

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 387
5371160**

BETWEEN	PANATDA MAIL Applicant
AND	PATTITA SUMTHONG First Respondent
	MOHAMED SALEM Second Respondent
	OCEAN TASTY SEAFOOD LIMITED Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Olinda Woodroffe, Counsel for Applicant Sanjay Sharma, Counsel for First Respondent Mohammed Salim for Third Respondent
Investigation Meeting:	28 July & 15 August 2014 at Auckland
Submissions received:	21 August 2014 from Applicant 28 August 2014 from First Respondent None from Second and Third Respondent
Determination:	17 September 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Panatda Mail, claims that she was employed at the Ayutthaya Thai Food Shop (the Shop) by the First Respondent, Ms Pattita Sumthong, during the period 15 January to 1 July 2008, and claims an amount for unpaid wages which resulted from her having been paid below the statutory minimum wage rate during that time. Ms Mail also claims unpaid annual and statutory holiday leave entitlement for that period.

[2] Ms Mail further claims the sum of \$500.00, which she states Ms Sumthong unlawfully withheld from her wages allegedly for payment as 'security money' in respect of

the two weeks' notice she was expected to provide should she offer her resignation from the Shop.

[3] Ms Sumthong denies that she was the employer of Ms Mail, and claims that the Shop was owned and operated by Mr Mohamed Salem who employed Ms Mail.

[4] Mr Salem denies that he employed Ms Mail and claims that during the period of Ms Mail's alleged employment the Shop was leased to Ms Sumthong, who was operating it as a business on her own account, and therefore she was Ms Mail's employer.

Issues

[5] The issues for determination are whether or not:

- Ms Sumthong or Mr Salem or Ocean Tasty Seafood Limited t/a Ayutthaya Thai Food was the employer of Ms Mail
- Ms Mail is owed monies in respect of unpaid wages resulting from payments below the statutory minimum wage at the relevant time
- Ms Mail is owed monies in respect of unpaid annual leave and statutory leave entitlements
- Ms Mail is owed monies in respect of the 'security money'.

Non-attendance by Applicant at Investigation Meeting held on 15 August 2014

[6] The meeting held on 28 July 2014 required a further day of hearing time to conclude the Third Respondent's evidence and for closing submissions. The Second and Third Respondents attended the Investigation Meeting held on 15 August 2014; however the First Respondent did not do so.

[7] It was ascertained by an Authority Officer that Counsel for the Applicant had received notice of the date for the second day of the Investigation Meeting, however it had been overlooked.

[8] The parties had agreed in the circumstances to submit any further evidence and closing submissions in writing for the consideration of the Authority, and I consequently proceeded with the Investigation Meeting and conclusion of the investigation pursuant to clause 12 of Schedule 2 of the Act.

Background Facts

Ms Mail's explanation

[9] Ms Mail said that she responded to a magazine advertisement for a kitchen hand/customer service person at the Shop in January 2008, and was interviewed by Ms Sumthong and, her husband, (Mr Sakchai Pewklieng), prior to 15 January 2008.

[10] Following a one day trial, she had been offered employment by Ms Sumthong and Mr Pewklieng, and commenced employment on 15 January 2008. Towards the end of her first week, Mr Pewklieng had told her that her hours would be 10.00 a.m. to 9.30 p.m. 7 days a week, with a half hour lunch break. Her rate of pay would be \$100.00 net per week.

[11] Ms Mail said that she had provided her IRD number to Mr Pewklieng at his request and had assumed that he or Ms Sumthong would be paying PAYE on her behalf; however she had subsequently discovered that that had not been the case.

[12] Mr Pewklieng had allegedly told her that for the first 10 weeks, \$50.00 would be deducted from her weekly pay, and the total amount of \$500.00 would be retained by “*them*” as ‘security money’ in the event that she left her employment at the Shop without providing 2 weeks’ notice. In the event that she did provide notice, the ‘security money’ would be returned to her at the end of the two week notice period.

[13] Ms Mail said she had not been provided with an employment agreement or with payslips during the period of her employment at the Shop.

[14] Ms Mail said she had been paid \$100.00 in cash each week by either Ms Sumthong or Mr Pewklieng from which \$50.00 had been deducted for the first 10 weeks. During the time she worked at the Shop, she said she had taken no time off, either for annual holiday leave or for statutory holidays, nor did she receive a day in lieu in respect of the statutory holidays she worked.

