

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 289
3056106

BETWEEN DEEPAK RATHOD
 Applicant

AND NUTRA FOODS 2011 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in Person
 Terry LeSuer, Director of Respondent

Investigation Meeting: 14 May 2019 at Auckland

Additional information: 15 May 2019

Date of Determination: 16 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Rathod was employed by Nutra Foods 2011 Limited (Nutra Foods) as its Business Development Manager from 1 April 2018 until 1 March 2019.

[2] Mr Rathod says that he was not paid any wages for his last week of work and he has not been paid any annual holiday entitlements either while employed or upon termination of his employment.

[3] Mr Rathod seeks recovery of wage arrears consisting of his last week's wages and unpaid holiday pay entitlements under the Holidays Act 2003 (HA03).

Respondent's participation in these proceedings

[4] Mr Rathod's Statement of Problem was served on Nutra Foods registered office by track and trace courier post on 18 March 2019. It was signed for by "*Chloe Phillips*" at Nutra Foods' registered office.

[5] The Authority also emailed Nutra Foods on 2 April 2019 directing it (among other directions) to produce Mr Rathod's wage and time records, and holiday and leave records, together with other specified information relevant to the claims the Authority was investigating.

[6] None of this information was provided by Nutra Foods.

[7] In its email of 2 April 2019 the Authority also identified to Nutra Foods that, because it had not filed a Statement in Reply within fourteen days of the Statement of Problem being served on it, if it wanted to defend Mr Rathod's claims then it had to apply for leave to file a Statement in Reply out of time.

[8] The Authority gave Nutra Foods until 3:00 pm on 8 April 2019 to apply for leave to file a Statement in Reply out of time. No leave application was received.

[9] The Authority's notice of investigation meeting was served on Nutra Foods at its registered office by track and trace courier post on 12 April 2019. It was signed for by "*Don Abbot*".

[10] Mr Terry LeSuer, who is the sole director and shareholder of Nutra Foods, attended the investigation meeting on 14 May 2019 approximately 20 minutes after it was scheduled to start.

[11] Mr LeSuer had no reasonable explanation for failing to engage with the Authority about Mr Rathod's claim prior to the investigation meeting. He also failed to bring to the investigation meeting with him copies of any of the documents Nutra Foods had previously been directed to provide.

[12] The Authority granted Nutra Foods an indulgence by giving it a further 24 hours within which to produce to the Authority the information it had previously been directed to provide.

Respondent's evidence

[13] Mr LeSuer initially sought to justify Nutra Foods' failure to pay Mr Rathod his final week's pay and any holiday pay on the basis of dissatisfaction it supposedly had with him.

[14] Mr LeSuer also told the Authority that Nutra Food paid Mr Rathod \$900 gross weekly for the first three months of his employment but that after his trial period expired he was then paid \$900 per week as an "*advance on Mr Rathod's commissions*" which Mr Rathod was required to repay in full when his employment ended.

[15] Nutra Foods' stated position was that Mr Rathod owed it money; however it has not filed any claim with the Authority about that.

[16] Mr Rathod strongly disputed the amounts he had been paid were loans. He said he was paid a weekly wage, not repayable commission advances.

[17] On 15 May 2019 Mr LeSuer (for the first time) provided the Authority with some documentation. This included an offer of employment letter to Mr Rathod dated 3 April 2018 and an unsigned employment agreement between Mr Rathod and Nutra Foods which stated the employment was to commence no later than 2 April 2018.

[18] The offer letter stated "*[t]here will be a trial period of three months whereby you will be placed on a commission only basis without an advance.*"

[19] Clause 3.2 dealt with the trial period and (among other things) stated that during the trial period Mr Rathod would "*be paid an advance on commissions at the rate of \$22.50 per hour including holiday pay. After this time [he] will be remunerated at the rate of commissions as advised from time to time. The commissions paid are a total payment and include holiday pay if applicable.*"

[20] Mr Rathod was a permanent employee so Nutra Foods was not permitted to pay him 'all inclusive' holiday pay. Such an arrangement would have been in breach of the minimum code holiday entitlements protections specified in the Holiday Act 2003 (HA03).

[21] Mr Rathod emailed the Authority to say that:

- (a) The unsigned employment agreement Nutra Foods produced to the Authority document had not been given to him.
- (b) He had been paid a salary of \$900 gross per week, not advance on potential future commissions;
- (c) Nutra Foods' supposed complaints about his work were not raised with him while he was employed.

[22] The Authority notes that regardless of how an employer may feel about an employee's performance, every employer is legally required to pay employees their full salary/wages without making any unlawful deductions from the amount the employee is owed.

[23] Mr Rathod gave evidence that he is owed one week's wage arrears because he was not paid for his last week of work and he has not been paid any holiday pay at all.

[24] Mr LeSuer admitted to the Authority that he had told Mr Rathod that Nutra Food would not pay him any of the claimed wage arrears and, that following that advice to Mr Rathod, no wage arrears have in fact been paid.

