

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 84  
3169643

BETWEEN	ASHWIN LAL Applicant
AND	JAI ENTERPRISES CO LIMITED First Respondent
AND	LAL'S ENTERPRISES LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: David Reeves, counsel for the Applicant  
No attendance for the Respondents

Investigation Meeting: 21 February 2023

Determination: 23 February 2023

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**DETERMINATION OF THE AUTHORITY**

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- A. Within 28 days of the date of this determination:**
- (i) Jai Enterprises Co Limited (JEL) must pay Ashwin Lal the sum of \$79,023 in wage arrears and \$6,321.84 as holiday pay; and**
  - (ii) Lal's Enterprises Limited (LEL) must pay Ms Lal the sum of \$13,737 in wage arrears and \$1,098.96 as holiday pay; and**
- B. For the period from 1 April 2022 until the sums due are paid in full, JEL and LEL must also each pay Ms Lal interest on the sums it owes her, with interest to be calculated using the civil debt interest calculator.**

**C. JEL and LEL must also, on a joint and several basis, pay Ashwin Lal costs of \$2,250 and expenses of \$71.56.**

**Employment Relationship Problem**

[1] Ashwin Lal sought findings that she was owed wage arrears and other entitlements for work she did from 2016 to 2020 in two grocery stores in Dargaville owned by the two respondent companies.

[2] Her former husband Amitesh Lal is the sole shareholder and director of both companies. Lal's Enterprises Limited purchased Dargaville Four Square in 2009. Jai Enterprises Co Limited purchased Victoria Superette in 2012.

[3] Ms Lal said she was required to work in each store after their purchase and continued doing so until shortly before she separated from Mr Lal in 2020.

[4] Inland Revenue records show JEL and LEL reported paying Ms Lal wages, at various times and of various amounts, from April 2015 to November 2019. Her wage arrears claim was, however, limited to the six-year period before she raised her claim with the two companies in February 2022.<sup>1</sup> It covered the four tax years running from 1 April 2016 to 31 March 2020.

[5] Ms Lal said she was not aware of the supposed payment of wages as reported to IRD. She said she had not received those wages and did not have access to the money that the companies had reported paying her as wages.

[6] Ms Lal's application to the Authority also included a claim of a personal grievance in relation to failure to pay wages. At the investigation meeting she opted not to pursue that claim, focussing instead on her arrears claim.

[7] Ms Lal said she only learned of the reported wage payments after she had separated from Mr Lal in 2020. She had moved to Whangarei and got a job. As part of starting that job, she applied for an IRD number. She then discovered IRD already had a tax number for her. On further inquiry she was able to access IRD's records of what LEL and JEL had reported paying her under that tax number between April 2015 and November 2019. She said seeing the income information held by IRD was "a

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<sup>1</sup> Wages Protection Act 1983, s 11 and Employment Relations Act 2000, s 141.

complete shock”. She sought legal advice about her employment rights. Her lawyer wrote to the companies. Counsel for the companies sought an extension of time to respond on the basis that they were “in the process of arranging for their respective accountants to provide copies of all employment records”. The companies provided no records by the expected date and Ms Lal’s counsel lodged her application to the Authority.

[8] Ms Lal’s application said her hours of work “were generally between 7am and 8pm, seven day per week”.

[9] JEL and LEL, in their statement in reply, did not dispute Ms Lal had worked in the stores and that she did so as an employee. However they said Ms Lal had not worked as many hours in the stores as she claimed. Some of the time she was at the store was said to be because she was bringing Mr Lal food from home. They said she was “afforded flexibility as to when she could and could not work because of her relationship with [Mr Lal]”, including time spent on study when she began a course at NorthTec. They also said Ms Lal was responsible for the companies’ payroll and had full access to their internet banking account, including Mr Lal’s account into which her wages were paid. They also said Ms Lal had Mr Lal’s eftpos card and a copy of his credit card which she had used “lavishly”.