[15] On or about the second week she had been working at the Shop, Ms Mail said Mr Salem had come into the Shop and Ms Sumthong had introduced her to him as the new staff member. At that time she said she did not know who he was, but was later informed by the Chef, Ms Benchamaporn Inpai, that Mr Salem was the legal owner of the Shop from whom Ms Sumthong and Mr Pewklieng were renting it.

[16] Sometime later Ms Mail said she had been told by Ms Sumthong and Mr Pewklieng that they were paying \$2000.00 per week in rent to Mr Salem, and that all their Eftpos sales went into his bank account from which amount he would deduct the \$2000.00 rent and pay to them any surplus monies in cash.

[17] She had also observed Ms Sumthong giving all the receipts for purchases made by her for the Shop's business to Mr Salem on a weekly basis. In addition each week Ms Sumthong would pay the owner of the Food Court in which the Shop was situated \$120.00 from the Shop cash register, which she understood had been for overheads like lighting, cleaners and signage.

[18] During the period of her employment at the Shop Ms Mail said she had become aware that Mr Salem was negotiating the purchase of an Indian take away shop located in the Food Court, and that at that same time Ms Sumthong and Mr Pewklieng were also in negotiations with a view to purchasing the same Indian take-away shop without informing Mr Salem that they were attempting to do so.

[19] On or about mid-June 2008, Ms Mail said Mr Salem had discovered Ms Sumthong and Mr Pewklieng's intention to purchase the Indian take-away shop, and he had been very upset. Ms Mail also stated that Mr Salem had told Ms Sumthong she could either buy the Shop from him or leave the Shop. On or about this time she had decided to resign and notified Ms Sumthong and Mr Pewklieng, providing them with two weeks' notice.

[20] On or about the time that her notice period ended, Ms Mail said that Ms Sumthong and Mr Pewklieng left the Shop and went to work at the Indian take-away shop which they had purchased.

[21] Prior to their leaving the Shop, Ms Mail said she had asked for the refund of the \$500.00 'security money' in addition to \$200.00 which she was owed in unpaid wages, however they said that they were unable to pay the \$700.00 at that time, but said that they would pay it when they were financially able to do so.

[22] Ms Mail said that after Ms Sumthong and Mr Pewklieng had left the Shop, Mr Salem had asked her if she would like to take it over and run it. She had agreed to do so, and during the period she did so, all the Eftpos sales went into Mr Salem's bank account, from which amount he would deduct the \$2000.00 rent and pay to her any balance outstanding.

[23] Ms Mail said she had run the Shop with the help of her partner and his friends, however after one month she had decided not to continue and had left the Shop.

[24] During the period she had operated the Shop, Ms Mail said she had not employed any one, and said she had not paid any tax on the monies she had received during that period.

[25] After Ms Sumthong and Mr Pewklieng had left the Shop Ms Mail said she had continued to request the return of the 'security money' and outstanding wages; however Ms Sumthong kept telling her that she did not have the money to pay her.

[26] During the period between the end of July and beginning of August 2009 Ms Mail said she had been involved in discussions with Ms Sumthong about purchasing from her a Malaysian take-away business. She said it had been agreed that the outstanding \$700.00 would be deducted from the purchase price she would pay for the business.

Ms Sumthong's explanation

[27] Ms Sumthong denied that she had employed Ms Mail at the Shop. She said she had previously been employed by Mr Salem to work in another restaurant which he owned, and that she had commenced working as a Chef/Manager at the Shop, which Mr Salem also owned, on or about 31 January 2008.

[28] Her hours of work were 10.00 a.m. until 9.30 p.m. each day, and she received \$700.00 gross in cash per week paid to her by Mr Salem. She was not provided with an employment agreement or pay slips.

[29] Ms Sumthong said that she had provided her IRD number to Mr Salem, and provided in evidence IRD records showing that during the period 1 May until 31 July 2008, which was the date her employment at the Shop ended, PAYE had been paid on her behalf by Curry Corner Limited, a company of which Mr Salem is the sole director and shareholder

[30] Ms Sumthong stated that she had not owned, nor leased, the Shop from Mr Salem.

[31] Ms Sumthong said that neither she nor Mr Pewklieng had interviewed Ms Mail; further her husband, Mr Pewklieng, had not commenced working at the Shop until April 2008.

