

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 162
3078412

BETWEEN AARON LACEY
 Applicant

AND MCKENZIE AND SONS
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Caroline Rieger, counsel on behalf of the Applicant
 No Attendance by Respondent

Investigation Meeting: 20 April 2020

Submissions and further 20 and 21 April 2020 from the applicant
Information Received:

Date of determination: 23 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] McKenzie and Sons Limited trades in Taupo as the Lakehouse Restaurant (the Lakehouse). Aaron Lacey was employed by the Lakehouse in late 2015 as a Chef. On 6 March 2018 the employment relationship ended.

[2] Mr Lacey claims for unpaid wages and asks the Authority to impose a penalty on the Lakehouse for breaches of the Wages Protection Act 1983, the Holidays Act 2003, and under s 63A and s 64 of the Employment Relations Act 2000 (the Act). A claim for holiday pay arrears was resolved shortly before the investigation meeting; however Mr Lacey maintains a claim for interest on the holiday pay he was owed up to the date of payment as well as for interest on his wage arrears.

[3] No Statement in Reply was filed by the Lakehouse.

The Authority's process

[4] On 18 December 2019 the Authority issued a minute wherein it confirmed that the Lakehouse had not filed a Statement in Reply despite being granted an extension of time to do so. The Lakehouse was advised:

Pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, the Respondent will require the leave of the Authority to reply or respond to the application. If an application for leave is filed by the Respondent this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[5] The Lakehouse was also directed to provide a copy of Mr Lacey's employment agreement, wage and time records, leave and holiday records, payslips and final pay details.

[6] The Lakehouse did not file a Statement in Reply, nor did it provide the documents that were directed by the Authority. Accordingly, the parties were notified that personal attendances at the investigation meeting would not be required and the investigation meeting would take place by telephone.

[7] The Lakehouse then notified the Authority that it objected to this process. The Authority therefore provided it with a further opportunity to provide a Statement in Reply, failing which it was advised the investigation meeting would go ahead by telephone. No statement in reply was filed.

[8] The scheduled investigation meeting was then adjourned to 20 April 2020, being a date that the Lakehouse confirmed was suitable. A minute was issued advising the parties of this adjournment and reminding the Lakehouse that the Authority had yet to receive a Statement in Reply. It was also reminded that the Authority had not received the directed documents and told:

In the event that these documents are not provided the Authority may, unless the Respondent proves that the Applicant's claims are incorrect, accept as proved all claims made by the Applicant in respect of the wages actually paid to him and the hours, days, and time he worked.

[9] In the circumstances, the investigation meeting took place by telephone. Mr Lacey provided evidence on his behalf and was represented by his lawyer. There was no appearance by or on behalf of the Lakehouse. However, as provided for in clause 12 of Schedule 2 of the Act, I proceeded to act as fully in the matter before me as if the Lakehouse had duly attended or been represented.

[10] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

The issues

[11] The issues requiring investigation and determination were:

- a) What wage arrears are owing to Mr Lacey?
- b) Should the Authority order the Lakehouse to pay interest on any wage arrears owing to Mr Lacey and/or on holiday pay arrears that were not paid upon the termination of Mr Lacey's employment as required by s 27 of the Holidays Act?
- c) Did the Lakehouse breach s 63A or s 64 of the Act?
- d) Should the Authority order the Lakehouse to pay a penalty for any breach of the Wages Protection Act, the Holidays Act and/or the Act?
- e) Should either party contribute to the costs of representation of the other party?

Issue One: What wage arrears are owing to Mr Lacey?

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

[13] Mr Lacey claims wage arrears totalling \$2,550. These wages are alleged to arise from the non-payment of wages to Mr Lacey during the two week period from 12 February to 26 February (\$1,550 gross) and from 27 February to 6 March 2018 (\$1,000 gross).

Wage arrears for the period 12 February to 26 February 2018

¹ Employment Relations Act 2000, s 131.