### **The Authority’s investigation**

[10] The Authority’s investigation began with a case management conference in November 2022 where, after discussion with the parties’ counsel, directions were set for Ms Lal and Mr Lal to provide written witness statements and additional documents. From the companies those documents were to include bank statements and pay records showing payments to Ms Lal. Those directions also included setting a date for an investigation meeting on 21 February 2023. After discussion with Ms Lal’s counsel and counsel for LEL and JEL, Umar Kuddus, the venue for the investigation meeting was agreed as Whangarei rather than Dargaville. Whangarei was more convenient for Ms Lal, her counsel and for Mr Kuddus, who is based in Auckland. Mr Kuddus advised that Mr Lal would be prepared to travel to Whangarei from Dargaville, a drive of around 45 minutes. The directions issued included a note stating “witnesses are expected to attend the investigation meeting ... and answer questions”. The Notice of Investigation Meeting, in its statutory form, included a note advising, among other things, that if the

respondent did not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[11] While Ms Lal observed those directions, lodging a witness statement and various additional relevant documents, Mr Lal did not. When an Authority Officer contacted Mr Kuddus to ask why Mr Lal had not lodged a witness statement due on 27 January, she was told Mr Kuddus had difficulty contacting his client. In the week before the investigation meeting the officer made a routine telephone call to Mr Kuddus to check on the number of attendees who were expected at the meeting venue, as this can sometimes include support people or assisting counsel not already noted in the Authority file as parties, witnesses or representatives. In that telephone call Mr Kuddus said he and Mr Lal expected to attend by audio visual link only. When that conversation was reported to me I had a message sent by email to Mr Kuddus advising that no application to attend by AVL had been made or granted and, given the nature of the dispute and points in issue, it was unlikely to be a matter where attendance by that mode was appropriate. In subsequent responses from Mr Kuddus, he initially claimed an Authority officer had told him an AVL connection would be “accommodated” and then claimed no formal application for such an arrangement was necessary as he had mentioned attending by AVL during discussion at the case management conference in November. No arrangements were made at the conference call for attendance by AVL.

[12] Twenty-three minutes before the investigation meeting was due to begin Mr Kuddus sent an email to the Authority office asking for the meeting to be adjourned because he had received instructions from Amitesh Lal that Mr Lal was “medically unwell to attend” and he would provide a medical certificate shortly. I had a message of response sent advising that the meeting would proceed because, in light of other delays and attempts to attend the meeting by AVL only, I was not satisfied as to the bona fides of this belated claim that Mr Lal was now too unwell to attend.

[13] This doubt regarding the bona fides of the reason given was confirmed on reviewing the certificate sent by email at 11.06 am. It was signed by a general practitioner based in Hikurangi, an hour’s drive away from Dargaville where Mr Lal resides.

[14] The doctor’s certificate said Mr Lal “reported to me on 21/02/2023 stating that he has been/will be unfit for work from 21/02/2023 and fit to return to work

24/02/2023". Significantly the certificate did not claim the doctor had seen or assessed Mr Lal that day or recently. Rather its clear wording indicated it was based on what the "patient reported to me" (underline emphasis added). It was an instance of the distinction that the relevant Medical Council standards for a medical certificate draw between "patient comment" and "clinical observation".<sup>2</sup> The certificate did not include an examination date and did not include a clinical opinion in the section regarding the assessment of time before the patient is fit for work (or other activities), again both elements required by the Medical Council standards.

[15] Taking account of those limitations in the content of the certificate, and the context of other delays and steps to avoid attending the investigation meeting, I was satisfied Mr Lal had failed to show good cause for failing to attend or be represented. It was a situation where the Authority could reasonably exercise its discretion to act as fully in the matter before it as if the party had duly attended or been represented.<sup>3</sup> In reaching that view I also considered the opportunities that the respondent companies and Mr Lal had to provide information, what information had been provided by them and the prospect that, as elaborated on in this determination, that the outcome would largely be determined on the content of the companies' statement in reply (which accepted Ms Lal was an employee) and the IRD records of payments said by the companies to be her wages.

[16] Having decided to proceed with the investigation meeting I heard some additional oral evidence from Ms Lal, given under affirmation. She described working longer hours than those accepted in the companies' statement in reply. Ms Lal acknowledged, however, that she had not kept or had not provided evidence to corroborate her account of the hours she spent working in the stores. This was not a criticism of her as she did not know she needed to keep and record such information. Rather, given the companies' concession she had been an employee for some of the time at least, it was the companies who had failed to keep and then provide the employment records that they are required by law to keep of wages and hours of employees.<sup>4</sup>

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<sup>2</sup> <https://www.mcnz.org.nz/assets/standards/0541c585e7/Statement-on-medical-certification.pdf>

<sup>3</sup> Employment Relations Act 2000, Schedule 2, clause 12.

<sup>4</sup> Employment Relations Act 2000, s 130 and s 132.