[32] Ms Sumthong said she had first met Ms Mail when she came into the Shop asking about employment. At that time she had referred Ms Mail to a notice in the Shop displaying Mr Salem's mobile telephone number, and told her to contact him. The next time she saw Ms Mail was in May 2008 when Ms Mail commenced employment at the Shop.

[33] Ms Sumthong said that Mr Salem made all the decisions about who to employ at the Shop, and that all the employees, including herself and Ms Mail, were paid in cash by Mr Salem.

[34] It was her responsibility to purchase the Shop supplies for which she would take the money from the Shop till and provide the receipts to Mr Salem. She would also take money from the Shop till to pay the Food Court owner in respect of the overheads. Ms Sumthong said she had no control over the hours Ms Mail would work; these had been set by Mr Salem.

[35] Ms Sumthong denied that she had paid rent to Mr Salem and stated that as Manager she was responsible for paying the supplier invoices in cash and giving the balance of the cash in the till to Mr Salem from which he paid the staff their wages in cash. She stated that the Landlord's (the owner of the shop premises) interactions were with Mr Salem.

[36] Ms Sumthong denied that either she or Mr Pewklieng had asked Ms Mail to pay her monies in respect of 'security money'.

[37] After the purchase of the Indian take-away shop by herself and Mr Pewklieng in July 2008, Ms Sumthong said that Mr Salem had told them that he had given the business to someone else and gave them 2 weeks' notice. Their employment at the Shop had ceased on or about mid-July 2008.

[38] During the period after she had left her employment at the Shop, Ms Sumthong said that she had purchased a Malaysian take-away business which Ms Mail and her son had subsequently purchased from her in 2009. However there had a been a default on the purchase payment which had resulted in action being taken by her against Ms Mail's son in 2011, initially in a Dispute Tribunal, and which she states is currently being pursued in the District Court.

Mr Salem's explanation

[39] Mr Salem confirmed that the head lease of the Shop is held by Curry Corner Limited, a company of which he is the sole director and shareholder. He stated that Curry Corner Limited had entered into a sub-lease for the Shop with Ms Sumthong; however he was not certain of the date when the lease came into being.

[40] Mr Salem said he had visited the Shop each week and collected the Eftpos takings dockets, representing about \$3,000.00 per week, which were paid into his bank account, and after withholding \$2,000.00 per week in respect of the lease payments, he had paid Ms Sumthong and Mr Pewklieng the balance in cash.

[41] Other than Ms Sumthong and Mr Pewklieng, Mr Salem said he had not employed anyone, including Ms Mail, and the responsibility for the engagement of other employees had been undertaken by Ms Sumthong and Mr Pewklieng.

[42] Mr Salem confirmed that Curry Corner Limited had paid PAYE on behalf of Ms Sumthong during the period 1 May to 31 July 2008, and that Ocean Tasty Seafood Limited, a company of which he is the sole director and shareholder and which trades as Ayutthaya Thai Seafood, employed and paid PAYE on behalf of Mr Pewklieng. However he said the PAYE had only been paid in respect of Ms Sumthong at her request as at that time she and Mr Pewklieng had been undertaking a trial to operate the Shop with a view to buying it after the trial.

[43] Following his discovery that Ms Sumthong and Mr Pewklieng had purchased the Indian take-away shop which he had been in negotiations to purchase, an argument ensued and their employment at the Shop had been terminated.

[44] Mr Salem also confirmed that Ocean Tasty Seafood Limited, a company owned by him, traded as Ayutthaya Thai Seafood.

Determination

Who is the correct Respondent and Employer of Ms Mail?

[45] This action is a claim brought under s 131 of the Employment Relations Act 2000 (the Act), s 6 of the Minimum Wage Act 1982, and s 23(2) and s 50 of the Holidays Act 2003.

[46] In this case in which there is little documentary evidence on which to establish the nature of the parties' employment relationships with each other, and the written and sworn evidence of each party is in direct conflict leading to serious credibility issues

[47] I shall therefore proceed to determine the true relationship of the parties to each other in accordance with s 6 of the Employment Relations Act 2000 (the Act) which states:

Meaning of employee:

(2) In deciding for the purposes of subsection (1) (a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority-
(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[48] The question of who is the employer has been held in *Mehta v Elliot (Labour Inspector)*¹ to be determined at the outset of the employment, applying the question of what would an independent, but knowledgeable, observer taking an objective view have said was the appellant's employer when he/she commenced employment.

