

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 326
3013815

BETWEEN Jonathan Xavier Maybee
Kubiak
Applicant

AND Nosh Food Market Limited
Respondent

Member of Authority: Jenni-Maree Trotman
Representatives: Applicant in person
No appearance for Respondent
Investigation Meeting: 18 October 2017
Oral Determination: 18 October 2017
Record of Determination 19 October 2017

**RECORD OF ORAL DETERMINATION
OF THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Nosh Food Market Limited defaulted in payment to Mr Kubiak of wages and other money payable to him under the Individual Employment Agreement.**
- B. Nosh Food Market Limited is ordered to pay to Mr Kubiak the following amounts within 14 days of the date of this determination:**
- i. The sum of \$3,402.13 gross under s131 of the Employment Relations Act 2000;**
 - ii. Interest on the sum of \$3,402.13 from 6 June 2017 at the applicable rate of 5% per annum continuing until payment.**
 - iii. The sum of \$71.56 for costs.**

Employment Relationship Problem

[1] Mr Kubiak was employed by Nosh Food Market Limited on 23 August 2015 as a merchandiser. The parties' relationship was without issue until Mr Kubiak's last day of employment on 7 June 2017.

[2] On 7 June 2017, Mr Kubiak claims that Nosh did not pay all wages payable to him including his outstanding annual leave and alternative holiday entitlements. He says Nosh has not rectified this default.

[3] No Statement in Reply has been filed by Nosh. In addition, there was no appearance for or on behalf of Nosh at the investigation meeting. The notice of investigation meeting was served on Nosh at its registered office on 13 July 2017. It was signed for by Mr Van der Burgh at 5.53 pm. No good reason has been provided for Nosh's failure to attend or be represented. As provided for in Clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Nosh had duly attended or been represented.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the applicant but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues:

[5] The issues to be determined are:

- a) Has there been a default in payment of wages payable to Mr Kubiak under the Individual Employment Agreement (IEA)?
- b) If so what monies are payable by Nosh to Mr Kubiak?
- c) Should interest be awarded on any amount found payable by Nosh to Mr Kubiak?
- d) What costs, if any, are payable?

Issue One: Has there been a default in payment of wages payable to Mr Kubiak under the IEA?

[6] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.¹

[7] The terms and conditions of Mr Kubiak's employment are set out in an undated IEA. The version I was provided with was unsigned but I accept Mr Kubiak's evidence that he signed the IEA prior to commencing employment with Nosh.

[8] The material terms of the IEA were:

a) Clause 6.1

The Employer shall provide you with up to the number of paid hours per week specified in Schedule A to be worked across any day throughout the week, including weekends and public holidays. The hours shall initially be in accordance with the following roster unless both parties agree otherwise. However, following consultation with you the number of hours of work...may be varied by the Employer to meet the needs of the business and its customers. Where, after consultation with you, agreement is not reached about any variation required, the Employer may give two weeks' notice of any change.

b) Clause 7.1

Your ordinary hourly rate of pay per hour worked shall be as specified in Schedule A payable fortnightly, by direct credit to a bank account nominated by you.

c) Clause 15.1

Annual holidays shall be allowed in accordance with the Holidays Act 2003 and its amendments. The Employee is entitled to the amount of annual holidays specified in Schedule A on the completion of 12 months of current continuous employment with the Employer

d) Clause 15.4

Any annual holidays taken in advance of entitlement shall be later deducted from the Employee's future entitlement or, where applicable, from any final payments on termination of employment.

e) Clause 15.5

¹ Section 131 Employment Relations Act 2000

Payment for annual holidays will be processed in the pay period that relates to the period during which the holiday was taken.

f) Schedule A

Hours of Work: Approximately 20 hours per week

Hourly rate: \$17.50

Annual holidays: 4 weeks entitlement per annum

[9] The IEA also reiterated the Holidays Act provisions relating to payment for public holidays.

[10] For the reasons which I set out below, I find that Nosh defaulted in payment to Mr Kubiak of monies payable under the IEA. Particularly in relation to monies payable for alternative holidays, public holidays and annual leave.

Issue Two: What monies are payable to Mr Kubiak?

Alternative holidays

[11] Section 56 of the Holidays Act 2003 provides that an employee is entitled to another day's holiday where the employee works on a public holiday and that public holiday falls on a day that would otherwise have been a working holiday for the employee.

[12] The Wage Records show that on termination Mr Kubiak was owed 7.5 alternative holidays. Mr Kubiak says this record is incorrect because it fails to include an alternative holiday for 2 January 2017 and 17 April 2017 (Easter Monday).

[13] Mr Kubiak says, and the rosters produced show, that he worked on both 2 January 2017 and 17 April 2017. These were days he ordinarily worked. On 2 January 2017 he was paid for the 9.5 hours he worked. However, he was not paid half that amount again nor was he provided with an alternative holiday as required by s 50 and s 56 of the Holidays Act.

[14] On 17 April 2017 Mr Kubiak was paid for the hours he worked, and half that amount again, but he did not receive an alternative holiday for this day prior to his termination.

[15] I am satisfied that Mr Kubiak was entitled to receive an alternative holiday for both 2 January 2017 and 17 April 2017. When these alternative holidays are added to those recorded in the wage records the total alternative holidays for which Mr Kubiak must receive payment total 9.5 days.