[17] Ms Lal agreed her hours of work had varied over the years due to other commitments on her time, including when her daughter was born eight years ago and when she began a course of study at Northtec in 2016. She also agreed not to pursue her personal grievance claim which would require some further technical steps to satisfy the exceptional circumstances test that applies to grievances not raised within 90 days of the causative event.

[18] In that light, Ms Lal's counsel made concise closing submissions which persuasively focussed on the strength of her claim for payment of the wages reported in the IRD records. While there was arguably a case for a broader assessment of the hours she had worked over the different years, the IRD records were submitted to show the companies accepted she was owed at least the amounts reported in those records. The companies had produced no pay records or any other reliable evidence to show Ms Lal was paid those amounts or otherwise had access to that money.

### **The issues**

[19] The issues requiring determination were:

- (a) When was Ashwin Lal an employee of JEL and/or LEL?
- (b) Did JEL and LEL fail to pay Ms Lal wages due for her work?
- (c) For what period is Ms Lal entitled to an order for arrears of wages and other entitlements?
- (d) What amounts are due to her?
- (e) Should interest be paid on those amounts?
- (f) Should either party contribute to the costs of representation of the other party?

[20] 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.

### **The period of employment**

[21] As already noted, LEL and JEL had accepted in their statement in reply that they had an employment relationship "for a period of time" with Ms Lal but they claimed she was paid all her wage and statutory entitlements during the time period that she was an employee. Based on the objective reality of what JEL and LEL reported to

IRD, this was not a situation, as found in some other cases, where work done in a family business was not intended to be treated as part of an employment relationship.<sup>5</sup>

[22] While Ms Lal may have worked for more or longer hours than those which may be deduced from the IRD records of wages said to have been paid for, LEL and JEL could not deny she had worked for whatever period was said to be covered and paid for in those records. Having provided that information to IRD, under the various obligations to truthfully report wages paid and PAYE deductions, LEL and JEL must be held to those amounts as what it was liable to pay Ms Lal under employment standards obligations.

[23] Taking one example only, those records reported Ms Lal was paid the sum of \$2,562 for each of the months of April, May, July, August, September October 2017 and February and March 2018. This gave an annual total of \$20,496 for the period from 1 April 2017 to 31 March 2018. There was nothing to indicate what hourly rate was applied to calculate those payments. Taking the statutory minimum wage rate of \$15.75 in force from 1 April 2017, the amount of \$2,562 represented just under 163 hours, consistent with working or being paid for just over 40 hours a week in the relevant months.

### **Failure to pay wages and other entitlements**

[24] Contrary to LEL and JEL's statement in reply, there was no reliable evidence that Ms Lal was aware the companies had reported to IRD that she had been paid those wages, knew those sums were intended to be wages for her use or had access to those amounts for whatever purposes she may have chosen to use money paid to her as wages.

[25] LEL and JEL said the money was paid into a bank account of Mr Lal's, she had access to that account with an eftpos card and she also use of a credit card enabling her to access that money. They described her as using the credit card "lavishly".

[26] Ms Lal denied the companies' allegation that she was responsible for the payroll system used by the companies and was aware of the amounts reported to IRD as being paid to her. There was no evidence before the Authority to support the companies' assertion that she had any such knowledge or involvement.

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<sup>5</sup> *Dillon v Tullycrine Ltd* [2020] NZEmpC 52 at [30] - [35].

[27] The companies had provided her counsel with redacted copies of a bank account of Mr Lal which were said to show the payment of wages to Ms Lal. The readable lines on those redacted statement had a narrative reading only “Jain Enterpris Wages Victoria Superette” (sic). However the amounts shown on those lines were significantly larger than the amounts showing in the IRD records as supposedly paid to Ms Lal. Ms Lal, in her oral evidence, suggested those payments may have been of amounts paid to Mr Lal as wages. While that observation was speculation, the amounts certainly did not match what was said in the IRD records to be the amounts of net wages paid to her.

[28] From the documents and information available to the Authority, including what was said in the companies’ statement in reply, there was no credible and reliable evidence to establish Ms Lal was ever paid the wages reported in the IRD records or, in fact, any amount at any time.

[29] Payments into Mr Lal’s account, even if Ms Lal did have access to it, did not meet the requirement of the Wages Protection Act 1983. That Act allows for workers to agree to payment of their wages into a bank account standing in their own name or the same of a worker and some other person (that is a joint account).<sup>6</sup> No agreement of any kind was sought from Ms Lal about any such arrangement.