[49] Ms Mail asserts that her employer was Ms Sumthong, on the basis of her evidence that as a result of being interviewed by Ms Sumthong and Mr Pewklieng who, according to Ms Mail held themselves out to be the owners of the Shop, she believed Ms Sumthong to be her employer at the outset of employment.

[50] In *Colosimo v Parker*² Judge Perkins stated:³

Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the court to say he personally entered into binding legal relations with Mr Parker. While it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The court is then placed in the position of having to make an objective assessment.

[51] Mr Salem stated that Curry Corner Limited owned the Head Lease on the Shop. However a letter written on behalf of Mr Pewklieng to the New Zealand Immigration Service was headed: "*Ocean Tasty Seafood Limited T/A Ayutthaya Thai Seafood Limited*".

[52] The employment agreement attached thereto in the name of Mr Pewklieng, signed by both Mr Salem and Mr Pewklieng and witnessed by Ms Sumthong, identifies the employer as: "*Ocean Seafood Limited T/A Ayutthaya Thai Food Limited*".

[53] Mr Salem is listed as the sole director and shareholder of Ocean Tasty Seafood Limited on the NZ Companies Office website, and therefore I find that the business of the

¹ [2003] 1 ERNZ 451

² Employment Court, Auckland AC 68/06

³ Ibid at para [30]

Shop was effectively owned by Mr Salem's company Ocean Tasty Seafood Limited trading as Ayutthaya Thai Seafood, and that Mr Salem was the guiding and controlling influence of Ocean Tasty Seafood Limited.

[54] Mr Salem was present in the Shop every week and confirmed that the Eftpos takings were paid into a bank account which he controlled. Whilst he asserted that the purpose of his visit was to collect the lease rent from Ms Sumthong, no evidence of such a lease has been provided to the Authority as requested. Furthermore the Curry Corner Limited and/or Ocean Tasty Seafood Limited company accounts, also requested by the Authority with a view to establishing the existence of the lease with Ms Sumthong, have not been provided nor any explanation provided as to the reason why they have not been provided.

[55] Ms Sumthong claimed that she was an employee at the Shop during the period 31 January to 31 July 2008, and the PAYE records provided confirm that during the period 1 May to 31 July 2008 the employer or payee in respect of the taxes paid on behalf of Ms Sumthong was Curry Corner Limited. However I do not find this to be definitive proof of who was the employer, rather it is an indication because the IRD record does not differentiate between Employer and Payer.

[56] Examining the situation objectively and having regard to:

- Mr Salem's Statement in Reply in which he states, "Pattita Sumthong was employed by me to run the business on her own.";
- the fact that Mr Salem operates a number of similar businesses;
- Mr Salem's statement to the Immigration Authority that he had been "... running this business for more than 5 years" (Ayutthaya Thai Foods);
- Mr Salem's confirmation that he advertised for and employed a chef to work at the Shop;
- Mr Salem's confirmation that all takings of the Shop were paid into a bank account which he controlled;
- Mr Salem's confirmation that Ms Sumthong joined her husband (the newly recruited chef) to work at Ayutthaya Thai Food;

- The fact that in Mr Pewklieng's employment agreement contains the clauses (a) The employee has to report to the shop manager, and (b) the employee has no right to hire another employee.

I accept that Ms Sumthong was employed during the first half of 2008 as Manager at the Shop, on behalf of Ocean Tasty Seafood Limited t/a Ayutthaya Thai Food..

[57] Accepting Ms Sumthong was the Manager at the Shop I proceed to consider whether or the doctrine of undisclosed principle applies. The doctrine of undisclosed principle derives from the case of *Cuttance v Purkis*⁴ in which a person alleged to be the employer claims to have been acting for another, who is said to be the true employer, at the time of the engagement. Where this is not disclosed the doctrine of undisclosed principle will apply and the employee can choose who to proceed against.

[58] Ms Sumthong denies that she offered employment to Ms Mail, she denies that she set Ms Sumthong's hours of work, and claims that following the commencement of her employment Ms Mail was paid her wages in cash by Mr Salem as were all the other employees, including herself, until 1 May 2008. It is her evidence that staff recruitment was the responsibility of Mr Salem.

