

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 120
5434478

BETWEEN NAMIKO HARADA
Applicant

AND FRANCO CAON and TAO ZHI
TING Trading as The Tin Goose
Café
Respondents

5457267

BETWEEN TING'S ENTERPRISES
LIMITED trading as The Tin
Goose Café
Applicant

AND JO-ANN DUFF, LABOUR
INSPECTOR
Respondent

Member of Authority: Christine Hickey

Representatives: No appearance for Franco Caon, Tao Zhi Ting or Ting's
Enterprises Limited
Jo-Ann Duff on behalf of Ms Harada and herself

Investigation Meeting: 5 August 2014

Determination: 8 August 2014

DETERMINATION OF THE AUTHORITY

Tings Enterprises Limited must pay Jo-Ann Duff, Labour Inspector, \$532.87 which is Namiko Harada's unpaid holiday pay and \$71.56 reimbursement of the Employment Relations Authority filing fee. Both amounts are to be paid to the Labour Inspector for the benefit of Namiko Harada and should be made within 28 days of this determination being issued.

Employment relationship problem and issues

[1] The Authority needs to consider an objection to an improvement notice made by Ms Tao on behalf of Ting's Enterprises Limited¹ (TEL), in particular:

- (a) Whether the employer failed to comply with the specified provision of the relevant Act; and
- (b) The nature and extent of the employer's failure to comply with the provisions; and
- (c) The nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision.
- (d) The Authority is then able to confirm or rescind the improvement notice as it thinks fit.²

Factual background

[2] Namiko Harada worked as the manager of a café called The Tin Goose Café in Queenstown. She resigned. Her final day was 2 July 2013. Ms Harada requested that her holiday pay and any pay for alternative holidays still owed be paid to her as soon as possible. She understood that she was owed \$1,095.68 as final holiday pay and \$1,449.25 pay for alternative holidays. Ms Harada was not paid the amount of holiday pay that she understood she was owed.

[3] On 3 October 2013 Ms Harada made an application to the Employment Relations Authority that she be paid the outstanding holiday pay (file no. 5434478). The parties were referred to mediation. The Mediation Service decided that it was an appropriate matter for the Labour Inspectorate to become involved in. Labour Inspector Jo-Ann Duff investigated the matter and communicated with both parties.

[4] On 28 March 2014, in accordance with s 233 of the Employment Relations Act 2000 (the Act), Ms Duff issued an improvement notice. The improvement notice was served on TEL by a process server the same day.

[5] The improvement notice stated that the Labour Inspector believed that TEL was failing or had failed to comply with s 4 of the Wages Protection Act 1983

¹ Tao Zhi Ting is the sole director and shareholder of TEL.

² Section 223E of the Act

because \$532.87 was being withheld from Ms Harada's final pay. The Labour Inspector wrote that she had no evidence to prove that the deduction of \$532.87 was consented to in writing by Ms Harada. The Labour Inspector alleged that the employer had failed to comply with the requirement to pay the outstanding amount of \$532.87 to Ms Harada:

...despite being alerted to the failings and having ample time to comply with the relevant legislation.

[6] Under the improvement notice TEL was required to pay the amount of \$532.87 to Ms Harada and provide evidence of the payment to the Labour Inspector by 5pm on 25 April 2014.

Procedural history

[7] On 23 April 2013 Tao Zhi Ting lodged an objection to the improvement notice with the Authority (file no. 5457267). Ms Tao wrote:

I am of the position that the applicant, Ms Namiko Harada, was overpaid due to a mistake in the calculation of her pay. Ms Harada has never queried the overpayment.

I am consequently seeking a determination of the Authority on this case. Specifically, I would like the Authority to establish whether or not the mistake made in the calculation of the Employer's pay determined an unjust enrichment for the Employee.

Upon termination of Ms Harada's employment with Ting's Enterprises Limited I went through all her payments and realized that she had erroneously been overpaid in the past for \$1,077.13. Upon payment of her final holiday pay, ... funds by way of wages due and other entitlements owing to Ms Harada had accrued therefore there was an informal set-off of \$532.87 which reduced the amount Ms Harada had been overpaid.

TEL has never asked Ms Harada to repay her outstanding \$544.26 to which she was not entitled to (sic).

If it is indeed determined that Ms Harada gained an unjust enrichment from the overpayment, am I correct to assume, from a more correct legal perspective, that TEL is indebted to Ms Harada for the total amount of final pay owed to her but as yet unpaid to her (\$544.26) and Ms Harada is indebted to TEL for the total amount of the overpayment (\$1,077.13)?

