

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 427
3130054

BETWEEN	FABIAN COOK Applicant
AND	CLOUDSWEPT LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Applicant in person No attendance from the Respondent
Investigation Meeting:	On the papers
Submissions (and further information) received:	19 April, 15 June and 25 August 2022 from Applicant
Determination:	30 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Fabian Cook was employed by Cloudswept Limited as a Senior Software Developer from 19 March 2018 to 18 September 2020. Mr Cook says he was not paid correctly during the employment relationship and no PAYE payments were made to Inland Revenue (IR) on his behalf. He claims wage and holiday arrears and he would like resolution of the issue created by the absence of PAYE payments on his behalf.

[2] Cloudswept Limited (Cloudswept) is a duly incorporated company with its registered office in Wellington and it carries on business as a software development service.

The Authority's investigation

[3] Mr Cook attended the case management call on 16 March 2022 and agreed to an investigation meeting on the papers unless Cloudswept participated, in which case Mr Cook requested an in-person meeting. The directions notice included advice that the matter would proceed on the papers if there was no response from Cloudswept by 30 March 2022. The notice was served on the physical address recorded on the Companies Office website for Cloudswept and there was no response from Cloudswept.

[4] On the basis that Cloudswept has not participated in these proceedings, despite service of the required documents on it by the Authority, I am satisfied there is no good reason for the failure to appear or participate and the investigation should proceed as if Cloudswept appeared or was represented.¹

[5] For the Authority's investigation Mr Cook provided a timeline, the individual employment agreement between the parties, copies of messages he sent to Cloudswept requesting his holiday and wage records, a table setting out the wage payments he received during the course of his employment, and a printout of his PAYE records from the IR website.

[6] 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.

Background

[7] The issue requiring investigation and determination is whether Mr Cook is owed wage and holiday arrears by Cloudswept.

[8] The written employment agreement between the parties provided that Mr Cook received a gross annual salary of \$100,000.00 and he was to be paid fortnightly. Mr Cook was entitled to four weeks annual leave for each year he worked for Cloudswept.

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

[9] Mr Cook says that throughout his employment there were multiple times when his pay was inconsistent or late and he found it hard to keep track. In the end he says he eventually just gave up and continued on with his role, letting the payments come through when they did.

[10] When Mr Cook's employment ended, he says he was not paid out his accrued annual leave and received no response to his requests to Cloudswept to pay him the wage arrears he says he was owed.

Analysis

Wages

[11] Mr Cook worked for 30 months for Cloudswept and his net wages should have consistently been \$2872.60 (net) each fortnight. The schedule of wage payments shows this was consistent until 30 August 2019. Over 30 months or 131 weeks there should have been 65 payments of \$2872.60 which amounts to \$186,724.85 plus one payment of \$1436.35 (for a half week), comes to a total of \$188,161.20.

[12] By the end of his employment Mr Cook has calculated that he received \$179,543.13 (net) in wages which is shortfall of \$8,618.07.

Holiday pay

[13] Mr Cook did not keep an accurate record of the holiday leave he took but says he never used his full yearly allocation. He estimates he took between five to ten days over the course of his employment. He says he would typically take holidays at a time aligned with public holidays or the weekend. He provided copies of messages he sent requesting his holiday to be paid out to him after he had left and says this did not happen.

[14] Having worked for 30 months, Mr Cook would have accrued 8 weeks leave for the first two years employment at Cloudswept and is entitled to 8 per-cent of his earnings for the balance. Subtracting 10 days leave he estimates he used, Mr Cook was owed holiday pay for 6 weeks annual leave at the time the employment relationship ended.

Failure to provide wage and time records

[15] Under s 131 of the Employment Relations Act 2000 (the Act) where there has been a default in payment to an employee of any wages or other money payable under an employment agreement it may be recovered by the employee lodging a statement of problem in the Authority.

[16] Under s 132 of the Act, if the employer fails to keep or produce a wage and time record as required by the Act, and that failure prejudiced the employee's ability to bring an accurate claim, then unless the employer proves those claims are incorrect, the Authority may accept as proved all claims made by the employee in respect of the wages actually paid to the employee and the hours, days and time worked by the employee.

[17] Because Cloudswept has not participated in this process, despite having an opportunity to do so, it has not provided the Authority with any information about the accuracy of Mr Cook's claims. Mr Cook has provided evidence of his requests for wage and time records after the employment relationship ended and communications between the parties during the employment relationship about under payment of wages. Mr Cooks says he has never received the wage and time records. In these circumstances I consider it appropriate to exercise the discretion set out in s 132 of the Act and accept as proved all claims made by Mr Cook.

PAYE

[18] The evidence satisfied me Cloudswept deducted amounts equating to PAYE from Mr Cook's wages prior to forwarding the residue to him. It also satisfies me that the sums amounting to PAYE were not forwarded to IR by Cloudswept on behalf of Mr Cook. This amounts to a breach of several of the employer's obligations to an employee.

Orders

[19] Having established that wage arrears are owed to Mr Cook, the Authority makes the following orders:

- (a) Cloudswept Limited is ordered to pay the following to Fabian Cook within 28 days of the issue of this determination:

- (i) Wage arrears amounting to \$8,618.07 (net) under s 131 of the Act; and
 - (ii) Holiday pay amounting to \$11,720.21 (net) under s 131 of the Act;
- (b) Cloudswept Limited is ordered to pay directly to the IRD the correct amount of PAYE that should have been but was not paid on Mr Cook's total gross earnings for the period 19 March 2018 to 18 September 2020.

Costs

[20] As Mr Cook filed his claim and presented his information to the Authority I perceive there will be no issue as to costs for representation. However, if that was not the case, costs are reserved.

[21] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Cook may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Cloudswept would 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.

[22] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Sarah Kennedy
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1