[59] I accept that it would be unusual for a person in the role of Manager not to have involvement in these matters; however it is clear from Ms Mail's own evidence that on or about the second week of her employment she had been informed by Ms Inpai that Mr Salem was the owner of the Shop. Moreover Mr Salem was in the Shop on a weekly basis and there is no documentary evidence establishing that Ms Sumthong held herself out as Ms Mail's employer in circumstances in which she denies that was the case.

[60] Mr Salem confirms both Ms Sumthong's and Ms Mail's statements that he was in the Shop on a weekly basis. Whilst he states that this was for the purpose of dealing with the Shop proceeds and collecting the rent from Ms Sumthong, it is reasonable to conclude that he may have dealt with staff management issues on these weekly occasions

[61] Ms Mail claims that following the departure of Ms Sumthong, she operated the Shop under a lease arrangement similar to that which had existed between Ms Sumthong and Mr Salem. However she has provided no evidence of the existence of such a lease (despite providing documentation for the Sale and Purchase Agreement for the purchase of the Malaysian take-away business from Ms Sumthong). Furthermore and significantly, Mr Salem has provided no copy, or any other evidence, of the alleged lease.

⁴ [1994] 2 ERNZ 321

[62] I find that examining the situation from an objective point of view, there is no evidence establishing that Ms Sumthong was Ms Mail's employer, either directly, or as a result of the application of the doctrine of undisclosed principle in circumstances in which she denies that she held herself out as being such, and where there is no evidence of the existence of a lease to refute that Ms Sumthong was other than an employee, namely the Manager of the Shop, especially given the evidence that Curry Corner Limited paid PAYE on her behalf during the period that she was working at the Shop..

[63] Given the following facts that:

- i. Mr Salem's company Curry Corner Limited paid PAYE on behalf of Ms Sumthong;
- ii. Mr Salem's company Ocean Tasty Seafood Limited held out itself as the employing entity of Mr Pewklieng;
- iii. Mr Salem's confirmation that Ocean Tasty Seafood Limited was trading as Ayutthaya Thai Food;
- iv. The receipts and takings by the Eftpos system used in the Shop were, at all the relevant times, paid directly into a bank account controlled and operated by Mr Salem;
- v. Mr Salem was in the Shop on a weekly basis,
- vi. There is evidence that transactions between Mr Salem and the employees took place by way of cash payments;
- vii. There is no evidence of the existence of a lease between Mr Salem or Ocean Tasty Seafood Limited and Ms Sumthong and/or Ms Mail, and
- viii. Mr Salem is the sole director and shareholder of Ocean Tasty Seafood Limited.

I find that, on the balance of probabilities. the employer of Ms Mail and therefore the correct Respondent to be Ocean Tasty Seafood Limited trading as Ayutthaya Thai Food - the Shop.

[64] I determine that Ocean Tasty Seafood Limited was the employer of Ms Mail.

Is Ms Mail is owed monies in respect of unpaid wages?

Period of employment

[65] Ms Mail claims that she applied for employment at the Shop in January 2008, being interviewed by Mr Pewklieng, and was offered employment by Mr Pewklieng and Ms Sumthong jointly. Ms Mail stated that it was Mr Pewklieng who informed her of the terms and conditions of her employment and to whom she had supplied an IRD number, and claims in the Statement of Problem that her employment commenced on 15 January 2008.

[66] Ms Sumthong stated that Mr Pewklieng had not commenced employment at the Shop until 3 April 2008, which date is supported by (i) the verbal evidence of Mr Salem, (ii) the written evidence in the form of a letter from Ocean Tasty Seafood Limited to the NZ Immigration Service in support of a work permit for Mr Pewklieng, (iii) the copy of the work permit from NZ Immigration Service which allowed Mr Pewklieng to work for Ocean Tasty Seafood Limited as from 3 April 2008, and (iv) a copy of the employment agreement with Ocean Tasty Seafood Limited t/a Ayutthaya Thai Food which cites the start date of employment as being: “*March 20th, 2008*”.

[67] In the absence of an employment agreement, PAYE records, and pay slips there is no documentation which establishes the exact start date of Ms Mail, but in her verbal evidence she stated clearly that both Ms Sumthong and Mr Pewklieng had been actively involved from the commencement of her employment at the Shop. However, I also note that an earlier work permit, dated 4 January 2008, for Mr Pewklieng, states that he could work only for *Otto Woo, Ponsonby*, a fact noted by Mr Salem in his letter to the NZ Immigration Service and at the Investigation Meeting, and also a letter from Otto Woo, Ponsonby, stated that Ms Sumthong left their employment on 31 January 2008.