[16] Mr Kubiak is entitled to receive payment for 9.5 days at the rate of his relevant daily pay or his average daily pay for his last day of employment². To calculate Mr Kubiak's average daily pay I have used the formula set out in s 9A of the Holidays Act 2003. The Wage records show Mr Kubiak's earnings for the 52 weeks prior to his employment ending amount to \$32,955.57.

[17] This sum must be divided by the number of days on which Mr Kubiak earned those earnings. Mr Kubiak says his days of work fluctuated at various periods during his employment. However, as he retained copies of the rosters provided by Nosh, he was able to produce a schedule showing the number of days he worked in the 52 weeks prior to his employment ending. The number of days worked total 184 days. This is consistent with the wage records and rosters provided to the Authority by Mr Kubiak.

[18] Mr Kubiak's average daily pay was therefore \$179.10. Multiplying this sum by the number of alternative holidays (9.5 days) comes to a sum of \$1,701.45. A sum of \$136.11, representing 8% holiday pay, must be added to this sum.

[19] Nosh is ordered to pay Mr Kubiak the sum of \$1,837.56 under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Time and a half

[20] Pursuant to s 50 of the Holidays Act, Mr Kubiak is entitled to be paid time and a half for hours worked on a public holiday. On 2 January 2017 Mr Kubiak was paid for the 9.5 hours he worked but was not paid half that amount again. 4.75 hours multiplied by Mr Kubiak's hourly rate of \$17.50 equals \$83.12. A sum of \$6.65, representing 8% holiday pay, must be added to this sum.

² Section 60(2), Holidays Act 2003

[21] Nosh is ordered to pay Mr Kubiak the sum of \$89.77 under s 50 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Public Holidays

[22] Sections 43 and 44 of the Holidays Act set out an employee's entitlement to 11 public holidays if the holidays fall on days that would otherwise be working days for the employee.

[23] Mr Kubiak said, and the wage records support, that he didn't receive payment for 5 June 2017 being Queen's Birthday. He said that, whilst he didn't work on this day, it was a day that he would otherwise have worked. This is consistent with the roster in place at the time.

[24] Pursuant to s 49 of the Holidays Act Mr Kubiak is entitled to receive payment for this public holiday. This must be calculated at a rate not less than his relevant daily pay or his average daily pay for that day. Mr Kubiak says the amount of pay he would have received had he worked on this day would have been 4.5 hours. Multiplying this by his hourly rate of \$17.50 amounts to a sum of \$78.75. A sum of \$6.30, representing 8% holiday pay, must be added to this sum.

[25] Nosh is ordered to pay Mr Kubiak the sum of \$85.05 under s 49 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Payment for annual leave due on termination

[26] Calculation of Mr Kubiak's annual leave entitlements must be made in accordance with s 25 of the Holidays Act. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays for a subsequent 12-month period of employment because the employee has not worked for the whole of the subsequent 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount paid to the employee for annual holidays taken in advance.

[27] Mr Kubiak started working for Nosh on 23 August 2015. The second 12-month period of his employment therefore started on 24 August 2016. Between 24 August 2016 and 6 June 2017 Mr Kubiak's gross earnings were \$25,246.88. 8% of this sum is \$2,019.75.

[28] During this period the wage records show Mr Kubiak took 36 hours of annual leave in advance. Multiplying these hours by his hourly rate of \$17.50 comes to a figure of \$630.00. Deducting this figure from the sum of \$2,019.75 leaves a sum of \$1,389.75 payable to Mr Kubiak for annual holiday pay.

[29] Nosh is ordered to pay Mr Kubiak the sum of \$1,389.75 for unpaid annual holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Issue Three: Interest

[30] Mr Kubiak claims interest on the amounts awarded by the Authority. In the circumstances I consider it appropriate to order interest is payable by Nosh. The combined total of the wage arrears awarded is \$3,402.13. Nosh is ordered to pay interest on this sum from 6 June 2017 at the applicable rate of 5% per annum³ continuing until payment. This must be paid within 14 days of the date of this determination.

Issue Four: Costs

[31] Mr Kubiak was not represented and therefore does not claim legal costs. He does however claim a sum of \$221.56 representing 6 hours of his time at a rate of \$25.00 per hour. I do not consider Mr Kubiak's time in preparing for, or attending the investigation meeting, to be costs reasonably recoverable from Nosh. I therefore decline Mr Kubiak's claim for this sum.

[32] Mr Kubiak also claims the Authority's filing fee of \$71.56. This fee is an amount reasonably recoverable from Nosh. I order Nosh to pay the sum of \$71.56 within 14 days of the date of this determination.

³ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4

Certificate of Determination

[33] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 that Mr Kubiak be provided with a certificate of determination, sealed with the seal of the Authority recording that within 14 days of the date of this determination, Nosh Food Market Limited is to pay Mr Kubiak:

- a) The sum of \$3,402.13 gross under s 131 of the Employment Relations Act 2000;
- b) Interest on the sum of \$3,402.13 from 6 June 2017 at the applicable rate of 5% per annum continuing until payment.
- c) The sum of \$71.56 for costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority