

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 161
3135628

BETWEEN	JOHN HAYES Applicant
AND	UMBRELLA MULTIMEDIA LIMITED Respondent

Member of Authority:	Claire English
Representatives:	John Hayes in person No appearance for the Respondent
Investigation Meeting:	21 February 2022 at Wellington
Submissions received:	21 February and 4 March 2022 from Applicant None received from Respondent
Determination:	26 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr John Hayes, brings claims against the respondent, his former employer, for unpaid wages, and unpaid Holidays Act entitlements that were not paid on the ending of his employment with the respondent. In addition, the applicant brings penalty claims against the respondent for failures to provide a written employment agreement, and breaches of good faith.

[2] The respondent company has not responded to the claims, and did not attend the investigation meeting as scheduled.

[3] This raises the question of whether or not to proceed with the investigation. The answer is “yes” as I am satisfied that the respondent company was made aware of the claims against it and the investigation meeting.

[4] The respondent (Umbrella) is registered on the companies register, and has a registered office for the service of documents¹. Copies of all relevant documents have been sent to Umbrella’s registered address. Copies of the statement of problem and attachments have been signed for by “Samson Sam” (who was a director of Umbrella at the time, including after his bankruptcy, and continued to be involved in the employment of Mr Hayes even after the directorship ceased).

[5] Advance notice of the case management conference was signed for by “Kevin L”; the directions resulting from the case management conference were signed for by “Kevin Lauulu” and the Notice of Hearing was also signed for by “Kevin Lauulu”. Included in the Notice of Hearing was advice that, should Umbrella fail to attend the investigation meeting, the Authority may proceed and issue a determination in favour of the applicant².

[6] The companies register records that Kevin Lauulu was the sole director of Umbrella at the time these documents were served, and that the current director is Vika To’oala. The idea that Mr Kevin Lauulu and Mr Vika To’oala are different people is a fiction.

[7] Mr Hayes, and both his two witnesses, gave evidence that Kevin Lalau and Vika To’oala were both names used by the same person, who was the director of Umbrella, and that they knew this person both as Kevin and Vika. Both names were used interchangeably by Mr Lauulu, and those who knew him. All three drew my attention to the fact that Kevin/Vika used the same email address, phone number, and street address, and would respond to emails and sign documents addressed to one name eg Kevin, by using the other name, eg Vika.

[8] In addition, I note that the companies office records of Umbrella show that Mr Lauulu and Mr To’oala have the same residential address. The address is the same as that provided for Umbrella’s registered address and also its address for service. Finally, Mr To’oala’s director’s consent form is noted as having been completed by Mr Lauulu.

¹ This is also the same as the address provided for the sole director of Umbrella.

² Note 2 to Form 8 of the Employment Relations Authority Regulations 2000.

[9] I am satisfied that these two names are used by one and the same person.

[10] I also note that a Mr Samson Samasoni was a Director from 1 October 2019 through to 18 February 2020. Mr Hayes gave evidence that Mr Samasoni was involved in running the business of Umbrella even after this date, and Mr Samasoni was the person who signed for the copies of the statement of problem in this matter on 22 June 2021, with the name "Samson Sam". Mr Samasoni is currently (as at the date of this determination) an undischarged bankrupt. He became so on 19 November 2019, thus he was an undischarged bankrupt during the time he was also director of Umbrella. I will order a copy of this determination be sent to the Official Assignee and leave these issues to the proper authority to deal with.

[11] I am also satisfied that Umbrella, was made aware of these proceedings and the consequences of non-attendance.

The Authority's investigation

[12] For the Authority's investigation, Mr Hayes provided a written statement and accompanying documents. Written statements were lodged from Mr Teewa Cameron, and Mr Robert Walker. All witnesses answered questions under affirmation from me. Mr Hayes provided a written closing statement, and tax records, which were also sent to Umbrella at its registered office for a response.

[13] As already indicated, there was no appearance at the investigation meeting on behalf of the respondent. Although ample time was provided to allow Umbrella to respond to Mr Hayes' closing statement and documents, nothing has been received.

