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Percival v Harris t/a Breakers Restaurant (Wellington) [2017] NZERA 2057; [2017] NZERA Wellington 57 (11 July 2017)

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Percival v Harris t/a Breakers Restaurant (Wellington) [2017] NZERA 2057 (11 July 2017); [2017] NZERA Wellington 57

Last Updated: 23 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 57
3005913

BETWEEN

SANDRA ANN PERCIVAL Applicant

AND KENNETH HARRIS t/a BREAKERS RESTAURANT Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person

Respondent in person Investigation Meeting: 10 July 2017 by telephone Oral Determination: 10 July 2017

Written Determination: 11 July 2017

WRITTEN RECORD OF ORAL DETERMINATION

Employment relationship problem

[1] Ms Sandra Percival alleges Mr Harris is in breach of clauses 4 and 5 contained in a Record of Settlement agreed between the parties on 1 November 2016.¹ She seeks an order for compliance with the Record of Settlement.

[2] For the purposes of establishing enforcement action it is necessary to set out the relevant provisions contained in the Record of Settlement as follows:

4. The respondent will pay no later than 4pm on Friday, 4 November

2016 all holiday pay entitlements due to the applicant if any. If the

respondent's independent accountant after viewing the respondent's time and wage records is of the professional opinion that all holiday payments have been paid to the applicant for both or one of the 2015 and 2016 periods of employment the respondent will provide within

14 days of today's date written confirmation from their accountant

that holiday pay has been paid and sufficient information to justify this professional opinion.

5. The respondent will post to the applicant's residential address no later than 4pm on Friday, 4 November 2016 two separate payslips detailing the applicant's gross earnings, PAYE paid to IRD and holiday pay for both the 2015 and 2016 periods of employment.

[3] Mr Harris says Ms Percival has been paid her full entitlement to holiday pay although he had not provided any evidence, despite a Notice of Direction to the effect,² to support his assertion. I am unwilling to accept his oral evidence alone in this regard. Mr Harris does concede, however, that he has not complied with clause 4 or clause 5 of the Record of Settlement insofar as he not provided the information agreed under those provisions.

Determination

[4] I find that Mr Harris is in breach of his obligations pursuant to the Record of

Settlement.

Orders and costs

[5] Pursuant to s. 151(2) and s.137 of the Employment Relations Act Mr Kenneth Harris t/a Breakers Restaurant is ordered to comply with the agreed terms of the Record of Settlement and in particular:

(i) the contents of the first sentence of clause 4 and pay Ms Percival outstanding holiday pay (which, in the absence of holiday and leave records, is calculated as approximately \$242.13 (nett)), or

(ii) if Ms Percival's full entitlement to holiday pay has been paid, Mr Harris must comply with the second sentence of clause 4 and furnish independent verification of payments of Ms Percival's total holiday pay entitlement in accordance with the recorded terms at cl.4, and

(iii) comply with the contents of clause 5.

[6] I further order Mr Harris to reimburse Ms Percival the sum of \$71.56 – the cost of filing her application with the Authority.

[7] Mr Harris must comply with the orders and costs of this determination on or before 24

July 2017.

[8] Attention is drawn to s 140(6) of the Employment Relations Act which allows the Court, where it finds that a person has failed to comply with a compliance order made under s.137, to impose a fine not exceeding \$40,000, order property to be sequestered, or sentence imprisonment not exceeding 3 months.

[9] Failure to comply with this order may result in Ms Percival making an application to the Employment Court to have it exercise its powers.

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Michele Ryan

Member of the Employment Relations Authority

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