[14] Mr Lacey said he was not paid for the hours he worked during the two week period from 12 February to 26 February 2018. The sum claimed of \$1,550 equates to 62 hours at his hourly rate of \$25.

[15] Under questioning, Mr Lacey said he had no immediate recollection of the hours he worked and relied on the payslips that were provided for this period. He also referred the Authority to an email dated 13 March, the week after his termination, which he sent to the Lakehouse and which recorded the hours he had worked.

[16] Having considered these contemporaneous documents I accept as proven Mr Lacey's claim that he worked 62 hours during the period from 12 February to 26 February. In doing so, I have taken into account the following:

- a. Mr Lacey's email of 13 March noted the hours he had worked each day during the period from 12 February to 23 February 2018. These hours totalled 50 hours (excluding a "150 minute break"). However, he noted that he had also worked on Saturday 24 February and Sunday 25 February but that he didn't keep a record of the hours he worked those days.
- b. The payslips issued by the Lakehouse show that Mr Lacey worked 62.02 hours during the period from 12 February to 19 February. Although it appears that the hours recorded on 19 February (55.52 hours) were for the entire week i.e. until 25 February.
- c. Although the hours recorded in the payslips exceed the hours Mr Lacey recorded in his 13 March email, it is likely they included the hours Mr Lacey worked on Saturday 24 February and Sunday 25 February.

[17] 62 hours multiplied by Mr Lacey's hourly rate of \$25 comes to \$1,550 gross.

[18] I accept as proven Mr Lacey's claim for payment of wage arrears in the sum of \$1,550 for the two week period from 12 February to 25 February 2018.

Wage arrears for the period of suspension

[19] Mr Lacey was suspended from 27 February to 6 March 2018. He says he was not paid wages during this one week period. He claims recovery of a sum of \$1,000 that equates to what he would have earned that week had he not been suspended, based on his average earnings.

[20] In the absence of a written employment agreement allowing for suspension without pay, and taking into account Mr Lacey's evidence that he did not consent to being away from work without pay, Mr Lacey was entitled to be paid for the hours he would have worked but for his suspension.

[21] I accept as proven Mr Lacey's claim for payment of wage arrears for the period from 27 February to 6 March 2018 in the amount claimed of \$1,000. This sum is consistent with my calculations of his ordinary weekly wages on the basis set out in s 8(2) of the Holidays Act. The payslips for the four weeks prior to his termination show that he worked 168.77 hours. Dividing those hours by four I reach an average of 42.19 hours per week. 42.19 hours multiplied by Mr Lacey's hourly rate of \$25 per hour equals \$1,054.81.

Findings on issue one

[22] The Lakehouse is ordered to pay Mr Lacey the amount of \$2,550 gross, within 14 days of the date of this determination, being made up of:

- a. Wage arrears for the two week period from 12 February to 26 February 2018 in the sum of \$1,550.
- b. Wage arrears for the period from 27 February 2018 to 6 March 2018 in the sum of \$1,000.

Issue Three: Interest

[23] Mr Lacey was paid weekly. He ought to have been paid his wage entitlements as they fell due. He was not. He is entitled to an award of interest on the wage arrears owed to him of \$2,550 of which he was deprived the use. In addition, at the end of his employment, Mr Lacey ought to have been paid his holiday pay entitlements of \$12,389.16. He is entitled to an award of interest on this sum too.

[24] The Lakehouse is ordered to pay interest, using the Civil Debt interest calculator, as follows:²

² Employment Relations Act 2000, Schedule 2 clause 11 and www.justice.govt.nz/fines/civil-debt-interest-calculator.

- a. Interest on the wage arrears of \$2,550 gross for the period from 6 March 2018 until the date payment is made in full.
- b. Interest on the outstanding holiday pay arrears of \$12,389.16 from 6 March 2018 until 4 May 2019.
- c. Interest on the outstanding holiday pay arrears of \$6,194.50 from 5 May until 26 February 2020.

Issue Four: Employment Agreement

[25] The Act imposes a number of mandatory requirements that apply when parties are bargaining for individual terms and conditions in an employment agreement.³ It also sets out requirements of an individual employment agreement (IEA) including that it must be in writing and contain the six pieces of information set out at s65(2).

[26] Section 64 of the Act requires an employer to retain a copy of an IEA and, if requested by the employee, provide the employee with a copy of the IEA.

[27] An employer who fails to comply with any of these requirements is liable to a penalty imposed by the Authority.

[28] The Statement of Problem alleges that the Lakehouse breached s 63A(2) and s 64 of the Act. In submissions filed on Mr Lacey's behalf it is submitted:

In his email of 16 April 2019, Mr Clark refers to the "HANZ employment agreement". The Applicant has not been presented with a signed copy of his employment agreement by the Respondent. Therefore, the Respondent has breached section 63A of the Employment Relations Act 2000.

[29] Having heard from Mr Lacey I am satisfied, on balance, that the Lakehouse met its obligations under these provisions.

[30] Under questioning from the Authority Mr Lacey acknowledged that he had received three copies of the IEA from the Lakehouse prior to taking on his role as head chef. He said he read the IEA before signing it and then returned the three copies to the Lakehouse. He said he never asked for a copy of the IEA but was aware at all material times that he was entitled to do so.

³ Employment Relations Act, s 63A.

[31] In the circumstances I dismiss this aspect of Mr Lacey's claim.

Issue Five: Penalties

Breach of Wages Protection Act

[32] Section 4 of the Wages Protection Act requires an employer to pay the entire amount of wages to an employee without deduction.

[33] Section 5 creates an exception where the written consent of the employee has been provided. However, this exception does not apply in this case. Even if Mr Lacey's IEA contained a deduction clause, and I pause here to note that the Lakehouse failed to provide a copy of the IEA to the Authority, Mr Lacey was not consulted before the deductions were made as required by s 5(1A). In these circumstances, even if Mr Lacey had engaged in the conduct alleged by the Lakehouse, it was not entitled to make any deductions from his wages.

[34] I find the Lakehouse breached s 4 of the Wages Protection Act by failing to pay Mr Lacey his wages as they fell due for the weeks commencing 12 February 2018, 19 February 2018 and for the period from 27 February to 6 March 2018 when he was suspended.

Breach of the Holidays Act

[35] Where an employee's employment has come to an end, s 27 of the Holidays Act requires an employer to pay an employee's annual holiday pay in the pay that relates to the employee's final period of employment. In the present case that did not occur. Mr Lacey was not fully paid his holiday pay entitlements until the end of February 2020.

[36] I find the Lakehouse breached s 27 of the Holidays Act by failing to pay Mr Lacey his holiday entitlements upon the termination of his employment.

Analysis of penalty

[37] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty where a breach is established. These considerations include whether the breach was intentional, inadvertent or negligent and

the nature and extent of any loss or damage suffered by the person in breach or the person involved in the breach. In addition, the Court has set out additional considerations in its judgments in *Borsboom v Preet PVT Limited* and *Nicholson v Ford and A Labour Inspector v Daleson Investment Limited*.⁴

[38] Having considered the mandatory and common law considerations, I reach the following findings:

- a. The Lakehouse's actions in failing to pay Mr Lacey his wages undermined the objectives of the Act, particularly the objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship.
- a. There were three breaches of s 4 of the Wages Protection Act. I consider these breaches are sufficiently interrelated such that it is appropriate to deal with them as one breach. The maximum total penalty available in respect of this breach is \$20,000.⁵
- b. There was one breach of the Holidays Act 2003, namely the failure to pay Mr Lacey his holiday pay entitlements on the termination of his employment.⁶ The maximum total penalty available in respect of this breach is also \$20,000.⁷
- c. It is likely that the Lakehouse deliberately and knowingly withheld payment of Mr Lacey's wages and holiday pay entitlements. In terms of the withholding of his wages, this was due to its belief that Mr Lacey had caused it loss. It is likely that its non-payment of holiday pay was due to financial difficulties it was experiencing.
- d. The Lakehouse's failure to make payment of the amounts due resulted in Mr Lacey losing the use of the money he was entitled to at the time his wages became due and him suffering financial hardship. He has been without his entitlements for over two years. Mr Lacey said that the effect of the non-payment was significant. He had to rely on his partner's income and use his

⁴ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

⁵ Wages Protection Act 1983, s 13; Employment Relations Act, s 135 (2)(b).

