

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 49
3264759

BETWEEN	ELVIS-OTTO NGAN-WU Applicant
AND	GARAGE 10 AUTOMOTIVE LIMITED First Respondent
AND	JODY VINCENT Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Simon Greening and Andrea de Stadler, counsel for the applicant No appearance for the respondents
Investigation meeting:	8 August 2024 in Auckland
Submissions and information received:	At the investigation meeting, 16 September 2024, 24 and 31 October 2024 from the applicant None for the respondents
Determination:	31 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Elvis-Otto Ngan-Wu was employed as a technician at an automotive garage in Māngere, Auckland, by Orange Service Centre Limited (OSCL) from September 2019. His employment with OSCL ended at the latest by July 2022, at which point OSCL was placed into liquidation. Mr Ngan-Wu says prior to that he was told by OSCL and Garage 10's director and shareholder Jody Vincent that Garage 10 would become his employer. Mr Ngan-Wu continued to work at the garage, resigning in June 2023.

[2] Mr Ngan-Wu believes his employment with Garage 10 may have commenced in December 2021, when Garage 10 first started to be referenced against wage payments deposited into his bank account.

[3] Mr Ngan-Wu claims arrears of wages for unpaid overtime, and annual holiday pay due on termination of his employment in June 2023, plus interest on those amounts. He also seeks leave to recover such monies payable due to breaches of employment standards from Mr Vincent personally, in the event his employers are unable to pay them.

[4] The respondents' position is unknown as they have failed to take part in this matter in any meaningful way.

The Authority's process

[5] Mr Ngan-Wu originally named Mr Vincent as the only respondent in his statement of problem, which was accepted for validation by the Authority on 23 November 2023. Mr Vincent agreed to accept service of the statement of problem electronically on 5 December 2023 and it was served on him by email the same day. No statement in reply was received from him.

[6] After obtaining representation, an amended statement of problem was lodged on Mr Ngan-Wu's behalf on 22 February 2024, naming OSCL, Garage 10 and Mr Vincent as respondents. An electronic version of the amended statement of problem was emailed to Mr Vincent at his known email address at the same time. Hard copies were also served at the registered offices of the companies on 27 and 28 February 2024. A hard copy was accepted for service by Mr Vincent on 28 February 2024, with courier records showing it was signed for by "Jody". No statements in reply were subsequently received from any of the respondents.

[7] The Authority contacted the parties and arranged a case management conference for 9 April 2024. Mr Vincent failed to confirm his attendance, and it took place in his absence with only Mr Ngan-Wu represented. Mr Vincent emailed the Authority using a different email address on 10 April 2024. He claimed he had "no documentation and only found out about this last week" and asked the Authority to forward the paperwork so he could obtain advice.

[8] On 12 April 2024 the Authority emailed written directions and a notice of investigation meeting to the parties. On 24 April 2024 it also emailed the parties further copies of the amended statement of problem and its attachments.

[9] While OSCL was named as a respondent in the amended statement of problem, its liquidators did not consent to the application commencing or continuing against OSCL. Mr Ngan-Wu's representatives acknowledged OSCL would need to be removed as a respondent on the basis findings could still be made regarding its liability for arrears. OSCL was subsequently struck out as a party.

[10] Mr Ngan-Wu provided a witness statement and documents, which were served on the respondents.

[11] On 27 July 2024 Mr Vincent telephoned the Authority advising he had received a call from his earlier company advising that the Authority had sent documents for him. He advised that he is in Christchurch now and his company had closed and he is not working at Garage 10 anymore. Mr Vincent claimed he said he never received anything at his email address and advised he was now using a different address, which he emailed the Authority from the same day.

[12] On 29 July 2024 the Authority emailed all relevant documentation to that email address, including the notice of investigation meeting. Mr Vincent responded that he would need an extension to engage and claimed he had not personally been served with documents.

[13] On 30 July 2024 the Authority advised the parties by email that the investigation meeting was able to take place in Mr Vincent's absence if he fails to attend. It advised if Mr Vincent was no longer based in Auckland, he may seek leave to attend by audio visual link, providing reasons why he cannot be there in person. No application for leave was received.

[14] After a delayed start, the investigation meeting proceeded in the respondents' absence.¹ I heard evidence from Mr Ngan-Wu who answered questions under oath or affirmation.

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

[15] After the investigation meeting, the Authority sought and received advice from OSCL's liquidators about their understanding and position on OSCL's liability for arrears of wages and holiday pay relating to Mr Ngan-Woo's employment. Mr Ngan-Wu also provided an amended witness statement with revised calculations, which addressed questions the Authority had for him at the investigation meeting.

[16] 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 but all material has been considered.²

The issues

[17] The following are the issues for investigation and determination:

- (a) Who was Mr Ngan-Wu's employer at the relevant times?
- (b) Does OSCL and/or Garage 10 owe Mr Ngan-Wu arrears of wages for unpaid overtime?
- (c) Does OSCL and/or Garage 10 owe Mr Ngan-Wu annual holiday pay?
- (d) Should interest be awarded on amounts owing?
- (e) Did OSCL and/or Garage 10 breach employment standards by failing to pay monies to Mr Ngan-Wu?
- (f) If so, is Mr Vincent a person involved in those employment standards breaches, such that leave should be granted to recover monies from him?

Background

[18] OSCL was incorporated on 17 June 2019. A significant portion of its business appears to have been servicing rental cars given its proximity to Auckland Airport.

Employment with OSCL

[19] Mr Ngan-Wu commenced employment with OSCL on 9 September 2019. He has provided a copy of his signed employment agreement. His hours of work were recorded as 42.5 per week within the business' normal hours of operation, defined as Monday to Friday 8am to 5pm and Saturday 8am to 1pm. The agreement records that overtime authorised by the employer would be paid at Mr Ngan-Wu's hourly rate. His pay was recorded as \$17.70 per hour. An "office manager" is recorded as signing the

² Employment Relations Act 2000, section 174E.

agreement. There is a handwritten notation in the agreement saying from 11 June 2020 Mr Ngan-Wu's pay rate was \$18.90 per hour.

[20] If he had any issues with pay, Mr Ngan-Wu would speak with Jody directly, as he was the owner and the boss.

[21] Mr Ngan-Wu says he received a total of 10 payslips during his more than three and a half years of employment, which have been provided to the Authority. Each of the payslips holds OSCL name. Mr Ngan-Wu says the only payslip he received in 2022 was for the pay period 7 February to 13 February 2022. OSCL's name is recorded as paying the amounts recorded in it.

[22] In many weeks throughout his employment, Mr Ngan-Wu claims to have worked overtime to complete jobs, which he estimates being at five hours per week. He says he received no payment for additional hours in accordance with the terms of his employment agreement. The payslips and bank statements provided by Mr Ngan-Wu to the Authority certainly do not reflect any payments for additional hours being made during his employment.

OSCL's liquidation

[23] OSCL went into liquidation on 1 July 2022. The first liquidator's report states NZTA records identified that OSCL vehicles were transferred out of its name in July 2021, a year earlier.

[24] The report further states the liquidators were advised by Mr Vincent as shareholder that OSCL appointed liquidators by special resolution on 14 March 2022. The report notes the appointment was understood to be outside a permitted time period in s 241AA of the Companies Act 1993, and the appointment was removed from the Companies Register.

[25] The report further stated upon application of the Commissioner of Inland Revenue, OSCL was placed into liquidation on 1 July 2022 for failing to meet its obligations to Inland Revenue, consisting of overdue Employer Activities and Goods and Services Tax together with associated penalties and interest. The report states advice from the director received was that OSCL's business and assets were sold prior to liquidation.

Employment with Garage 10

[26] Garage 10 was incorporated on 2 August 2021.

[27] Mr Ngan-Wu is unsure exactly when the identity of his employer changed. All wage payments onwards received into his bank account from 22 December 2021 referenced Garage 10.

[28] Mr Ngan-Wu believes it was in March 2022 Mr Vincent informed him he would be employed by Garage 10. Mr Ngan-Wu asked Mr Vincent for a written employment agreement with Garage 10, but never received one. He recalls Mr Vincent saying everything, meaning Mr Ngan-Wu's entitlements, were going to be transferred over from OSCL to Garage 10. He says he was even asked, and did, at some point in 2022 assist in rebranding the premises by re-painting it to the colours of Garage 10.

[29] Mr Ngan-Wu says he never received payslips from Garage 10.

[30] Mr Ngan-Wu gave notice of his resignation from his employment on 23 May 2023 via letter to Mr Vincent, addressed to Garage 10. His last day of work was 6 June 2023.

[31] He did not receive any holiday pay on termination and his attempts at contacting Garage 10 and Mr Vincent proved unsuccessful.

[32] On 21 August 2023 Mr Ngan-Wu made a wages and time, and holiday and leave, records request to Mr Vincent. As Mr Ngan-Wu has never received records pursuant to his requests, he does not know exactly how much his outstanding holiday pay is but has attempted to calculate it.

Mr Ngan-Wu's unchallenged evidence is accepted

[33] OSCL and Garage 10 have not produced any wages and time records and holiday and leave records relating to Mr Ngan-Wu pursuant to his requests. This failure has prejudiced Mr Ngan-Wu's ability to bring an accurate claim for wage arrears and holiday pay.

[34] It is clear he has done his best to calculate what he believes is owing on the information he has available. On the balance of probabilities, and the complete absence of any evidence his claims about his hours, days and pay are incorrect, I accept Mr

Ngan-Wu's arrears of wages and holiday pay claims as proved.³ I have no reason to consider the overtime worked was not authorised.

Who was Mr Ngan-Wu's employer at the relevant times?

[35] The Authority must consider what an independent but knowledgeable observer would say about who Mr Ngan-Wu's employer was at the relevant times.

[36] It is clear from the employment agreement, and other documentation, that from 9 September 2019 OSCL became Mr Ngan-Wu's employer. Mr Ngan-Wu has not suggested Mr Vincent personally became his employer, and it is clear that at the latest, on 1 July 2022, Garage 10 became Mr Ngan-Wu's employer.

[37] A useful starting point is often the documentation evidencing any written agreement between the parties. However, not in this case. Garage 10 failed to provide Mr Ngan-Wu with an employment agreement at any point, even after OSCL's liquidation. There are no wages and time or holiday and leave records available. There are no payslips relating to Mr Ngan-Wu's employment after February 2022, and certainly none identifying Garage 10 as his employer. Mr Ngan-Wu has provided the Authority with email correspondence between himself and Inland Revenue, which advised him it had not received any income details from his employer after March 2022.

[38] Upon request for information by the Authority, on 27 September 2024 the liquidator noted that, by way of a Deed of Acknowledgement of Debt, liabilities were transferred from OSCL to Garage 10 on sale of the business. The liquidator advised that in the Deed, Mr Ngan Wu's outstanding wages included in the transfer were recorded as \$4,209.82. At that time the liquidators stated they had not yet received a claim from Mr Ngan-Wu so were unable to confirm whether OSCL was still liable for any wages payable to him. Mr Ngan-Wu subsequently submitted a secured creditor's valuation and claim form to the liquidators, for \$9,661.08.

[39] The fact that Mr Ngan-Wu was not aware that Garage 10 may have become his employer until March 2022 is not conclusive. There have been many instances where an entity has been held to be an employer, even where the employee was not aware of the employer's true identity.

³ Employment Relations Act 2000, section 132 and Holidays Act 2003, section 83.

[40] Mr Ngan-Wu has calculated his wages based on his employment having transferred to Garage 10 from 22 December 2021, which is the date wage payments into his bank account started referencing the depositor as “Garage 10 Automo Centre Orange Service”. While payment of wages by a particular entity is not conclusive evidence of an employment relationship, in the opaque circumstances OSCL and Garage 10 operated under as associated companies, I find this indicator sufficiently shows Garage 10 became Mr Ngan-Wu’s employer on 22 December 2021.

[41] I therefore find Mr Ngan-Wu was employed by OSCL from 9 September 2019 to 22 December 2021. Thereafter he was employed by Garage 10 until 6 June 2023.

[42] If the sale or transfer of OSCL’s business to Garage 10 involved the transfer of employee any wage, holiday and leave entitlements, liability resulting from this determination would appear to be a matter between OSCL and Garage 10.

Does OSCL owe Mr Ngan-Wu arrears of wages for overtime worked but not paid?

[43] Mr Ngan-Wu’s hourly rate between 9 September 2019 to June 2020 was \$17.70 per hour, increasing to \$18.90 per hour from about 6 June 2020.

[44] Mr Ngan-Wu worked over a period of 56 weeks, approximately an additional five hours of overtime each week. The periods he worked overtime were October to December 2019, January, March and August 2020, and February to March 2021 and May to August 2021.

[45] He calculates he is owed \$2,212.50 for overtime worked from October 2019 to May 2020 at \$17.70 per hour.

[46] He calculates he is owed \$2,268.00 for overtime worked from 2 August 2020 to August 2021 at the \$18.90 pay rate.

[47] I accept OSCL owes him \$4,480.50 of overtime pay in total.

Does OSCL owe Mr Ngan-Wu annual holiday pay?

[48] Mr Ngan-Wu provided evidence that he took a week of leave without pay after his second or third week of employment, as stated on one of the early payslips on 2019.

[49] He believes he took two days of annual holidays on Friday 16 October 2020 and Monday 19 October 2020, although there is no record of this in the payslips provided.

[50] Mr Ngan-Wu calculated his annual holiday entitlements due on termination from OSCL as totalling \$5,180.58, which I accept.

Does Garage 10 owe Mr Ngan-Wu arrears of wages for overtime worked but not paid?

[51] The periods Mr Ngan-Wu worked overtime for Garage 10 were October and November 2021, February to April, July to September and November 2022, and January to March 2023.

[52] He worked around five additional hours per week and was not paid for this overtime worked over a 48 week period, totalling \$4,536.00 from October 2021 to March 2023 at the hourly rate of \$18.90 per hour. I accept this amount is owing.

Does Garage 10 owe Mr Ngan-Wu annual holiday pay?

[53] Mr Ngan-Wu believes he took five days of annual holidays while working for Garage 10, having taken a trip to Australia over 24 to 28 April 2023 and 1 May 2023.

[54] In total Mr Ngan-Wu believes he is owed \$3,020.22 in annual holiday pay by Garage 10. Again, Mr Ngan-Wu did not include overtime hours in these calculations, on the basis it was too complicated. I accept Garage 10 owed Mr Ngan-Wu \$3,020.22 in annual holiday pay on termination of employment.

Should interest be awarded on any amounts owing?

[55] Mr Ngan-Wu is entitled to an award of interest on the arrears of wages and holiday pay due to him. Interest must be calculated using the civil debt interest calculator.⁴

[56] Interest should be calculated on the total amount of \$9,661.08 owed by OSCL from the period from 22 December 2021 (being on or about the date his employment ended) until the date of full payment.

[57] Interest should be calculated on the total amount of \$7,556.22 owed by Garage 10 from 7 June 2023 (being on or about the date his employment ended) until the date of full payment.

⁴ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Did OSCL and/or Garage 10 breach employment standards by failing to pay entitlements to Mr Ngan-Wu?

[58] Both OSCL and Garage 10 have breached employment standards by failing to pay Mr Ngan-Wu his entitlements. They have breached s 6 of the Minimum Wage Act 1983 in respect of overtime hours worked, s 4 of the Wages Protection Act 1983 by failing to pay the entire amount of wages when they became payable, and section 24, 25 and 27 of the Holidays Act 2003 in respect of annual holiday pay.

Is Mr Vincent a person involved in these employment standards breaches and should leave should be granted to recover monies from him?

[59] The evidence points to Mr Vincent having management control over Mr Ngan-Wu's terms and conditions of employment and pay. He is a person involved in breaches within the meaning of s 142W of the Act – as a director he was officer of both OSCL and Garage 10, and was knowingly concerned in the breaches (having knowledge of the essential facts establishing the breaches). Leave is granted to Mr Ngan-Wu to recover any amounts owed to the extent OSCL and Garage 10 are unable to pay.

[60] I make an order that Mr Vincent is indeed liable to pay the arrears and interest on arrears to the extent the companies default in payment of those amounts. This is appropriate due to OSCL's liquidation status and Mr Vincent's advice to an Authority Officer by telephone on or about 27 July 2024 that his company had closed.

Determination to be sent to Inland Revenue

[61] The evidence showed no PAYE was reported as deducted from Mr Ngan-Wu's pay from March 2022. It seems likely money has been deducted from Mr Ngan-Wu's wages which is not accounted for. A copy of this determination will be provided to Inland Revenue in the event it determines further action is to be taken.

Outcome

[62] Orange Service Centre Limited is liable to pay Elvis-Otto Ngan-Wu the following:

- (a) \$4,480.50 in overtime wages; and
- (b) \$5,180.58 in annual holiday pay;

(c) Interest on these amounts.

[63] Garage 10 Automotive Limited is liable and ordered to pay Elvis-Otto Ngan-Wu within 21 days of the date of this determination the following:

- (a) \$4,536.00 in overtime wages; and
- (b) \$3,020.22 in annual holiday pay; and
- (c) Interest on these amounts.

[64] Interest is to be calculated and is owing on the arrears at [62] and [63] above, in accordance with [56] and [57] of this determination.

[65] Jody Vincent is liable, as a person involved in Orange Service Centre Limited and Garage 10 Automotive Limited's breaches of employment standards, to pay the arrears and interest on the arrears to the extent the companies are unable to pay those amounts.

Costs

[66] Mr Ngan-Wu is legally aided and seeks costs, but has not provided information regarding costs incurred and sought to date. Any costs application and supporting information should be provided within 14 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority