

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 130
3084952

BETWEEN

MICHELLE McARTHUR
Applicant

AND

FOOD ENTERPRISES LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Dharshini Ramanathan, counsel for the Applicant
Neville Higgison, counsel for the Respondent

Investigation Meeting: 1 October 2020

Submissions Received: 7 and 16 October 2020 from the Applicant
12 October 2020 from the Respondent

Date of Determination: 6 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michelle McArthur was employed as a baker by Heritage Bakery Limited (“HBL”) from, or around, 15 October 2015. HBL was removed from the New Zealand Companies Office register in March 2018. Earlier that year, Ms McArthur had been informed she was now working for Food Enterprises Limited (“FEL” or “the company”).

[2] Ms McArthur terminated her employment with FEL on 25 July 2019. She claims arrears of wages in respect of unpaid overtime she says she was forced to work during her employment; holiday pay; and pay for Public holidays worked but for which she had not been properly remunerated. Ms McArthur accuses FEL of breaching her employment agreement

and her minimum employment rights. She asks the Authority to consider imposing a penalty on her former employer.

[3] FEL denies Ms McArthur's claims. It agrees that she worked additional hours during her employment but says that any work she performed over and above her scheduled hours was as a volunteer. The company says it did not require her to work beyond her contracted 45 hours per week and it did not authorise her to do so. FEL asserts it paid all outstanding holiday pay in October 2019.

Relevant background

[4] HBL operated a bakery and, at various times, a café in Blenheim. Ms McArthur worked in the bakery and performed front of house and other duties in the café when required.

[5] The two directors of HBL were Mr John Wilson, whom I will refer to as Mr Wilson, and his son, Mr Chris Wilson.

[6] Mr Wilson had been a baker for over 30 years and trained Ms McArthur in the requirements of her role. From an early stage in Ms McArthur's employment with HBL, Mr Wilson had discussions with her about his future retirement and the prospect of her taking over the bakery.

[7] Those discussions continued after HBL went into liquidation and the bakery was operated by FEL. Ultimately, no agreement was reached between the parties.

[8] The sole director of FEL is Ms Annette Wilson. She is married to Mr Wilson and mother of Mr Chris Wilson.

The Authority's investigation

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act), I have not set out in this determination all the evidence and submissions received from the parties although I have carefully considered all such information. Instead, I have stated relevant findings on facts and law; expressed conclusions on issues requiring determination to dispose of the matter; and made orders where necessary.

[10] The Chief of the Authority has decided, in accordance with s 174C(4) of the Act, that exceptional circumstances exist for providing this determination outside the statutory time frame specified in s 174C (3).

Issues

[11] The issues for the Authority to determine are whether:

- (a) Ms McArthur is owed arrears of wages;
- (b) Ms McArthur has received all holiday pay to which she is entitled;
- (c) Ms McArthur was paid correctly for the public holidays she worked;
- (d) Ms McArthur received an alternative day's holiday in respect of all public holidays she worked;
- (e) FEL breached Ms McArthur's employment agreement and/or her minimum rights; and, if so, whether
- (f) A penalty should be imposed on FEL.

Legal considerations

[12] Section 130 of the Employment Relations Act 2000 (the Act) requires an employer to keep wages and time records for each employee. It specifies the information that must be kept. This includes the number of hours worked each day in a pay period, the pay for those hours, the wages paid to the employee for each pay period and the method of calculation.

[13] Section 132 of the Act, concerns an employer's failure to keep or produce records in respect of an employee who brings a claim to the Authority. Where that failure has prejudiced the employee's ability to bring an accurate claim, the Authority has the discretion to accept as proved all claims made by the employee in respect of wages actually paid and the hours, days and times worked by the employee.

[14] A similar obligation applies under s 81 of the Holidays Act 2003, which requires employers to keep a comprehensive holiday and leave record in respect of each employee showing specified details relating to annual leave, sick leave, bereavement leave, and family violence leave. The record is to include details such as dates of, and payments for, any public

holiday on which the employee worked, and of any alternative holidays to which the employee became entitled.