[14] 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.

The issues

[15] The issues requiring investigation and determination were:

- (a) Are wages owing to Mr Hayes, in the sum of \$5,780.10?

- (b) Are payments for annual leave and work done on public holidays owing to Mr Hayes?
- (c) Should a penalty be awarded against Umbrella for failure to provide an individual employment agreement?
- (d) Should a penalty be awarded against Umbrella for breaches of good faith?

Background

[16] Mr Hayes gave evidence on his own behalf. He has worked as a presenter for the radio station “Beach FM”, for approximately 20 years.

[17] He explained that for many years, his key work was on Friday Evenings, and again on Sunday mornings, where he was – and indeed – remains, the regular host of two shows in particular.

[18] In addition to these regular shows, he made himself available for approximately four or so weeks each year, where he would fill in for other hosts who were on leave. He would also fill in for other hosts on public holidays. In particular, he would routinely work on Christmas Day and Boxing Day, New Years Day and 2 January, Easter Friday and ANZAC Day, and Labour Day and Queen’s birthday. He recalls that he would often, although not always, work on other public holidays also. This included working his regular Friday and Sunday shows regardless of whether a public holiday fell on that day or not.

[19] Around the end of 2019, Mr Hayes became aware that the business that included Beach FM had been sold to Mr Samasoni and Mr Lauulu. Mr Hayes’ employment with Umbrella continued.

[20] When Mr Samasoni and Mr Lauulu took over, Mr Hayes was asked to increase his shifts, and to become a week-day host, in addition to his usual shows on Friday evenings and Sunday mornings.

[21] He agreed to do so, but asked that he be provided with a written employment agreement that reflected this. Although he asked for this on multiple occasions, no agreement was ever provided.

[22] Mr Teewa Cameron, the station manager at the time, gave evidence in support of what Mr Hayes had said about his days and times of work, and the absence of an employment agreement. In fact, Mr Cameron said that he himself had asked Mr Samasoni to provide a written employment agreement to Mr Hayes, but nothing was ever done about this.

[23] Mr Hayes was customarily paid monthly in arrears. In early 2020, Mr Hayes and other staff began to experience short pay, and late pay. This came to a head when several staff, including Mr Hayes, authorised a barrister to write to Umbrella on their behalf, on 19 March 2020, raising a personal grievance claim around short-payment, and asking for wage and time records to be provided.

[24] No response to this letter was ever received, either in terms of a response to the grievance claims, or in response to the request that wage and time records be provided.

[25] During Level 4 and then Level 3 Covid-19 restrictions³, Mr Hayes and his colleagues put their pay issues to one side, and worked hard to maintain their local radio, which supported their community and local businesses through the provision of locally relevant information.

[26] Unfortunately, Mr Hayes advises he is still unpaid for the month of March 2020.

[27] On 19 October 2020, Mr Hayes and other staff wrote again to Umbrella reiterating claims for, among other things, unpaid wages.

[28] He has received no response to this claim either.

[29] In around October 2020, Mr Samasoni and Mr Lauulu sold the business of “Beach FM”. Mr Hayes agreed to continue to work for the new owners. Mr Rob Walker gave evidence that he, though his company had employed Mr Hayes as of 1 December 2020. Both Mr Walker and Mr Hayes also gave evidence that originally Mr Samasoni had suggested that Mr Hayes remain employed by the respondent, but continue his work at Beach FM, with Mr Samasoni invoicing Mr Walker for Mr Hayes services.

³ New Zealand went into Level 4 restrictions at 11.59 pm on 25 March 2020. New Zealand moved to Level 3 restrictions at 11.59 pm on 27 April 2020, and remained at Level 3 until 13 May 2020.

[30] Neither Mr Hayes nor Mr Walker were comfortable with this idea, and it was rejected.

[31] Mr Hayes gave evidence that he continues to be owed wages for the month of March 2020, as well as wages for his last two months of work with the respondent.

