of balance between the principles mentioned above.

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [109].

⁴ *Ion v Maori Investments Limited* [2022] NZERA 251.

[26] Here, the proposed settlement was early in the course of the problem. Adopting the approach taken in *Ion*, I fix an uplift of \$2,250.00 as appropriate. That sum will be added to the daily tariff of \$4,500.00 for a one day investigation meeting.

[27] Mr Shanks is also entitled to recover a further \$71.55 as the application fee paid to commence the claim.

[28] Costs total \$6,821.55.

Orders

[29] Ray Thomas and Ruth Thomas trading as Te Matai Partnership are to pay Carl Shanks the following amounts:

- (a) arrears of \$37.06 (gross) under the Minimum Wage Act 1983; and
- (b) arrears of \$2,679.90 (gross) under the Holidays Act 2003; and
- (c) Costs of \$6,821.55.

Philip Cheyne
Member of the Employment Relations Authority