[15] A similar discretion to that of s 132 of the Act in respect of wages, is provided to the Authority under s 83 of the Holidays Act if, after hearing the evidence, it is satisfied that the employer has failed to keep the required records or provide access to those records when requested by, or on behalf of, an employee, and the failure prevented the claimant from bringing an accurate claim.

[16] In that situation the Authority may make a finding to that effect and may then accept as proved, in the absence of evidence to the contrary, statements made by the employee about:

- (a) holiday pay or leave pay actually paid to the employee:
- (b) annual holidays, public holidays, ... actually taken by the employee.¹

[17] Both the wages and times record and the holidays and leave record must be either in written form or in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.² The employer's holiday and leave record may be kept so as to form part of its wage and time records under s 130 of the Act.³

Are wage arrears owing?

HBL

[18] Ms McArthur claims that she was forced to work overtime throughout her employment from 2016 onwards, and was not remunerated for it. She has calculated that her former employer owes her \$90,751.76 in unpaid wages and \$7,260.14 in annual leave. Ms McArthur's calculations of these amounts commenced from 24 May 2017. At that time her employer was HBL.

[19] The effect of s 248(1)(c) of the Companies Act 1993 is that Ms McArthur is prevented from bringing proceedings against HBL, as a company that was in liquidation and was removed

¹ Section 83(3) of the Holidays Act .

² Sections 130 (1A) of the Act and 81(3) of the Holidays Act respectively.

³ Section 83(3) of the Holidays Act.

from the Companies Register on 14 March 2018. Accordingly, I cannot consider any claims Ms McArthur has made in respect of her period of employment with HBL.

FEL

[20] The respondent in these proceedings, and Ms McArthur's employer at the time she terminated her employment, is FEL, a company registered on 1 August 2017 which remains currently registered. While there is no impediment to Ms McArthur bringing proceedings against FEL, it is necessary to establish exactly when her employment with that company commenced for the purposes of considering her claims.

[21] Ms McArthur's evidence is that she was given an IEA early in 2018 in which the employer party was FEL. No signed copy of that document was produced but both parties accepted it had been executed. The IEA records the commencement of Ms McArthur's employment with FEL as 1 October 2017.

[22] In written evidence provided to the Authority by Ms Wilson, she stated FEL's records show Ms McArthur's employment with the company started on 14 August 2017. Ms Wilson did not attend the Authority's investigation meeting for health reasons and was not able to be questioned on her evidence.

[23] Ms McArthur's payslips reveal that her wages were paid by FEL from the pay period of 4 to 10 September 2017. Ms Wilson stated, in a letter to Ms McArthur dated 18 October 2019 regarding holiday pay owing to her at the time she left her employment with FEL, that Ms McArthur was entitled to four weeks' holiday per year "and the first entitlement began on 4 September 2018".

[24] The Holidays Act 2003 provides that, after the end of each completed 12 months of continuous employment, an employee is entitled to not less than four weeks' paid annual holidays.⁴ Ms Wilson's letter supports the view that 4 September 2017 was the date Ms McArthur's employment commenced with FEL. Accordingly I find on the evidence that the date of commencement of Ms McArthur's employment with FEL was 4 September 2017.

[25] The Hours of Work clause of her IEA provided:

⁴ At s16 of the Holidays Act.

The employee will work for 45 hours each week on Sunday – Friday, between the hours of 7 am – 7 pm.

The employee can choose when to start and end work each day (within agreed limits), as long as they work the agreed number of hours.

[26] The IEA contained no provision for the payment of overtime.

[27] Ms McArthur's evidence was that she normally put 45 hours down on her timesheets regardless of how many hours she actually worked. She said that when she occasionally recorded her actual hours, she was paid only for 45 hours.

[28] Through her legal representative, Ms McArthur had formally requested wage and time records from FEL. Ms McArthur had also directly contacted her employer, orally and in writing, making it clear she had a holiday pay claim against the company as well as a wage arrears claim, and again seeking records, in particular, break sheets. These were completed by employees on a daily basis and recorded the hours employees worked as well as the number and length of the breaks they took. Ms McArthur's evidence was that Ms Wilson had advised her she had worked the hours specified in her IEA. Ms McArthur said she did not receive the documentation she had requested.

