

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 138
3225980

BETWEEN JOANNE JENKINS
Applicant

AND ANTONIO CANDERLE
Respondent

Member of Authority: Rowan Anderson

Representatives: Ursula Nicholls, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 8 March 2024 in Palmerston North

Submissions received: At the investigation meeting from the Applicant
No submissions from the Respondent

Determination: 8 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joanne Jenkins was employed as a barista and front of house staff member by Antonio Canderle at “Italy 2 U” in Palmerston North, commencing her employment on 7 November 2022. Ms Jenkins’ individual employment agreement (IEA) recorded “Italy 2 U” as being the employer, although she claims her employer was Antonio Canderle.

[2] Ms Jenkins claims that she is entitled to unpaid wages and entitlements and that she was unjustifiably disadvantaged in her employment resulting from an ongoing failure by Mr Canderle to make payment in relation to those wages and entitlements. Ms Jenkins seeks compensation for humiliation, loss of dignity, and injury to feelings. She also seeks payment of unpaid wages and entitlements. Further, Ms Jenkins claims

that Mr Canderle breached s 10 of the Minimum Wage Act 1983 by failing to pay wages when due and seeks a penalty be imposed upon Mr Canderle.

[3] Mr Canderle has not responded to the statement of problem lodged by Ms Canderle.

Issues

[4] The issues identified for investigation and determination, are:

- (a) Was Ms Jenkins employed by Mr Canderle?
- (b) Is Ms Jenkins entitled to any unpaid wages or other entitlements?
- (c) Was Ms Jenkins unjustifiably disadvantaged in her employment, including having regard to any failure by Mr Canderle to pay wages or entitlements?
- (d) If Mr Canderle's actions were not justified (as to the dismissal or disadvantage) what remedies should be awarded?
- (e) Has Mr Canderle breached the Minimum Wages Act 1983 by failing to make payment of the minimum wage? If so, should a penalty be imposed upon Mr Canderle?
- (f) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[5] Mr Canderle did not lodge a statement in reply responding to Ms Jenkins' claims. Mr Canderle did not otherwise meaningfully engage in the Authority's process, nor did he attend the investigation meeting.

[6] On 25 September 2023, I issued a Minute that included a direction as to service in respect of Mr Canderle providing for Mr Canderle to be served documents and notices by email.

[7] The Authority received emails from Mr Canderle, including on 10 October 2023 and 9 November 2023. Those emails referred, without providing any relevant detail and without requesting an adjournment, to Mr Canderle being in hospital. On 11 October 2023, the Authority sought further detail from Mr Canderle as to whether an adjournment was being sought on medical grounds, directing that further information be provided if that were the case, and inviting comment on any arrangements that might

facilitate his participation if there were any issues impacting the same. No substantive response was provided by Mr Canderle and the matter has proceeded.

[8] I am satisfied that Mr Canderle was served with the statement of problem, notice of investigation meeting, and other relevant documents relating to the Authority's investigation.

[9] A case management conference was held on 9 November 2023. There was no appearance by Mr Canderle. Written directions were issued, and an investigation meeting scheduled for 8 March 2024 in Palmerston North. The written directions issued provided a timeframe within which any objections should be made as to the proposed timetable. No objection was received.

[10] An investigation meeting was held on 8 March 2024. Mr Canderle was not present at the scheduled commencement time. I delayed commencement of the investigation meeting for 15 minutes and checked that Mr Canderle was otherwise at the premises. Ms Jenkins was the only witnesses, having earlier provided a written statement in accordance with the directions issued. She answered questions under affirmation at the investigation meeting. Mr Canderle did not attend the investigation meeting.

[11] At the commencement of the investigation meeting, counsel for Ms Jenkins confirmed that her claim as to penalties in relation to the Minimum Wage Act 1983 were withdrawn. As such, I need not consider that issue.

[12] 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 of the evidence and submissions received.

Was Ms Jenkins employed by Mr Canderle?

[13] Ms Jenkins claims that Mr Canderle was her employer. Although the café ran under the name "Italy 2 U", that being the same name as used in the IEA as being the employer, Ms Jenkins claims that Mr Canderle was her employer and text messages provided by Ms Jenkins show Mr Canderle as being responsible for both Ms Jenkins' recruitment and as dealing with Ms Jenkins's pay claims. "Italy 2 U" is not registered with the Companies Office.

[14] Mr Canderle also was the signatory of correspondence issued by “Italy 2 U” and singled the IEA. There is no evidence of any other entity or individual acting in a manner that might indicate that Ms Jenkins was employed other than by Mr Jenkins.

[15] I am satisfied that Mr Canderle was Ms Jenkins’ employer in his personal capacity.

Was Ms Jenkins unjustifiably disadvantaged in her employment?

[16] Ms Jenkins claims that she was unjustifiably disadvantaged in her employment on the basis that Mr Canderle failed to pay her full wages when due.

[17] Ms Jenkins’ evidence is that she was employed on a permanent full-time basis starting on 12 February 2023, albeit that she had worked a shift on 30 January 2023 to cover for another worker. She said that after a few weeks, she found out from other staff that Mr Canderle was having financial difficulties.

[18] During the week of 13 March 2023, Ms Jenkins said that Mr Canderle told her and other staff that the café would need to close early because there was not enough business. She said she was paid \$418.96 net for that week and that her hours were recorded as being 21.10 instead of the 35 hours per week that she had contracted for. A payslip provided from that period records that 22.10 hours were worked. The payslip provided by Ms Jenkins shows the gross payment made as being \$519.35 for the week commencing 13 March 2023.

[19] Ms Jenkins said that a similar situation occurred the following week and that on 25 March 2023 another staff member messaged her advising that that would be their last night of work. Ms Jenkins then sent a text message to Mr Canderle who confirmed that it was the last night of service. Mr Canderle’s response was simply “yes” and no other information was provided at that time. The text messages provided show that the next message from Mr Canderle was on 10 June 2023 asking Ms Jenkins to return a key.

[20] Ms Jenkins said she followed up on a number of occasions seeking payment of her outstanding wages. Ms Jenkins’ claims that she is entitled to payment of \$1,151.50 for the period between 19 March 2023 and 25 March 2023. The text messages provided

show that Mr Canderle was aware that wages were due. When asked when the wages would be paid, Mr Canderle responded “[w]hen I can I’m still in hospital”.

[21] The IEA states that Ms Jenkins would be paid \$23.50 per hour for a minimum of 35 hours per week. Clause 7.2 of the IEA provided that Ms Jenkins would be paid weekly. Ms Jenkins was entitled to payment of her full wages on a weekly basis. Ms Jenkins sought payment from Mr Canderle on a number of occasions, but the wages have not been paid. I find that Ms Jenkins was not paid in accordance with the IEA.

[22] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Mr Canderle’s actions, and how Mr Canderle acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[23] Justification requires the consideration of both substantive and procedural fairness. The onus is on Mr Canderle to justify his actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[24] Mr Canderle has not responded to Ms Jenkins’ claims and no justification has been put forward. I am not satisfied that Mr Canderle has discharged the onus of proving there was a justification for his actions. I find that Ms Jenkins was unjustifiably disadvantaged in her employment by Mr Canderle’s actions in failing to pay wages for the agreed hours of work.

[25] I find that Ms Jenkins was unjustifiably disadvantaged in her employment.

Is Ms Jenkins entitled to remedies?

Is Ms Jenkins entitled to compensation for humiliation, loss of dignity and injury to feelings?

[26] Ms Jenkins seeks compensation for humiliation, loss of dignity and injury to feelings.

[27] Ms Jenkins’ evidence is that she was suddenly without income and suffered stress as a result. She said that she sought alternative employment, but that she was

¹ Employment Relations Act 2000, s 103A.

initially unsuccessful. She fell behind in paying bills and is still impacted and trying to pay outstanding sums. She said she also had to have her flatmates cover rent arrears and that she had to approach Work and Income New Zealand for assistance. She said she was affected emotionally, lost confidence, and suffered anxiety.

[28] I am satisfied that Ms Jenkins was negatively impacted by Mr Canderle's actions in relation to the issues with payment of wages and I am satisfied she is entitled to compensation for the impacts it has had.

Contribution

[29] Section 124 of the Act requires that the Authority consider the extent to which Ms Jenkins' actions contributed towards the situation that gave rise to her personal grievance, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.²

[30] I do not consider there is any basis on which Ms Jenkins' actions could be said to have contributed to the situation that gave rise to her personal grievances. I decline to make any reduction on account of contribution.

[31] I order Mr Canderle make payment to Ms Jenkins, within 28 days, of \$12,500 as compensation for humiliation, loss of dignity and injury to feelings relating to her unjustified disadvantage claim.

Is Ms Jenkins entitled to any arrears of wages and payment for annual holidays?

[32] Ms Jenkins claims that Mr Canderle failed to pay her wages when due and that she is owed \$1,151.50. Ms Jenkins gave evidence of the payment received and as to her hours of work and contracted hours.

[33] Ms Jenkins confirmed that she was paid a total of \$418.96 net for the work she undertook for the week commencing 13 March 2023, and that she was not paid at all for the following week. Ms Jenkins said she followed up on a number of occasions seeking payment of her outstanding wages. Ms Jenkins' claims that she is entitled to payment of \$1,151.50.

² Employment Relations Act 2000, s 124.

[34] I accept Ms Jenkins' evidence as to the hours of work agreed in the IEA. She was entitled to payment for 70 hours for the relevant two-week period. The gross wages due were \$1,645.00. Ms Jenkins was paid \$519.35 gross. As such, I find that she is due payment of \$1,125.65 gross.

[35] I find that Ms Jenkins, in addition to the wages not paid, is entitled to payment of annual holidays. Ms Jenkins was entitled to be paid for annual holidays when her employment ended in accordance with s 27(1)(b) of the Holidays Act 2003. I find that Ms Jenkins is entitled to \$131.60³ in unpaid annual holidays⁴.

[36] I order that Mr Canderle pay Ms Jenkins, within 28 days of the date of this determination:

- (a) \$1,125.65 in unpaid wages;
- (b) \$131.60 for annual holidays not paid;
- (c) 3 percent of the gross wages as the employer KiwiSaver contribution.

Summary of orders

[37] Antonio Canderle is ordered, within 28 days of the date of this determination, to make payment to Joanne Jenkins of:

- (a) \$12,500 as compensation for humiliation, loss of dignity, and injury to feelings relating to her unjustified dismissal claim;
- (b) \$1,125.65 in unpaid wages;
- (c) \$131.60 for annual holidays not paid; and
- (d) 3 percent KiwiSaver employer contribution on her gross wages, to the extent that has not already been paid.

Costs

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[39] If they are not able to do so and an Authority determination on costs is needed Ms Jenkins 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

³ On the basis of her gross wages having been a total of \$1,645.00.

⁴ Calculated on the basis of 8 percent of gross earnings in accordance with s 23 of the Holidays Act 2003.

Mr Canderle 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.

[40] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Rowan Anderson
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.