[68] On the basis that Mr Pewklieng did not commence employment himself at the Shop until on or about 20 March 2008, I determine that Ms Mail’s employment could not have predated this date.

[69] I also note that Ms Mail was employed by Pacific Flight Catering during the period 1 April to 20 May 2008 during which period she was paid approximately \$700.00 per week. I consider that this makes it more likely than not that a later start date applied given the long hours she worked at the Shop. Ms Mail also stated that her employment at the Shop ended on 1 July 2008, two weeks after she gave 2 weeks’ notice.

[70] I therefore determine that the commencement date of her employment was 21 March 2008 and that the termination of her employment was 1 July 2008.

Wages Owed

[71] Ms Mail, whose claim is based solely on her allegation that she was paid less than the Minimum Wage in force at the relevant time, states that she was paid \$100.00 net per day, and worked 11.5 hours per day including a half hour lunch break, and that she received \$700.00 net in cash per week.

[72] No employment agreement, pay slips, bank accounts or IRD records were produced to substantiate this claim. There is no statutory prohibition against contracting for a net rate of pay, providing that the net amount receivable by the employee plus any taxes due to be paid by the employer, is greater than or equal to the minimum wage rate at the relevant time.

[73] In her written brief of evidence Ms Mail stated: *“I assumed at this time that I would be paid \$100 per day and my tax would be paid by them.”* and in her affidavit of the 20 August 2014 stated, *“I thought that my tax was being paid.”* referring to her employment at the Shop. At the Investigation Meeting Ms Mail confirmed that: *“I would get \$100 per day and Pattita and Sakchai would pay the tax.”* In both documents and at the Investigation Meeting Ms Mail confirms that she provided her IRD number to her employer. The Respondents do not dispute the amounts stated as the wages she received in cash by Ms Mail.

[74] I find that the employer failed to keep or produce a wages and time record in respect of Ms Mail as required by s130 of the Act, and therefore pursuant to s 132 (2) of the Act which states:

... the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

(a) the wages actually paid to the employee:

(b) the hours, days, and time worked by the employee.

I accept, in the absence of any proof to the contrary, that Ms Mail contracted to be paid \$100.00 per day net of any taxes due on the gross pay which were to be paid direct by the employer to the IRD. as required by law.

[75] In accepting Ms Mails claim relating to the \$100 net per day, I also find that during the period she worked at the Shop she believed that PAYE contributions were being deducted from her gross wages and that her employer was making these contributions to the IRD, but was unaware of the fact that such contributions may not have been made. If this had not been

the case, Ms Mail may be considered to have entered into an unlawful contract, or alternatively possibly to have been an independent contractor.

[76] Therefore I find that Ms Mail contracted with her employer on the basis that she would receive \$100.00 net per day, for an 11 hour working day, and that the employer would pay whatever PAYE was due on the Gross Amount to achieve the net figure of \$100.00 per day.

[77] I find that Ms Mail's wages were calculated as \$100.00 per day plus taxes due on her gross wages (the Gross Amount), and therefore it is the Gross Amount that is to be compared with the relevant minimum wage due under the Minimum Wage Act 1983. At no time in her evidence did Ms Mail make any claim that the payment she received was a gross payment.

[78] Employers generally cannot make deductions from employees' wages, except where: an employer is required by law (for example, income tax, child support payments or other statutory purposes) to make such deductions. In this case the amount that was withheld, according to Ms Mail, was the tax due to the IRD on the Gross Amount allowing Ms Mail to be paid \$100.00 net cash per day.

[79] Ms Mail's claim before the Authority as set out in the Statement of Problem i: "*for unpaid wages being the difference between what was actually paid and the relevant minimum wage*". I find that without knowing the specific amount of PAYE tax that should have been or was deducted, it is not possible to determine whether or not Ms Mail's gross wage was below the minimum wage, and if so by how much. I note that Mr Salem's companies Ocean Tasty Seafood Limited T/A Ayutthaya Thai Food or Curry Corner Limited paid PAYE taxes due on the relevant employees.