[29] FEL said the break sheets had been kept in the bakery office and could not be found.

[30] Ms McArthur's evidence was that, because she would be paid for only 45 hours per week regardless of the actual hours she worked, she did not record her actual hours on the timesheets. For the purposes of working out her claim for wage and holiday arrears, Ms McArthur reconstructed her actual hours of work from various extraneous sources. These included text messages with her partner, vehicle GPS from January 2019, and bank statements. She provided the base documents from which she made her calculations which spanned the period from 24 May 2017 to her last day at work on 25 July 2019. Ms McArthur claims to be owed over \$90,000 in wages, not including holiday pay.

[31] After adjusting her calculations to reflect her 4 September 2017 commencement of employment with FEL, Ms McArthur's wage arrears claim is over \$76,000, not including holiday pay arrears.

[32] I find the claim to be problematic. Ms McArthur's assertion that she was "forced" to work overtime cannot be sustained. Definitions of "forced" and "force" include:

- (a) Obtained or imposed by coercion or physical power.⁵
- (b) Compelled by force or necessity.⁶
- (c) Done or brought about by rough force; not voluntary, compulsory.⁷

[33] From Ms McArthur's evidence, none of those applied to her situation. She acknowledged she worked long hours at least partly for her own benefit in the belief that she was working towards owning her own business. She felt that the pursuit of that goal required her to either step up or walk away. She chose the former option.

[34] Ms McArthur also referred to wanting job security, and said the business would not have survived without her putting in the amount of time that she did. She agreed that nobody had asked her to do the long hours that she did, but she believed there was an expectation that she would do it.

[35] Both Mr Wilson and Mr Chris Wilson denied that. Mr Chris Wilson observed that Ms McArthur had her own key to the premises and would come and go as she pleased. He said he knew she worked long hours although he had no idea of the actual hours she spent on the premises. He emphasised that she was not asked to do any hours over and above those specified in her IEA and said there were many occasions when Ms McArthur looked very tired and he would tell her to go home. He also said that she took a lot of breaks and should have been able to complete her duties within her contractual hours of work. She frequently undertook tasks that were unnecessary and that she was not required to do. He said she would come into work on her days off, which he described as "just hanging around". He thought she did so because she had an unhappy home life.

[36] Ms McArthur acknowledged she did come into the bakery on her days off, and said it was to try out new recipes. She told the Authority that baking was more than a job for her: it was her hobby, passion and love. She said the hours she spent on her days off did not form part of her claim for wage arrears.

[37] Mr Wilson said he was aware that Ms McArthur worked long hours and he recognised that the business had benefitted from that. He said she had done so with an eye to her future ownership of the business. He was keen for her to take over the bakery when he retired and

⁵ Oxford Languages, Oxford University Press.

⁶ Merriam-Webster Dictionary.

⁷ Collins English Dictionary.

she was eager to learn as much, and as quickly, as possible. Mr Wilson thought it reasonable that she put in additional effort that would be to her advantage in the longer term. He denied Ms McArthur had been asked to work extra hours or that there was any expectation she would do so.

[38] I do not doubt that Ms McArthur put in many additional hours per week over and above the 45 hours specified in her IEA. However, I find she was not asked or required by her employer to do so. While the company profited from the extra time she put into her role, I find it is not required to pay for services she provided that went over and above the agreed hours specified in her IEA. Ms McArthur's claim fails in respect of wage arrears based on the hours she worked additional to her contractual 45 hours per week.

[39] Ms McArthur is, however, owed some wage arrears. Her IEA with FEL, which I have found took effect from 4 September 2017, provided that she was to be remunerated at \$16.50 per hour. From 4 September 2017 until 31 March 2018, Ms McArthur's wages were paid at the rate of \$15.75 per hour, which was the minimum hourly rate at the time, a shortfall of \$0.75 per hour, or \$33.75 for a 45 hour week.

[40] From 1 April 2018, the minimum wage rose to \$16.50 per hour and Ms McArthur's wages were adjusted to reflect the increase. However, over the 30 working weeks to 31 March 2018 Ms McArthur was underpaid her contractual wage entitlement by \$1,012.50. An order will be made for FEL to pay her that amount.