[32] In addition, Mr Hayes has not received any annual leave payments in respect of his employment with the respondent, or payment for work done on public holidays, or alternative holidays in respect of the same.

[33] In support of his claims, Mr Hayes has provided several documents.

[34] He has provided example payslips. He has provided copies of two rosters showing his work which he has retained, and notes that the rosters, such as they were, were lost during a computer change-over. He has also provided a list of payments made to him, going back to 2015. This is not a comprehensive record, but Mr Hayes notes that this is the best he could obtain, in the absence of any engagement from Mr Samasoni and Mr Lauulu with his request for wage and time records. He further notes that Mr Lauulu was in control of the payroll system, and had removed access to pay records previously held by other staff.

[35] For completeness, I note that there is no particular indication that holiday and leave records exist – if they do, these have not been provided to Mr Hayes either.

[36] Section 132 of the Act provides that, where an employer has failed to keep or produce a wages and time record in respect of an employee as required by this Act; and this failure has prejudiced the employee's ability to bring an accurate claim for wages or other money payable to the employee, then the Authority may accept as proved all claims made by the employee in respect of:

- a. the wages actually paid to the employee; and
- b. the hours, days, and time worked by the employee.

[37] Section 83 of the Holidays Act 2003 applies equally where the employee is seeking to recover holiday and leave pay from the employer in the absence of records under that Act.

[38] I accept the evidence of Mr Hayes as to the work he did for the respondent. This work was public in nature. It is supported by the documentation that does exist, and by the evidence of two long-standing colleagues.

[39] I also accept the evidence of Mr Hayes as to the wages that were actually paid to him, or rather, his evidence that he has not been paid for three months of his work, being March 2020, October 2020, and November 2020. That he was underpaid is supported by contemporaneous correspondence promptly raising this concern on his behalf, and is also supported by the evidence of two colleagues who advise that this was both common knowledge at the time, and was treatment experienced by other staff.

[40] Accordingly, I find that Mr Hayes is owed the wages he claims of \$5,780.10 gross. Umbrella is ordered to pay this sum to Mr Hayes.

[41] Holiday pay is also payable on this sum at the rate of 8%, being \$462.41 gross. Umbrella is ordered to pay this sum to Mr Hayes.

[42] Mr Hayes also raises a claim for unpaid annual leave entitlements. He advises that he did not take any paid leave during his tenure. Rather, on those relatively rare occasions when he did take time off, it was on the basis that if he was not at work, he did not receive any pay. Again, his evidence as to his work habits was supported by his two colleagues.

[43] Mr Hayes advises that he did not receive any payment for annual leave on the ending of his employment with the respondent. There is no indication in the payslips or payment records that exist, that any payment for annual leave was ever made to Mr Hayes.

[44] Section 27 of the Holidays Act 2003 provides that payment for annual holidays must be made, at the latest, when the employee's employment has come to an end.

[45] Accordingly, Mr Hayes should have been paid annual leave on the ending of his employment with Umbrella. In the absence of wage and time records or holiday and leave records, Mr Hayes is not able to bring an accurate claim. Rather, he relies on a partial printout labelled (perhaps misleadingly) "Detailed Hours Worked Report", showing total payments to him over some 5 years, of \$27,830. Mr Hayes claims an amount equal to 8% of that sum which he submits is a fair approximation of his

entitlement to annual leave payable on the termination of employment. This is a claim for the sum of \$2,226.40.

[46] Section 83 of the Holidays Act 2003 provides that, where the Authority is satisfied that an employer has failed to keep holiday and leave records, and that this failure prevented the claimant from bringing an accurate claim, the Authority may accept as proven statements made by the employee about leave payment made and leave actually taken.

[47] I find that Umbrella failed to keep compliant holiday and leave records, if only because it consistently failed to provide them when asked. The partial records that have been provided to the Authority by Mr Hayes are not sufficient to comply with the requirements of section 81 of the Holidays Act 2003. This lack of records has prevented Mr Hayes from bringing an accurate claim for leave owed to him. In my view, taking into account Mr Hayes' work patterns and rates of pay, his claim for unpaid annual leave is modest. I accept the statements made by Mr Hayes that he did not receive paid holidays during his employment or a payment for annual leave on the ending of his employment (which statements are supported by the pay records such as they are).

[48] Accordingly, Mr Hayes' claim for annual leave is made out. Umbrella is ordered to pay to Mr Hayes the sum of \$2,226.40 gross for holiday pay.

[49] Mr Hayes has claimed for payment for work done on public holidays. Section 50 of the Holidays Act 2003 provides that, where an employee works on a public holiday, they must be paid for the work done at the rate of time-and-a-half.

[50] I have already found that Mr Hayes did work on certain public holidays on a regular basis. He states that he was never paid any additional sums to account for public holidays, and the partial records of payment to him suggest that this is correct.

[51] Section 56 of the Holidays Act 2003 provides that, where a public holiday falls on a day that would otherwise be a working day for the employee, and the employee works on that day, the employee must be provided with an alternative holiday. The provision of an alternative holiday is in addition to the payment of time-and-a-half for work done.

[52] Mr Hayes' ordinary days of work were Fridays and Sundays for many years, so he will be entitled to receive payment for alternative holidays in respect of the public holidays that fell on those days. In addition, for the year 2020, Mr Hayes worked Sunday to Friday, so he will be entitled to additional alternative days for that year. Where alternative holidays are not taken as paid time off in the course of employment, the employee will be entitled to receive payment for the un-taken alternative holidays when employment ends, as provided for at section 60 of the Holidays Act 2003.

[53] It is not possible to accurately calculate what Mr Hayes might be owed for untaken alternative holidays, in the absence of compliant holiday and leave records. Mr Hayes has claimed a figure of \$840 per year, over a period of 5 years, the period of 5 years being based on the dates provided in the document labelled "Detailed Hours Worked Report" referred to earlier.

[54] The lack of records kept by Umbrella has prevented Mr Hayes from bringing an accurate claim for the amounts owing to him. In my view, taking into account Mr Hayes' work patterns and rates of pay, his claim for unpaid public holiday pay and alternative days is likely to be modest. I accept the statements made by Mr Hayes that he did not receive payment at the rate of time-and-a-half for work done on public holidays during his employment or a payment for untaken alternative holidays on the ending of his employment (which statements are supported by the pay records such as they are).

[55] Accordingly, Mr Hayes' claim for unpaid public holiday and alternative holidays is made out. Umbrella is ordered to pay to Mr Hayes the sum of \$4,200 gross for these outstanding payments.

Penalties

[56] Mr Hayes also makes claims for penalties, namely: a penalty for failure to provide an individual employment agreement; and a penalty for breaches of good faith.

[57] Mr Hayes gave evidence that he had asked for a written individual employment agreement when he agreed to work Monday to Friday in addition to his long-standing Friday and Sunday work, so that the agreement would accurately reflect his new duties and responsibilities. However, he was never provided with one. Mr Walker and Mr

Cameron also gave evidence that they had raised this with Mr Lauulu and Mr Samsoni as part of their management duties, yet to the best of their knowledge, this was never actioned.

[58] Section 65 of the Act provides that an individual employment agreement must be in writing, and subsection 65(4) provides that an employer who fails to comply with the requirements of this section may be subject to a penalty at the request of the employee.

[59] Umbrella is in breach of section 65 of the Act, in that it has not provided Mr Hayes with a written employment agreement.

[60] The claim that Umbrella is in breach of the duties of good faith set out in section 4 of the Act is based on a number of factors. Most relevant is the evidence that Umbrella repeatedly delayed paying Mr Hayes, provided incomplete or conflicting information about when and how payments owing to him would be made, and refused to respond to the two letters setting out his concerns.

[61] Section 4 of the Act provides that the parties to an employment relationship must not do anything directly or indirectly that misleads or deceives, or is likely to mislead or deceive, the other. The parties must also be active and constructive, and deal with each other in ways that are responsive and communicative. Umbrella's lack of communication with Mr Hayes when he formally and informally raised his concerns, as well as its incomplete and confusing statements around his arrears of wages, fall well short of its obligations towards him.

[62] Accordingly, I find that Umbrella has breached both section 4 and section 65 of the Act. It is liable for a penalty for each breach. Section 135(2)(b) provides that each penalty may be up to \$20,000. In the present case, as there are two breaches, Umbrella is liable for penalties of up to \$40,000.

[63] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁴ *A Labour Inspector v Prabh*⁵ and *A*

⁴ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁵ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

Labour Inspector v Daleson Investment.⁶ Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[64] The considerations in regard to penalties⁷ are as follows:

- a. The object of the Act – section 3 of the Act recognises the legislative requirement for good faith behaviour, and the inherent inequality of power in employment relationships. Umbrella’s conduct undermines the objects of the Act, and Mr Hayes’ has been denied his rights to both fair wages and fair treatment by his own employer;
- b. The nature and extent of the breach – the breaches go to the fundamental nature of the employment relationship, and have continued over time;
- c. Whether the breach was intentional, inadvertent, or negligent – The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question⁸, or failed to take reasonable steps to fulfil their legal obligations.⁹ The evidence suggests that the breaches were negligent, as Mr Hayes sought remedies on multiple occasions, and was ignored;
- d. The nature and extent of any loss or damage – the with-holding of monies due to Mr Hayes is a disadvantage to him and provides a practical benefit to Umbrella;
- e. Compensation or other steps in mitigation – Umbrella has taken no steps to remedy the breaches, which extends to its failure to engage with the Authority’s investigation;

⁶ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁷ *Nicholson v Ford*, [2018] NZEmpC 132.

⁸ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

⁹ *El-Agez v Comprede Limited*, TT 4121553, at para 18

- f. The circumstances of the breach, including the applicant's vulnerability – Umbrella had the ability to engage with Mr Hayes, but chose not to over a period of some months;
- g. Any similar conduct – There is evidence of similar previous conduct by the respondent. I note the matter of *O'Leary v Umbrella Multimedia Limited*¹⁰, where Umbrella was found to have failed to pay wages to another employee in similar circumstances. This suggests a deliberate course of conduct by Umbrella, again with obvious financial benefits to it.
- h. Deterrence – there is a need for deterrence on a general basis, and also on a particular basis given past similar conduct;
- i. Degree of culpability – the breaches were ones capable of remedy, if only Umbrella had responded to Mr Hayes in a timely way;
- j. Consistency – the present case is consistent with previous awards;
- k. Ability to pay – Umbrella has provided no financial information;
- l. Proportionality – the breaches are on-going and affect more than just the applicant;

[65] Taking all the above matters into account, a penalty of \$12,000 is awarded; \$2,000 of this penalty is to be paid to the Crown account, and the remaining \$10,000 to Mr Hayes. This is in recognition of the fact that both the failure to provide a written employment agreement, and the failure to engage with Mr Hayes in good faith are actions that have made it more difficult for Mr Hayes to pursue his claim and to make accurate claims for the arrears owing to him.

Orders

[66] Umbrella is ordered to pay to Mr Hayes in full and within 28 days:

- a. wages of \$5,780.10. gross; and
- b. holiday pay on this sum at the rate of 8%, being \$462.41 gross; and

¹⁰ 2021 NZERA 442.

- c. annual leave being \$2,226.40 gross; and
- d. payment for work done on public holidays at the rate of time-and-a-half, and unpaid alternative holidays, being \$4,200 gross; and
- e. Penalties of \$12,000, with \$10,000 being paid to Mr Hayes, and \$2,000 to the Crown account.

[67] I advise Mr Lauulu that should the above amounts not be paid in full, he may find himself personally liable for at least the amounts specified in [67](a) to (d) pursuant to section 142W and 142Y of the Employment Relations Act 2000.

Costs

[68] As neither party was legally represented, there is no issue as to costs.

Claire English
Member of the Employment Relations Authority