[80] Also I note from Ms Mail's IRD record submitted in respect of 1 April 2008 to 31 March 2009 that no income was declared in respect of Ocean Tasty Seafood Limited and/or the Shop, however in her declaration of earnings submitted in evidence Ms Mail claimed that the cash payment received from the Shop totalled \$9,100.00 for a four month period.

[81] Considering all of the factors, and the fact that the Authority is not in any position to assess the likely taxation of an individual taxpayer, I find that it is necessary for Ms Mail to establish with the Inland Revenue exactly what rate of PAYE tax was paid, or should have been paid, on her earnings from the Shop as set out in the submitted declaration of earnings.

[82] Upon submission of this information, together with the relevant proof, I will be able to calculate the amount owed and payable to Ms Mail to ensure that she was paid wages above the relevant minimum wage level.

Is Ms Mail owed monies in respect of unpaid annual leave and statutory leave entitlements?

[83] In her Statement of Problem Ms Mail claims that she is owed monies in respect of both unpaid annual leave and statutory holiday entitlements. She confirmed at the Investigation Meeting that she had not taken any annual leave and also submitted in evidence a schedule, which she had prepared, detailing the amounts relating to outstanding holiday pay and statutory holiday entitlements.

[84] In this respect I note that:

- (a) The employer did not maintain and subsequently did not produce any proper original wage and time records, despite my asking for them.
- (b) Ms Sumthong gave evidence that she knew nothing about any leave or time off Ms Mail may have taken.
- (c) Mr Salem did not refute or indeed comment upon Ms Mail's claim in this respect either for himself or on behalf of *Ocean Seafood Limited T/A Ayutthaya Thai Food*.
- (d) Ms Mail gave in evidence a detailed account of the statutory holidays she claimed to have worked.

I therefore accept that Ms Mail is entitled to holiday pay, subject only to the period of her employment, and the Gross Amount of daily earnings as I have detailed above.

[85] Section 23 of the Holidays Act 2003 deals with the calculation of holiday pay if the employment ends within 12 months, which applies in this case stating at:

23(2) An employer must pay the employee 8% of the employees gross earnings since the commencement of employment.....

and gross earnings are defined in s14 as meaning:

all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—

(i) salary or wages:

[86] Whilst there is no written employment agreement, I have determined that Ms Mail contracted to receive Gross Wages calculated as \$100.00 net per day plus the relevant taxes due on the gross pay. As I have commented there is no statutory prohibition against contracting for a net rate of pay, providing that the net amount receivable by the employee plus any taxes due to be paid by the employer, is greater than or equal to the minimum wage rate at the relevant time. As Ms Mail's claim is that she did not receive the relevant minimum wage, the actual unpaid holiday pay due cannot be calculated until the Gross Wage has been established in accordance with paragraph [82] above.

[87] Ms Mail claims that she worked statutory holidays during the period of her employment, which for the reasons set out above in paragraph 83 above I accept, subject to the starting date of her employment as being 20 March 2008. Section 50 of the Holidays Act 2003 allows for an employee to be paid at least time and a half for the hours worked working on a public holiday, and s 56 of the Holidays Act 2003 allows for provision for the alternative holiday.

[88] As Ms Mail's claim is that she did not receive the relevant minimum wage, the actual holiday pay due under s 50 and s 56 of the Holidays Act 2003 cannot be calculated until the Gross Wage has been established in accordance with paragraph [82] above

Is Ms Mail owed monies in respect of the 'security money'?

[89] Ms Mail stated that it was Mr Pewklieng who had told her that 'security money' of \$50.00 per week would be deducted from her net wages during her initial 10 weeks of employment. She also stated that a total of \$500.00 in cash had been deducted from her first 10 weekly payments and that she had received payment for her net wages in cash each week from either Ms Sumthong or Mr Pewklieng.

[90] Ms Mail claims that \$50.00 per week was deducted from her weekly wages by Ms Sumthong, and that such deduction was an unlawful deduction pursuant to s 4 of the Wages Protection Act 1983.

[91] Section 4 of the Wages Protection Act 1983 refers to the employer making the deductions, and I have found that Ms Sumthong was not the employer of Ms Mail; however for the sake of completeness I examine the claim.

[92] Ms Mail has not provided any written evidence substantiating this claim which Ms Sumthong denies.

[93] Ms Mail said that the outstanding \$500.00 was to be deducted, together with a further \$200.00 in respect of unpaid wages which she claimed was owed to her by Ms Sumthong, from the purchase price of the Malaysian take-away business which she had been in the process of purchasing from Ms Sumthong.