Is holiday pay owing?

[41] As I have dismissed Ms McArthur's claim to payment for the additional hours she worked, her claim for holiday pay for those hours also fails.

[42] However, based on the wage arrears I have found Ms McArthur is owed from 4 September 2017 to 31 March 2018, she is entitled to holiday pay arrears of \$81.00. An order will be made accordingly.

Is pay owing for public holidays and are alternative holidays owing?

[43] Ms McArthur claims she was not properly remunerated for the public holidays she worked and did not receive an alternative day's holiday for any public holiday she worked, as required by the Holidays Act 2003. Her IEA contained provisions whereby she agreed to work

on any public holiday that would otherwise be a working day for her if required, and not to work on any public holiday unless asked to do so.

[44] The provision also stated that her salary included compensation for being available to work on public holidays. As Ms McArthur was paid the minimum wage for the majority of her employment with FEL, that is an implausible assertion.

[45] As noted earlier, Ms McArthur had requested, both personally and through her legal representative, all pay and wages documentation as well as break sheets. Ms McArthur had a number of payslips, but not a complete set covering all of her employment with the company. She confirmed she had provided to the Authority all the payslips and other wages information provided by FEL.

[46] Ms Wilson had responded to Ms McArthur's letter on 18 October 2019, enclosing a payslip for the holiday pay and one alternative holiday she said was owing to Ms McArthur at the termination of her employment. This was to be paid on 24 October 2019. Ms Wilson advised Ms McArthur of the sum that was to be paid to her, and the amount of annual holidays she had taken in the pay year to 4 September 2018. She advised that Ms McArthur had taken two days in advance of annual entitlement in that year which had been deducted from the amount to be paid out. Ms Wilson did not address the issue of break sheets that Ms McArthur had raised.

[47] Some of Ms McArthur's payslips record standard pay of 9 hours for the date on which a public holiday fell, without acknowledging the day was a public holiday. Examples of these are the payslips for the pay weeks ending Sunday 29 October 2017 and Sunday 5 November 2017, which respectively cover Labour Day and Marlborough Anniversary Day in that year. From my examination of the documentation for such days, I have found no evidence that Ms McArthur was paid any more than her regular hourly rate. The Holidays Act required that she be paid at least time and a half for hours worked on a public holiday and receive an alternative day's holiday.⁸

[48] Other payslips, such as that for the pay week ending Sunday 31 December 2017, record, on a separate line from hours recorded for days worked, "Public Hol off".

⁸ In accordance with s 50 of the Holidays Act.

[49] Where the employer has failed to provide pay slips for a period over which Ms McArthur has provided evidence to support her claim to have worked on a public holiday, I have accepted her claim under s 83(3) of the Holidays Act. I am satisfied Ms McArthur made it clear she was seeking information in relation to both wages and holiday claims and the employer failed to provide all the documents to enable her to do so.

[50] After considering Ms McArthur's claims and the documentation provided, I have concluded she was not remunerated in accordance with the Holidays Act 2003 for the public holidays she worked and there is no evidence that she was provided with an alternative holiday for those days, other than for the one unspecified day for which she was remunerated in her final pay.

[51] Ms McArthur says she worked on several public holidays during her employment with FEL. I have cross-checked those days with the payslips provided to her by her employer, where such payslips were provided. The first two public holidays are Labour Day on 23 October 2017, and Marlborough Anniversary Day on 30 October 2017. Both holidays were on a Monday, which was normally a working day for Ms McArthur.

[52] The payslips for each of those pay weeks contain no reference to the public holiday and record Ms McArthur as working nine hours on each of those days. She received standard pay for each of the weeks in which the public holiday occurred and there is no reference to an alternative day's holiday in any subsequent payslip. I accept her evidence that she worked on those days and find she should have been paid at time and a half for each of the nine hour days she worked. She should also have received an alternative day's holiday in respect of each of those two days.