⁶ Holidays Act 2003, s 27, s 75(1)(b).

⁷ Wages Protection Act 1983, s 13; Employment Relations Act, s 135 (2)(b).

savings to meet his day-to-day expenses. When these funds were insufficient he had to rely on the good will of friends and family to get by. The Lakehouse on the other hand has gained financially by retaining use of these monies.

- e. The Lakehouse accepted responsibility for the breach of the Holidays Act, and its liability to pay Mr Lacey \$12,389.16, at an early stage. On 11 April 2019, the parties reached an agreement whereby the Lakehouse would pay the outstanding holiday pay in instalments. Although breaching the time-payment arrangement contained in this agreement, the Lakehouse has now fully repaid the amount outstanding to Mr Lacey.
- f. The Lakehouse continues to deny any liability for the non-payment of wage arrears.
- g. I am aware of no other previous conduct by the Lakehouse.
- h. It is important that a penalty is set at a level where it deters employers from delaying payment of wages to a time that suits the employer. However, it would not be appropriate to penalise the Lakehouse so heavily that it is unable to continue to operate.
- i. There are several aggravating factors. For example, the intentional nature of the breach, Mr Lacey's loss of use of the money he was entitled to at the time it became due, the length of time the arrears have been outstanding, and the Lakehouse's financial gain by retaining the funds.
- j. No financial information was provided by the Lakehouse to establish an ability to pay, or to not pay, a penalty.

[39] Taking into account the foregoing, I order the Lakehouse to pay a sum of \$2,000 by way of penalty for its breach of the Wages Protection Act and \$2,000 for its breach of the Holidays Act. These sums are proportionate to the seriousness of the breaches; the harm occasioned by them, and is just in all the circumstances. In addition, these sums are consistent with penalties imposed by the Authority in similar cases.

[40] Payment of the sum of \$4,000 must be made within 28 days of the date of this determination to the Employment Relations Authority.

[41] I consider it appropriate that part of this penalty be paid to Mr Lacey as he has suffered the impact of the breach and has been obliged to take steps to enforce his rights. I apply the same ratio of payment as the Court in *Lumsden v Skycity Management Limited* to reflect this.⁸

[42] By order under s 136(2) of the Act, I order 75% of the penalty (\$3,000) is to be paid to Mr Lacey once the full amount of the penalty has been recovered by the Employment Relations Authority. The other 25% (\$1,000) is to be transferred to the Crown account.

Costs

[43] In light of his success in bringing this application, Mr Lacey is entitled to an order for a contribution to his costs of representation and for reasonable disbursements associated with the bringing of his claim to the Authority.

[44] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.⁹ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.¹⁰ The principles include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience is to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.

⁸ *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

⁹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

¹⁰ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Costs generally follow the event.
- h. Without prejudice offers can be taken into account.
- i. Awards will be modest.
- j. Frequently costs are judged against notional daily rates.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[45] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting.¹¹ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[46] The investigation meeting took one quarter day. The starting point for a consideration of costs is \$1,125.

Adjustment to daily tariff

[47] Having reviewed the submissions put forward by Mr Lacey's representatives, and the Authority's file, I am satisfied that an increase in the daily tariff is warranted but not to the extent sought.

[48] To assess an appropriate level of increase, I have taken into account three key factors.