[94] There are two copies of the Agreement for Sale and Purchase of a Business before me. Both are in Ms Mail's handwriting and both have been signed by the purchaser. On neither of the Agreements is there a reference to the deduction of \$500.00 or \$700.00.

[95] Moreover I find it not credible that Ms Mail would enter into a business transaction with a party whom she claimed still owed her a significant sum of money a year after the conclusion of their working relationship together without making provision for the recognition that the sum was still outstanding in that transaction.

[96] I determine that Ms Mail is not owed monies in respect of the alleged 'security money' in the sum of \$500.00.

Remedies

[97] I order that Ms Mail is to establish with the Inland Revenue exactly what rate of tax was paid or should have been paid, on her earnings from the Shop as set out in her submitted declaration of earnings, and submit such information to the Authority together with the relevant proof so that I can calculate the sum, if any, *Ocean Seafood Limited T/A Ayutthaya Thai Food* must pay to Ms Mail to ensure that she was paid wages above or equal to the relevant minimum wage level.

[98] I order that that *Ocean Seafood Limited T/A Ayutthaya Thai Food* is to pay Ms Mail \$700.00 net as an interim payment pending the finalisation of the unpaid holiday pay due under s 23 of the Holidays Act 2003 (calculated as 8% of Gross Earnings for the period 20 March 2008 to 1 July 2008, less any tax due which is to be paid direct to the IRD).

[99] I order that that *Ocean Seafood Limited T/A Ayutthaya Thai Food* is to pay Ms Mail net \$ 600.00 (calculated as 4 days at \$50.00 per day plus 4 days at \$100.00 per day) as an

interim payment pending the finalisation of the holiday pay due under s 50 and s 56 of the Holidays Act 2003 which is to be calculated when the Gross Wage has been established in accordance with paragraph [82] above.

Should the Authority should impose a penalty pursuant to section 130(4) of The Act?

[100] Despite requests by both Ms Mail and the Authority for copies of wage and time records to be produced, none have eventuated. Ms Sumthong and Mr Salem on behalf of himself and Ocean Seafood Limited T/A Ayutthaya Thai Food, claimed that they were not the employer and as such did not have wages and time records.

[101] I have found that the employer of Ms Mai; to be Ocean Seafood Limited T/A Ayutthaya Thai Food, and as such it was obliged to comply with the requirements of s 130 of the Act. The explanation provided that no records were kept as Ms Mail was never an employee carries little weight considering the evidence that Ocean Seafood Limited had other employees and paid taxes on their behalf.

[102] Section 130 of the Act requires every employer to keep a wages and time record showing certain information, including the wages paid to an employee in each pay period. Section 130(4) of the Act states that every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.

[103] The then Chief Judge Goddard considered the question of whether or not to award penalties in the Employment Court case *Xu v McIntosh*⁵, and observed that there are three issues to be considered:

- i. How much harm has the breach occasioned?*
- ii. How important is it to bring home to the party in default that such behaviour is unacceptable?*
- iii. Was the breach technical and inadvertent or was it flagrant and deliberate?*

[104] In the absence of pay slips or wage and time records being made available, it has not been possible to simply determine whether or not Ms Mail was paid above or equal to the relevant minimum wage and to calculate holiday pay entitlements.

⁵ [2004] 2 ERNZ 448

[105] Furthermore I note that in these circumstances Ms Mail has been unable to provide Inland Revenue with reliable details as to the gross income earned for the period of her employment in 2008 so as to ensure compliance with her tax liabilities. Accordingly I find that significant harm has been occasioned.

[106] Ocean Seafood Limited was required to keep wages and time records in accordance with the legislative requirements. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives.

[107] I consider the Ocean Seafood Limited was aware of its obligations to keep wages and time records, evidenced by Mr Salem's comments that he had been running the business for many years and had other employees whose taxes were withheld and paid to the IRD, therefore I regard the breach by Ocean Seafood Limited as flagrant and deliberate.

[108] Ocean Seafood Limited is ordered to pay a penalty of \$8,000.00 to the Crown.

Costs

[109] Costs are reserved. I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them. If they are unable to do so, the Applicant may file and serve memorandum to costs within 28 days with reply submissions to be lodged within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame.

Eleanor Robinson
Member of the Employment Relations Authority