[30] Neither was it true, as the companies had alleged, that payment to Mr Lal’s account was necessary because Ms Lal had no bank account of her own or joint account as any time since she came to New Zealand from Fiji after marrying Mr Lal in 2007. Ms Lal provided evidence of a bank account opened in their joint names in 2007 which was still open and had been throughout their marriage.

[31] The companies had provided Ms Lal’s counsel with copies of statements for a credit card account of Mr Lal showing that Ms Lal had a card in her own name, enabling her to charge purchases to that account. The statements provided, for early 2016, did show a small number of purchases made on her card. Some were at petrol stations and supermarkets and some were from homeware stores such as Briscoes, Kmart and Spotlight. None of the amounts recorded on those statements could, objectively, be described as ‘lavish’. There was also nothing to indicate that Ms Lal knew or understood that any amount she spent was supposedly from wages paid into her husband’s account on her behalf. Rather, as she said she understood, the purchases on

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<sup>6</sup> Wages Protection Act 1983, s 9.

the card were from her husband's funds and, largely, were associated with costs of keeping and running their household.

[32] Against that background, and in the absence of any time and wage records that the companies were as employers obliged to have kept of their admitted employment relationship with Ms Lal, the amounts reported in the IRD records must be accepted as amounts due to her which the companies have failed to show were in fact paid to her at any time. Rather, there was an entirely unexplained absence of what happened to the money said in the IRD records to have been paid to her.

[33] On that basis, Ms Lal had established a failure to pay her and an entitlement to an award of arrears of wages for the amounts listed in those IRD records.

### **The limitation period**

[34] The IRD records show payments due to Ms Lal from 1 April 2015. She has, in her claim to the Authority, appropriately acknowledged the effect of statutory limitation periods, limiting her claim to the six-year period from when she began action over the arrears.

### **Arrears due for wages and holiday pay**

[35] Allowing for the accepted limitation, Ms Lal was entitled to award for arrears of wages for the following amounts showing in the IRD records as paid to her during the four years from 1 April 2016 to 31 March 2020:

	<b>Lal's Enterprises Limited</b>	<b>JAI Enterprises Co Limited</b>
1 April 2016 – 31 March 2017	\$13,737	\$1,281
1 April 2017 – 31 March 2018	-	\$20,496
1 April 2018 – 31 March 2019	-	\$35,406
1 April 2019 – 31 March 2020	-	\$21,840
<b>Total</b>	<b>\$13,737</b>	<b>\$79,023</b>

[36] These amounts do not include holiday pay Ms Lal was entitled to as an employee. There was no evidence she was ever provided with paid annual leave at any of the periods during which LEL and JEL are deemed, through the IRD returns filed for them, to have accepted she was their employee.

[37] The relevant entitlement to holiday pay for untaken annual leave has had to be calculated by applying an eight per cent loading to the amounts of wages she was

entitled to have received. The result is that Ms Lal is owed holiday pay of \$1098.96 by LEL and \$6,321.84 by JEL. The companies must pay her those amounts too.

### **Interest on the arrears**

[38] Ms Lal has been deprived of the use of the wages and holiday pay found due to her for a considerable period. An award of interest on those amounts was appropriate. Each company must pay her interest on the amounts it owes Ms Lal for the period from 1 April 2020 until all the money due to her is paid in full.<sup>7</sup>

[39] Interest is to be calculated by use of the civil debt interest calculator.<sup>8</sup>

### **Costs**

[40] Ms Lal sought an award of costs “on the usual basis”. The Authority usually awards costs on the basis of a daily tariff, adjusted upwards and downwards to account for circumstances and specific factors of the case.

[41] The investigation meeting for this matter did not require a full day. An award of costs on the basis of half the daily tariff, that is \$2,250, was appropriate in this case.

[42] LEL and JEL must also reimburse her for the expense of the \$71.56 fee paid to lodge her application in the Authority.

[43] JEL and LEL are jointly and severally liable to pay the costs of \$2,250 and expenses of \$71.56 within 28 days of the date of this determination.

### **Enforcement**

[44] In the event that LEL or JEL did not comply with the Authority’s orders for the payment of arrears of wages and holiday pay, interest and costs, the determination and a certificate of determination may be filed in the District Court and is then enforceable in the same manner as orders of the District Court.<sup>9</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>7</sup> Employment Relations Act 2000, Schedule 2, clause 11.

<sup>8</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

<sup>9</sup> Employment Relations Act 2000, s 141.