[53] Ms McArthur also claims to have worked on Christmas Day and Boxing Day 2017. She provided a start and finish time for Christmas Day but not for Boxing Day. The payslip from FEL for both days records her as having both public holidays off and having worked on Wednesday 27 to Friday 29 December inclusive.

[54] Ms McArthur did not provide any extraneous evidence to support her reconstructed record for either day and I am not prepared to accept that she was required to work on either of those two public holidays.

[55] Her payslip for the public holidays on 1 and 2 January 2018, being New Years Day and the day following, record Ms McArthur as having worked for nine hours each day from Monday 1 January to Friday 5 January. Her pay is recorded as standard and there is no evidence in that, or subsequent, pay slips that Ms McArthur received payment for an alternative day's holiday. I find she should have been paid at time and a half for nine hours on each of those days. She should also have received an alternative day's holiday in respect of each of those days.

[56] A similar situation applies to 6 February 2018, Waitangi Day, 30 March 2018, Easter Friday, 2 April 2018, Easter Monday, and 25 April 2018, Anzac Day. Ms McArthur's payslips record she worked 9 hours on each of those days for standard pay. There is no evidence she was paid more than her normal hourly rate for those days or that she received an alternative day's holiday. I find she should have been paid at time one and a half and received an alternative day's holiday in respect of each of those four days.

[57] Ms McArthur's reconstructed pay records show she worked for 9 hours on Monday 22 October 2018, Labour Day and 10 hours on Monday 29 October 2018, Marlborough Anniversary Day. Evidence of text messages between Ms McArthur and her partner on 29 October 2018 regarding Mr Wilson and Mr Chris Wilson's anticipated, and then actual, return to the bakery that afternoon support her claim to have worked that day. She did not have payslips for either pay period within which those public holidays fell. However, I note that her bank records do not reveal anything other than standard pay for the paydays following each of them. I accept her evidence of having worked both those days find she should have been paid at time one and a half and received an alternative day's holiday in respect of each of them.

[58] The next public holidays Ms McArthur claims to have worked are 1 and 2 January 2019 in which her reconstructed records note she worked a 14 and 15 hour day respectively on New Years Day and the day following. A payslip was provided in respect of that period: it records 1 and 2 January 2019 as "Pub Hol off" and payment for two public holiday in the pay period. While Ms McArthur provided some extraneous evidence to support her contention of having been at the bakery on both days, I am not satisfied that she was required by her employer to work on those days. Accordingly, I find she was properly remunerated by being paid for both those public holidays at her standard rate of pay.

[59] Ms McArthur's payslip for the period including 6 February 2019, Waitangi Day, records her as working five days that week, including Saturday 9 February. It did not record her as working on Wednesday 6 February and the payslip contained no reference to the public holiday or to Ms McArthur being paid for that day as she would have been entitled had she not worked. She was paid for a normal 45 hour week.

[60] Ms McArthur's reconstructed records show her as having worked for 9 hours on Waitangi Day and not having worked on Saturday 9 February. That was in accordance with her normal pattern of working Monday to Friday and not working on Saturday. I am not satisfied that the payslip accurately records the days Ms McArthur worked in the pay week ending Sunday 10 February 2019. No timesheet was provided that could have clarified the situation. I find it more likely than not that Ms McArthur's own record of having worked on Wednesday 6 February, and not worked on Saturday 9 February, is a more accurate reflection of her working week than that shown on the payslip. I find she is entitled to additional pay of four and a half hours for that day and an alternative holiday.

[61] There were no payslips provided covering 19, 22 and 25 April 2019, being Easter Friday, Easter Monday and Anzac Day. Ms McArthur's reconstructed records show she worked all three days. Her bank statement for the period does not show any increase in deposited wages, as would be expected if she had been paid at one and a half times her normal wage rate. I accept Ms McArthur's evidence of having worked on the three public holidays and find she should have been paid at time one and a half for each of those days and received an alternative holiday in respect of each of them.

[62] In summary, Ms McArthur has not been paid properly for 14 public holidays that she worked. She was paid at her normal hourly rate rather than at time and a half as required by the Holidays Act. She is entitled to public holiday pay arrears and to 13 alternative holidays, being one in respect of each public holiday worked, less the one paid out with her final pay on 24 October 2019.

