

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 299
3125118

BETWEEN ANDREW JAMES FOSTER
Applicants

AND AQUAWORLD LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 No appearance by Respondent

Investigation Meeting: 3 July 2021

Determination: 13 July 2021

DETERMINATION OF THE AUTHORITY

The problem

[1] The Applicant Andrew James Foster (Mr Foster) applies to recover arrears of wages from his former employer Aquaworld Limited (Aquaworld) consequent upon the termination of his employment purportedly for redundancy. Aquaworld has taken no steps in the Authority's investigation and Mr Foster's action to recover arrears of wages due to him under his employment agreement is unchallenged.

[2] Mr Foster claims arrears of wages in the form of six days salary outstanding at termination together with outstanding holiday pay of forty-one days annual leave not taken.

The investigation

[3] An affidavit of service verifies that Mr Foster's statement of problem was served on Aquaworld at its registered address on 6 January 2021. Aquaworld did not lodge a statement in reply in the time permitted for it to do so.

[4] Aquaworld did not take any steps and so in a notice of direction dated 17 June 2021, I directed that the matter should proceed to investigation meeting. That notice of direction informed Aquaworld of the arrangements for the investigation meeting and advised that having taken no steps, it would require the Authority's leave if it wished to defend Mr Foster's claim.

[5] A process server verifies by affidavit of service the notice of direction and a notice of investigation meeting were served on Aquaworld at its registered address on 23 June 2021.

[6] Aquaworld did not attend the investigation meeting on 2 July 2021 and I was satisfied that there was no good reason for that non-attendance. I proceeded to act as fully in the matter as if Aquaworld had attended.

[7] As permitted by section 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 facts

[8] At the investigation meeting Mr Foster gave affirmed and unchallenged evidence of his employment with Aquaworld between the period 12 March 2014 and 10 August 2020.

[9] Mr Foster was first employed with Aquaworld on a casual basis as a junior aquarist. He succeeded to indefinite employment as an aquarist and it was in that capacity his employment was purportedly terminated for redundancy in July 2020. The employment was brought to an end by this email sent to Mr Foster on 27 July 2020:-

*Hi Andrew
Our shop will be closed at 10/08/20,also this is you(sic) last day for work. So
u(sic) will be(sic) not work at Aquaworld at 10/08/20.
Thanks
Kaiming*

[10] Mr Foster, very generously in my view, does not pursue any challenge to the termination of his employment. He has resolved he wishes to move on from his time with Aquaworld with the arrears of wages it owes to him.

[11] The terms of the employment were recorded in a written employment agreement dated 9 June 2015. Mr Foster's hours of work were stated as "normally be(ing) 40 hours per week" and "from 9.00am to 5.00pm, Monday to Sunday, including 30min paid lunch break". The remuneration for the role was expressed as a weekly salary of \$600.00. In 2020, his payslips evidence an hourly rate of pay at \$22.00 per hour.

The analysis

[12] Mr Foster gives evidence that at the time his employment terminated he had not been paid for six days of work and he had an annual leave balance of forty-one days.

[13] Aquaworld takes no part in the Authority's investigation having been put on notice of Mr Foster's claim and being fully informed of the steps of the investigation as it progressed. It has not at any stage been moved to produce the wage and time record it is required to keep under the Act by way of defending Mr Foster's claim against it.

[14] Mr Foster produces a spreadsheet tracking the payment of his salary or more correctly, the late payment to him of his weekly salary. The spreadsheet tracks weekly payment delays for a period of many years.

[15] I have no reason to doubt Mr Foster's affirmed and unchallenged evidence and far from doubting it the meticulous fashion in which he has recorded the details of each salary payment due to him over the period of his employment provides me with further assurance. I am satisfied he performed six days work for Aquaworld on 3, 4, 5, 6, 7 August 2020 and Monday 10 August 2020. I am further satisfied that he was not paid the salary he was entitled to in respect of those days of work.

[16] I am further satisfied that Mr Foster had an annual leave entitlement of forty-one days at the time his employment was terminated and that he has not been paid for these annual leave days. That is eight weeks of paid leave over two years of service. It is disturbing that this employer did not see fit to permit Mr Foster the rest and recreation he was entitled to. Again Mr Foster very generously in my view, pursues only arrears recover and no other aspect of it.

[17] I conclude then that Mr Foster, having performed work, was not paid the salary he was entitled to under the terms of his employment agreement. I conclude too that he has not been paid his annual leave entitlements for annual leave not taken due to him

at termination. I therefore accept that Aquaworld is liable to pay arrears of wages to Mr Foster as follows:-

Outstanding salary at termination 8 hours x \$22per hour x 6 days	\$1,056.00
Outstanding annual leave at termination 8 hours x \$22per hour x 41 days	\$7,216.00
Total	\$8,272.00

[18] I have seen correspondence from Aquaworld's accountants apparently proposing the details of Mr Foster's termination pay. That information does not accord with the calculation above and is more generous to Mr Foster. I am not persuaded to adopt the amounts suggested in the correspondence as I am unsure of the context in which it takes place. As well, I do not know whether the amount for PAYE was actually paid by Aquaworld to the commissioner of inland revenue.

The outcome

[19] Being satisfied that there has been default in payment by Aquaworld Limited to Mr Foster under his employment agreement, and pursuant to section 131 of the Act, I make these orders:-

- (a) Aquaworld Limited is ordered to pay to Andrew James Foster within 28 days of the date of this determination the gross sum of \$1,056.00 as arrears of wages;
- (b) Aquaworld Limited is ordered to pay to Andrew James Foster within 28 days of the date of this determination the gross sum of \$7,216.00 as arrears of wages;
- (c) Aquaworld Limited is ordered to pay to Andrew James Foster within 28 days of the date of this determination the sum of \$71.56 being reimbursement of the lodgement fee for this application.

[20] I thank Mr Foster for his diligence assisting the Authority throughout its investigation.

Leon Robinson
Member of the Employment Relations Authority