

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 135/10  
5297963

BETWEEN                      ORALEE HUNT  
   Applicant

AND                              KALILANDS LIMITED  
   TRADING AS K & M  
   DINNERS  
   Respondent

Member of Authority:        G J Wood

Representatives:             Steve Emslie for the Applicant  
   Mariann Guy for the Respondent

Investigation Meeting:      7 July 2010 at Wanganui

Submissions Received:      By 14 July 2010

Determination:                27 August 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Ms Hunt claims that she was underpaid throughout the course of her employment of just over two months' with the respondent (Kalilands), which trades as K&M Dinners. It provides ready-to-eat meals for the elderly and others. Ms Hunt therefore claims \$1,006.27 gross wages outstanding, together with holiday pay of \$181.75 gross, plus the \$70 filing fee. Kalilands' position is that Ms Hunt was paid all moneys she was due but that many of the payments were in cash and hence do not appear in the records. Holiday pay was said to be included in the hourly rate, which was set at the minimum wage.

[2] Ms Hunt made a complaint about holiday pay to a Labour Inspector within two months of leaving her employment and raised a personal grievance with Kalilands soon thereafter, based on the same issues.

[3] By comparison Kalilands has not responded to Ms Hunt's claims in an appropriate manner. As indicated in my notice of direction dated 16 June 2010, Kalilands had failed to supply a statement in reply as required by law. It therefore required leave of the Authority to respond. I indicated at that point that such an application, together with a proposed statement in reply, should be made in writing by 28 June 2010. Despite a director of Kalilands, Ms Mariann Guy, being in attendance at the conference call, Kalilands again failed to follow its legal obligations. Instead, the only material provided by Kalilands was given to the Authority on the morning of the investigation meeting, which had been set in the afternoon at Ms Guy's convenience. I determined in the interests of justice to allow Kalilands' application for leave to respond and Ms Guy gave evidence in support of Kalilands' position.

[4] Consistent with its approach to this matter, Kalilands also failed to respond to calls from the Mediation Service to try and organise mediation, in order to avoid the involvement of the Authority. Furthermore, at the conclusion of the investigation meeting Ms Guy was directed to provide wage and time records, bank statements and records of cash transactions for Kalilands, together with her own personal bank statements by 14 July. This information was required in order to support Ms Guy's claims that Ms Hunt was paid all monies owing to her, either directly by Kalilands, or indirectly through payments made personally by her. Ms Guy failed to do so, but claimed (for the first time) that Ms Hunt was a contractor rather than an employee of Kalilands and noted that it had ceased trading from 31 March.

[5] I have no difficulty in concluding that the real nature of the relationship between Ms Hunt and Kalilands was one of employer and employee. She bought no tools to the business, had little or no discretion as to how she carried out her work, appeared to be required to carry out the work herself, and was subject to significant control by Kalilands, being fully integrated into its business. In no way therefore, could it be said that she was in business on her own account.

[6] The fact that Kalilands may have ceased trading is of no relevance to the Authority's determination.

[7] In essence, the major difference between the parties, apart from matters of payment for statutory holidays and holiday pay, relates to whether or not Ms Hunt was paid in the way that is colloquially known as *under the table*. There can be no

other explanation that either Ms Hunt or Ms Guy is simply incorrect about the existence of payments under the table.

[8] Although this could be expected, I note that there were no Inland Revenue records to support Ms Guy's contention. Ms Hunt denied ever receiving such payments. Accordingly, Ms Guy, on behalf of Kalilands, was either giving wrong evidence to the Authority or has not been meeting her obligations to the Inland Revenue Department.

[9] As well as its duties to Inland Revenue, Kalilands is also required to provide wage and time records under the Act, and holiday records under the Holidays Act 2003. The absence of such records required to be kept by statute, Kalilands' consistent failures to address the matters at issue and the inherent unlikelihood that Kalilands would have failed to meet its duties to the Inland Revenue lead me to the conclusion, on the balance of probabilities (i.e. what is more likely than not) that, rather than paying Ms Hunt *under the table*, Kalilands has failed to pay Ms Hunt properly during the course of her employment, perhaps for reasons of cashflow.

[10] While Ms Guy claims that Ms Hunt agreed to be paid holiday pay *as she went*, such an agreement, even if it existed, can not be entered into in breach of the minimum wage. An employee is entitled to the minimum wage (at that time \$12.50 per hour, which is what Ms Hunt was paid) plus holiday pay at 8% on top. Furthermore, Ms Hunt was entitled to be paid extra for days she worked that were statutory holidays. I accept the calculations of Ms Hunt based, as they are, on the employer's calculation of hours.

[11] I therefore order the respondent, Kalilands Limited, to pay to the applicant, Ms Oralee Hunt, the sum of \$1,188.02 gross in remuneration owing, plus the \$70 filing fee.

**G J Wood**  
**Member of the Employment Relations Authority**