Respondent's failure to keep employment records

[25] Section 130 of the Act requires every employer to keep wage and time records for every employee, which must be produced upon request.

[26] Failure by an employer to do so means that if an employee (such as Mr Rathod) brings a wage arrears claim to the Authority then under s 132(2) of the Act the Authority may accept as proved all claims made by the employee regarding the wages paid and the hours, days and times worked by that employee unless such claims are proven to be incorrect.

[27] That is the case here. Accordingly, under s132(2) of the Act Mr Rathod's wage arrears claim is proven to the required standard of proof.

[28] All employers are also required by s 81 of the HA03 to keep a holiday and leave record for every employee that records the information identified in s 81(2) of the HA03, that must be produced upon request.

[29] The Authority may find that an employer failed to comply with its obligation to keep a holiday and leave record and/or to provide an employee's holiday and leave record upon request. If so, then the Authority may make a finding that these failures prevented an employee from bringing accurate wage arrears claims.

[30] The Authority makes that finding in this case under s 83(3) of HA03.

[31] Therefore, in accordance with s 83(4) of HA03 the Authority accepts as proven, in the absence of any evidence to the contrary, Mr Rathod's statements about the holiday pay and annual leave he has actually received.

Proof of Claim

[32] Mr Rathod has discharged his onus of establishing on the balance of probabilities that he is owed wage arrears for unpaid wages relating to his last week of employment. He is also owed unpaid annual holiday entitlements under HA03, that should have been paid to him upon termination, but which were not paid at all.

[33] Mr Rathod's gross weekly earnings, as stated in the payslip provided to the Authority by Mr Rathod, were \$900 per week. It is clear from the documents provided by Nutra Foods that it treated the regular weekly payments it made to Mr Rathod as wages (as he claimed) not as advances against future commissions as it has subsequently stated.

[34] Nutra Foods also reduced the weekly payments it made to Mr Rathod to reflect his reduced hours of work when he was away from work on sick leave or ACC.

[35] Nutra Foods provided an "*Employee Earnings Certificate*" from ACC for Mr Rathod that it had completed that referred to Mr Rathod's gross taxable earnings (not to supposed loans it had given him against future commission earnings). Nutra Foods told ACC that Mr Rathod would have continued to have been paid the amounts he had earned previously, but for his injury. That also supports the payments being wages, not repayable loans.

[36] Nutra Foods deducted PAYE from the gross wages it paid Mr Rathod and remitted those deductions to Inland Revenue Department (IRD). That would only have occurred if Mr Rathod had been paid remuneration by Nutra Foods. PAYE was not payable if these payments were repayable loans.

[37] Nutra Foods also failed to provide any information about the sales Mr Rathod made while employed or the level of commissions he should have been paid.

[38] On that basis it can be assumed that even if the regular weekly payments to Mr Rathod were not wages or salary as he claimed, then they must have been commission payments that Nutra Foods was satisfied, at the time the payments were made, he had earned, because there was nothing given to Mr Rathod (or the Authority) to suggest that was not the case, or that the weekly payments that had been made were considered repayable.

[39] Repayable commission advances would also have breached the Minimum Wages Act 1983 (the MWA) as Mr Rathod was entitled to be paid not less than the minimum wage for every hour he worked.

[40] If Nutra Foods' position was correct then it would have paid Mr Rathod nothing for the 11 months he had worked. That would have been a very clear breach of the MWA, which could have attracted significant penalties.

Finding

[41] The Authority therefore accepts Mr Rathod's evidence supporting his wage arrears claim.

[42] Nutra Foods is therefore ordered to pay Mr Rathod \$900 wage arrears arising from its failure to pay him for his last week of work.

[43] Mr Rathod worked for less than 12 months so he is entitled to be paid 8% of his total gross earnings while employed. His total gross earnings while employed were \$35,680 plus the \$900 wage arrears from his last week of work, meaning Mr Rathod's total gross earnings while employed were \$36,580. Eight percent of that amount is \$2,926.40.

[44] Mr Rathod's evidence that he did not take any paid annual holiday while employed and has not received any holiday pay at all was accepted by the Authority. Therefore, no deductions are to be made to the 8% holiday pay amount (\$2,926.40) calculated above.

[45] Accordingly, Nutra Foods is ordered to pay Mr Rathod \$2,926.40 wage arrears consisting of unpaid holiday pay entitlements.

Costs

[46] Mr Rathod represented himself, so he is not entitled to any legal costs. Nutra Foods is however ordered to reimburse Mr Rathod \$71.56 for his filing fee.

Orders

[47] Within twenty-eight days of the date of this determination, Nutra Foods must pay Mr Rathod \$3,267.96 consisting of:

- (a) Wage arrears of \$900;
- (b) Unpaid holiday pay of \$2,926.40; and
- (c) \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority