

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 58
5623802

BETWEEN REBECCA MARGARET BRAY
Applicant

A N D HEAVEN BAR AND
RESTAURANT LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person,
No appearance for Respondent

Investigation Meeting: 22 February 2017 at Christchurch
27 February 2017 at Auckland

Date of Determination: 2 March 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant (Ms Bray) alleges that she was not paid holiday pay that she was entitled to as a consequence of her employment with the respondent (Heaven Bar).

[2] No statement in reply was filed by Heaven Bar and Heaven Bar failed to engage in the authority's telephone conference. The only communication received from the respondent was the following intimation by email dated 20 January 2017: *'This is a complete waste of time – in American terms I plead no contest. I will not be taking part in these proceedings. The authorities should simply award Becky (Ms Bray) whatever it is she is asking for, I will ignore it and we can all get on with our lives. Heaven Bar and Restaurant Limited has not traded since October 2015. It has bank account and no assets. There is no means to pay anything awarded from what is*

now a shelf company. Yours faithfully, Ken Morrison (Mr Morrison is the sole director of the respondent)'

[3] Given that response, my Authority officer communicated with Ms Bray to ensure that she still wished to proceed and we have received an affirmative response.

[4] I met with Ms Bray in Christchurch on 22 February 2017, she having now relocated south, and took her evidence by affirmation. The intention was that I would hear the evidence for the respondent at Auckland on 27 February 2017 but there was no appearance by Heaven Bar. Given the text of the email I quoted in full above that can hardly be surprising. Notwithstanding that failure to appear, I am satisfied I need to proceed to finalise this matter.

[5] Ms Bray worked for Heaven Bar from 20 April 2015 through until October 2015. She was paid her ordinary wages but was not paid holiday pay on the termination of the employment. She seeks payment of that outstanding holiday pay.

[6] Heaven Bar maintain that in terms of the employment agreement signed between the parties, there is no entitlement to holiday pay.

[7] I have not been provided with a copy of the employment agreement; Ms Bray says that she signed the agreement but was told that she could not remove it from the premises and despite subsequent requests for a copy, those requests have gone unanswered.

[8] The relevant clause which Heaven Bar appears to rely upon is referred to in an email from Mr Morrison to Ms Bray dated 28 October 2015. I now quote from that email: *'Let me quote you clause 9.4.5 on page 7. You have initialled the page. Where the employee is part-time and works for 12 months continuously they will then and only then be due holiday pay at 8%. Should their employment be terminated prior by either party then no holiday pay will be owed, nor claimed by the employee.'*

Your commencement date was 20 April 2015, so 6 months. This is the standard Hospitality Association of New Zealand contract.'

[9] If this clause is, as contended the standard Hospitality Association of New Zealand provision then it is wrong because it misstates the law. For the record, I intend to contact the Hospitality Association of New Zealand and satisfy myself that

they are not promoting a clause which completely misunderstands the entitlement to holiday pay.

[10] That said, and for the same reason, whatever the clause says is wrong and Ms Bray is entitled to holiday pay on the termination of her employment irrespective of how long that employment lasts.

[11] Because I have no other records on which to rely I am forced to consider only the calculations Ms Bray herself has made. This is a case that falls within the terms of s.132 of the Employment Relations Act 2000 (the Act). The effect of that section broadly is to entitle the Authority to rest its calculations on evidence provided by the employee as to the wages owed to her or him where the employer has failed to produce a wage and time record and that failure prejudiced the employee's ability to bring an accurate claim before the Authority.

[12] That presumption may be rebutted by evidence from the respondent but as I have already described, in this case, the respondent employer was simply not prepared to engage and on that footing I feel entitled to rely on the calculations provided to me by Ms Bray.

Determination

[13] Ms Bray was employed by Heaven Bar Restaurant Limited pursuant to an individual employment agreement which contains a clause concerning holiday pay which seeks to abrogate the statutory rule that holiday pay is due and owing in respect to all employment.

[14] For reasons already described I have relied on s.132 of the Act in respect of my calculations of the amount owed by Heaven Bar and Restaurant Ltd to Ms Bray and I now set those gross amounts out against the months of the year 2015 that they relate to: May \$999, June \$752, July \$413, August \$844, September \$538, and October \$844, totalling \$4,390.

[15] Heaven Bar and Restaurant Limited is now directed to pay to Rebecca Margaret Bray the sum of \$4,390 gross within 14 days of the date of this determination.

[16] A certificate of determination is to issue with this determination.

Costs

[17] There is no issue as to costs.

James Crichton
Chief of the Employment Relations Authority