[49] First, additional attendances were required by Mr Lacey's representatives over and above that anticipated by the daily tariff. For example:

- a. The Lakehouse failed to provide the Authority with documents it directed it to provide necessitating additional attendances by Mr Lacey.
- b. Whilst the Lakehouse did not file a Statement in Reply, it did engage with the Authority in terms of email correspondence. This correspondence

¹¹ Practice Note 2, Costs in the Employment Relations Authority.

contained allegations against Mr Lacey that, while ultimately irrelevant, I accept required consideration and additional costs to be incurred on Mr Lacey's behalf. The Lakehouse's correspondence also necessitated additional minutes from the Authority that resulted in additional attendances by Mr Lacey's representatives.

- c. The Lakehouse indicated to the Authority that its Director would appear at the investigation meeting. Although he did not in the end take part, I accept counsel for Mr Lacey was required to prepare fully on the basis the Lakehouse would be participating.

[50] Second, Mr Lacey was not required to file a witness statement and no case management conference was held.

[51] Third, I was not persuaded by the submission that the Calderbank offer made by Mr Lacey on 29 March 2019 warrants any uplift to the daily tariff. The evidence was that this offer was accepted by the Lakehouse, albeit it subsequently defaulted in payment of some of the amounts agreed. Had a record of settlement been signed pursuant to s 149 of the Act, the current proceedings could have been avoided.

[52] Standing back I consider an uplift of one quarter day is a fair and reasonable contribution towards the additional costs that Mr Lacey incurred. This brings the award of costs to one half day (\$2,250). While I acknowledge Mr Lacey has been charged considerably more than this sum, I agree with the comments made by the Court in *Booth v Big Kahuna Holdings Limited* namely:¹²

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

Finding

¹² [2015] NZEmpC.

[53] I order the Lakehouse to pay to Mr Lacey the sum of \$2,250 towards his legal costs pursuant to clause 15 of Schedule 2 of the Act within 14 days.

[54] In addition, within the same time period, the Lakehouse is ordered to pay Mr Lacey a sum of \$284.31 for disbursements representing:

- a. The Authority's filing fee of \$71.56.
- b. The service fee of \$212.75.

Outcome

[55] The overall outcome that I have reached is:

- a. McKenzie and Sons Limited breached s 4 of the Wages Protection Act 1983 by failing to pay Aaron Lacey the entire amount of wages that became due to him without deduction.
- b. McKenzie and Sons Limited breached s 27 of the Holidays Act 2003 by failing to pay Aaron Lacey his holiday entitlements upon the termination of his employment.
- c. McKenzie and Sons Limited is ordered to pay Aaron Lacey the following amounts within 14 days of the date of this determination:
 - i. The sum of \$2,550 for wage arrears.
 - ii. The sum of \$2,250 for legal costs.
 - iii. The sum of \$284.31 for disbursements.
- d. McKenzie and Sons Limited is ordered to pay a sum of \$2,000 by way of penalty for its breach of the Wages Protection Act and a sum of \$2,000 for its breach of the Holidays Act. Payment is to be made within 28 days of the date of this determination to the Employment Relations Authority. The Employment Relations Authority is then to pay 75% of the penalty (\$3,000) to Aaron Lacey and the other 25% (\$1,000) is to be transferred to the Crown Bank account.

Certificate of Judgment

[56] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Mr Lacey be provided with a certificate of determination, sealed with the seal of the Authority. This certificate is to record that:

- a. Within 14 days of the date of this determination, McKenzie and Sons Limited is ordered to pay the following amounts to Aaron Lacey:
 - i. The sum of \$2,550 for wage arrears.
 - ii. The sum of \$2,250 for legal costs.
 - iii. The sum of \$284.31 for disbursements.
- b. McKenzie and Sons Limited is ordered to pay a sum of \$2,000 by way of penalty for its breach of the Wages Protection Act and a sum of \$2,000 for its breach of the Holidays Act. Payment is to be made within 28 days of the date of this determination to the Employment Relations Authority. The Employment Relations Authority is then to pay three quarters of the penalty (\$3,000) to Aaron Lacey and the other quarter (\$1,000) is to be transferred to the Crown Bank account.

Jenni-Maree Trotman
Member of the Employment Relations Authority