Breach of employment agreement?

[63] As found earlier in this determination, there was a period of time, from 4 September 2017 to 31 March 2018, in which Ms McArthur was paid less than her contractual wage. Ms McArthur's evidence was that she was given the IEA in the early months of 2018, but it was

backdated to 1 October 2017, although acknowledged by Ms Wilson to have come into effect earlier than that.

Is a penalty warranted?

[64] Any breach of an employment agreement is a serious matter and I believe a penalty is appropriate in the circumstances. The monetary value of the breach of Ms McArthur's IEA is relatively low but the breach was ongoing for some months. It is likely to have been inadvertent rather than deliberate and most likely to have been the result of the uncertainty and upheaval over the state of HBL, which resulted in its liquidation and removal from the Companies register.

[65] Taking into account all the factors listed in s 133A of the Act, and the guidance provided by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited*⁹, I find a modest penalty of \$400 to be appropriate in the circumstances.

[66] Ms McArthur, in submissions from Ms Ramanathan, submits she was paid less than the minimum wage for a period of her employment with HBL. While she accepted in the Authority's investigation meeting that she was unable to seek financial remedies in respect of that company, Ms McArthur sought a declaration of breach of minimum employment provisions. I decline that request. HBL is not, and could not be for reasons already explained, a respondent in these proceedings and the request is inappropriate.

Interest

[67] Ms McArthur seeks interest on all sums awarded to her. The Authority has the power to award interest in any matter involving the recovery of money, pursuant to clause 11 of Schedule 2 to the Act. In this instance Ms McArthur was deprived of the benefit of the wages, holiday pay and alternative holidays she should have received at the time, and I consider her request to be reasonable.

[68] Interest will be awarded on wage arrears and holiday arrears, including those relating to alternative days. The interest will be calculated in accordance with the Interest on Money Claims Act 2016 from 6 August 2019 to the date of the Authority's investigation meeting. I have chosen 6 August 2019 rather than Ms McArthur's last day at work because that is the day

⁹ [2016] NZEmpC Christchurch 143.

Ms Ramanathan wrote to Ms Wilson on Ms McArthur's behalf. Before that date the employer may have believed Ms McArthur would return to her role in the bakery.

Orders

[69] Food Enterprises Limited is ordered to pay Ms McArthur the following sums:

- (a) Arrears of wages for the period 4 September 2017 to 31 March 2018 in the sum of \$1012.50;
- (b) Interest on the amount in (a) above of \$32.97;
- (c) Arrears of holiday pay in relation to the wage arrears sum specified in (a) above of \$81;
- (d) Interest on the amount in (c) of \$2.64;
- (e) Payment of arrears in respect of 14 Public Holidays worked, at T½ in the sum of \$1,115.10;
- (f) Interest on the sum at (e) of \$36.31;
- (g) Payment for 13 alternative days' holiday in respect of public holidays worked in the sum of \$2070.90; and
- (h) Interest on the sum at (g) of \$67.43.

[70] Food Enterprises Limited is also ordered, under s 134 of the Act to pay a penalty of \$400.00 in respect of the breach of Ms McArthur's employment agreement. The penalty is to be paid in its entirety to Ms McArthur, in accordance with s 136 of the Act.

[71] All sums specified in [69] and [70] are to be paid within 28 days of the date of this determination.

Costs

[72] Ms McArthur was ably represented by Ms Ramanathan from Community Law Marlborough. While no representation fees were involved, Ms McArthur incurred a filing fee in the Authority of \$71.56 and disbursements of \$200 for the printing of documents. She seeks an award of costs to cover those items.

[73] The respondent submits no costs should be awarded. I disagree. While Ms McArthur did not achieve success in all her claims, she was sufficiently successful to merit the reimbursement of the modest costs she incurred in bringing her claims to the Authority.

[74] I order Food Enterprises Limited to pay Ms McArthur costs in the sum of \$271.56, to reimburse her for the filing fee and printing costs she incurred. That amount is also to be paid within 28 days of the date of this determination.

Trish MacKinnon
Member of the Employment Relations Authority