I am hoping the situation will be clarified by the Authority to whom I send my sincere thanks for looking into this matter.

[8] The Labour Inspector lodged a statement in reply on 8 May 2014 and provided the relevant background documents to assist the Authority in understanding the claim.

[9] The Authority member determined that the two matters should be dealt with together. The Authority member also determined that the correct employer was TEL. The Tin Goose Café is identified on the Companies' Register as the business that TEL operates.

[10] The Authority's support officer arranged a telephone directions conference between the Authority member, the Labour Inspector and Ms Tao for 29 May 2014.

[11] On 28 May 2014 Ms Tao sent an email to the Authority's Support Officer stating that she was flying to China that day and asked if she could be called on a number in China for the directions conference. The directions conference was held on 29 May 2014. Ms Harada did not participate in the directions conference. Ms Duff participated. Ms Tao was present for part of that directions conference by way of her mobile phone while she was driving. The connection was not entirely satisfactory and neither was Ms Tao's ability to concentrate and participate fully in the directions conference.

[12] Ms Tao raised her inability to clearly understand the telephone call due to her limited English and her concern that she would not be able to fully participate in an investigation meeting for the same reason. The Authority member advised Ms Tao that TEL was entitled to have representation in person at the investigation meeting and that as she would be unable to attend TEL should consider instructing a person in New Zealand to represent it at the investigation meeting.

[13] Ms Tao said that she had an email from Ms Harada which she thought was relevant to the claim. She offered to provide that to the Authority as soon as possible and indeed was directed to do so, so that the Authority could provide it to Ms Duff. Ms Tao did not provide a copy of that document or any other document.

[14] Also at the directions conference the date for an investigation meeting was set, being 5 August 2014 in Queenstown. Ms Tao was notified that she may participate in that meeting by telephone and the notice of direction sent out after the directions conference noted that it was Ms Tao's responsibility to be available at the arranged time and to ensure that she has clear telephone coverage. She was reminded that one

of the applications which the Authority was to investigate on 5 August was her own application being the objection to the improvement notice.

[15] On 4 August 2014 at 7.24pm the Authority's support officer was sent an email from Ms Tao stating that she did not know anyone in New Zealand who could attend the meeting on her behalf. She gave a new cellphone number and stated that she was not sure the phone would work as it depended on the signal and:

...other unpredictable and uncontrollable aspects. English is not my first language, it is better to write me an email, like the last call from the Authority, I could not barely understand.

[16] The email was forwarded to me at 7.32am on 5 August by which time I was en route to Queenstown. I attended the investigation meeting in Queenstown at 1pm.

[17] The Labour Inspector, Ms Duff, attended the investigation meeting. Ms Harada was not present. I attempted to telephone Ms Tao on the new cellphone number she had provided. Initially the person who answered the telephone was apparently unable to hear me. I telephoned back and was told that Ms Tao was not available and she was not there as she was at work.

[18] The investigation meeting proceeded in Ms Tao's absence.

Determination

[19] I confirm the improvement notice. TEL has clearly breached s 4 of the Wages Protection Act 1983 which provides that:

...an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to the worker without deduction.

TEL did not pay the entire amount of wages due to Ms Harada without deduction. There is no evidence that Ms Harada consented in writing to her pay being withheld. Indeed, there is evidence to the contrary.

[20] I understand that Ms Tao considers it unfair that she should pay the remaining \$532.87 that is owed to Ms Harada by way of her final pay because she says that TEL accidentally overpaid Ms Harada in January 2013.

[21] New Zealand law clearly requires the Wages Protection Act 1983 to be strictly complied with even if an employer claims a right to set-off wages against amounts the

employer says the employee owes it. An employer cannot informally and unilaterally set off amounts it considers the employee owes it against an employee's wages. I must apply s 4 of the Wages Protection Act 1983 strictly and do so. Therefore, I cannot take into account TEL's claim that Ms Harada was overpaid in January 2013 as part of my consideration of TEL's objection to the improvement notice.

[22] TEL must pay the Labour Inspector the \$532.87 holiday pay still outstanding for Ms Harada's benefit.

[23] TEL must also pay the Labour Inspector \$71.56 being the cost Ms Harada paid to lodge her application (file no. 5434478) with the Authority. She would not have had to spend that money if TEL had complied with its legal obligation to pay her holiday pay without deduction.

Christine Hickey
Member of the Employment Relations Authority