

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 539
3131037

BETWEEN	JACOB PIETRAS Applicant
AND	TANYA VEGAR (aka TANYA STRUCK) Respondent

Member of Authority:	Michael Loftus
Representatives:	Joshua Pietras, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	On the papers with information up to and including 24 November 2021
Date of Determination:	1 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Jacob Pietras, seeks unpaid wages and holiday pay. He also seeks penalties for three alleged breaches.

[2] The respondent's position is unknown as she has failed to take any part in the proceedings.

Conduct of the Investigation

[3] The respondent's failure to participate raises two issues. The first is whether or not to proceed? The second, assuming a decision to proceed, is how?

[4] Initial attempts to serve the Statement of Problem at what was believed to be the respondent's home address in Auckland elicited advice she was now residing at an unknown address in Spain. That said, the approach confirmed she still owned the property and had it tenanted. The tenant advised the respondent used her father as a local agent and she communicated with him via an e-mail address which was provided.

[5] That information led to an application for substituted service which, given the circumstances, was approved. It required service at both the residential address owned by the respondent¹ and to the e-mail address of her New Zealand agent (her father).² A subsequently proffered affidavit satisfies me service has now occurred at both addresses.

[6] Included in the documents is notice that if a response is intended a Statement in Reply must be lodged within 14 days.³ No response or acknowledgment has been received meaning a defence can now only be raised with leave of the Authority.⁴ Absent that, or indeed any other response, I believe it appropriate I continue. A respondent should not be capable of running away from its obligations by simply ignoring them.

[7] That then leads to the question of how. After discussion with the applicant and having perused the documentation, I consider this a matter that can be determined on the papers.

Background

[8] Sometime in June 2020 the respondent placed an advertisement on Student Job Search stating *This employer is looking for a hardworking and reliable individual to assist in surveying/petition collection.* As stated, the task was to collect signatures for a petition to be presented to Parliament. It envisaged approximately 5 hours work at \$18.90 an hour plus a bonus of \$50 for every 500 signatures collected, but added a caveat that additional hours would be available for the right applicants. There was also an element of urgency with a request the 5 hours be completed *before the end of the week.*

¹ Satisfying Regulation 16(3)(a)(ii) of the Employment Relations Authority Regulations 2000

² In accordance with Regulation 16(3)(a)(iv) of the Employment Relations Authority Regulations 2000 as being the most likely address from which documents might be forwarded to the Respondent

³ Notice to respondent 1 to Form 1 of the Employment Relations Authority Regulations 2000

⁴ Regulation 8(3) of the Employment Relations Authority Regulations 2000

[9] Mr Pietras applied and was successful. He then completed six hours work on 25 and 26 June 2020. He was not paid, though the petition to which he contributed his time was presented to Parliament.

[10] Mr Pietras then tried to follow up and get his pay through both Student Job Search and via direct texts with the documentation satisfying me this is so. The documentation also satisfied me he was unsuccessful with Student Job Search being unable to help and no response whatsoever from the respondent.

Discussion

[11] Mr Pietras seeks \$122.47, being unpaid wages of \$113.40 and holiday pay of \$9.07. He also seeks penalties.

[12] As already said the documentation satisfies me Mr Pietras was employed. It also satisfies me there was no employment agreement and Mr Pietras was not paid despite attempts to have the issue addressed. It follows his wage claim is made out and there will be an order for the amount sought.

[13] These conclusions also mean there are three breaches to which a penalty might apply.⁵ That said I disregard the failure to provide an employment agreement. Essentially penalties are for wanton breaches and it is difficult to say that has occurred where the issue was not raised in time to allow the respondent an opportunity to address it. Indeed, it was first raised upon the lodging of this application which was well after the employment ended. I also have to say I am not surprised by this omission given the brief tenure.

[14] The same cannot be said of the failure to pay and while two Acts have been breached the failure is, in my view, just one – failure to make a single payment for a job of short tenure. I shall therefore approach this from the perspective of a single globalised breach.

[15] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,⁶ *A Labour Inspector v Prabh*⁷ and *A Labour Inspector v Daleson*

⁵ Either s 10 of the Minimum Wage Act 1983 or s 13 of the Wages Protection Act 1983, s 75 of the Holidays Act 2003 and s 64(4) of the Employment Relations Act 2000

⁶ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

⁷ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

Investment.⁸ Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[16] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances *involving a distinct power imbalance*.⁹ That would appear the case here.

[17] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question¹⁰, or failed to take reasonable steps to fulfil their legal obligations.¹¹ Here the evidence leads to a conclusion the failure is deliberate given the attempts by Mr Pietras to have it remedied and which were ignored.

[18] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at between 70 and 80%.¹² There is no argument from either party for an alteration either way from this starting point though I note the loss is monetary and relatively minor. While the magnitude may well be amplified for a student, this factor suggests a reduction should be applied.

[19] There is no evidence of similar previous conduct by the respondent and finally I have to be cognisant of issues such as consistency and proportionality. That, when combined with a perusal of recent penalties would also suggest 70 to 80% would lead to an improperly high figure.

[20] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$4,000. The final issue is then to whom the penalty should be paid and here I note Mr Pietras has, by the inaction of the respondent, been forced to inordinate lengths to get what was rightfully his and should never have been in dispute given the amount involved. He should therefore share in the penalty and I consider half appropriate.

⁸ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

¹⁰ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

¹¹ *El-Agez v Comprede Limited*, TT 4121553, at para 18

¹² See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

Conclusion and Orders

[21] For the above reasons I conclude the respondent, Tanya Vegar (aka Struck), has failed to pay money due to Mr Pietras. As a result she is ordered to pay:

- (a) Mr Pietras the sum of \$122.47 (one hundred and twenty two dollars and forty seven cents) gross being unpaid wages and holiday pay; and
- (b) A penalty of \$4,000.00 (four thousand dollars) with half (\$2,000) payable to the Crown via the Authority and half payable to Mr Pietras; and
- (c) The payments in (a) and (b) above are to be made no later than 4.00pm Wednesday 12 January 2022.

[22] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority