

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 343
5604886

BETWEEN SOUMYA THOMAS
 Applicant

A N D DAVID GROUP HOLDINGS
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Herman David, Director of Respondent

Investigation Meeting: 11 October 2016 at Auckland

Date of Determination: 11 October 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Ms Soumya Thomas was employed by David Group Holdings Limited (David Group) from 30 November 2014 until her resignation on 4 January 2016.

[2] Ms Thomas was employed as the café manager at the Hollywood Café which is owned by David Group. Ms Thomas had approximately 4 to 5 staff reporting to her. In December 2015 Ms Thomas gave notice of resignation which expired on 4 January 2016.

[3] Ms Thomas says that during the course of her employment she was not paid annual leave in accordance with the Holidays Act 2003 (Holidays Act).

[4] Mr Herman David, who is a joint director and shareholder of David Group, acknowledged in the statement in reply filed in the Authority on 31 August 2016 that Ms Thomas had not received holiday pay owed to her and that “*we are working towards raising the amount within the next few weeks*”.

[5] At the investigation meeting today, Mr David acknowledged that David Group had not yet paid Ms Thomas her holiday pay for a number of reasons. Reasons included that David Group was in the process of being liquidated and had a number of creditors he was trying to pay. Mr David also told the Authority he was attempting to sell equipment owned by David Group in order to pay debts, but had not been able to pay Ms Thomas yet.

Investigation meeting

[6] At the investigation meeting today, both Ms Thomas and Mr David swore that their evidence was true and correct. As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Relevant facts and legal issues are set out along with the Authority’s conclusions.

[7] Ms Thomas gave uncontested evidence that she was employed by David Group from 30 November 2014 until 4 January 2016. The Authority was provided with Ms Thomas’ bank statements showing some of the salary payments made to her by David Group. Some payslips were also provided detailing salary paid and PAYE deducted.

[8] Ms Thomas also provided the Authority with “earnings information for income tax statements from Inland Revenue” for the periods 1 April 2014 to 31 March 2015 and 1 April 2015 to 31 March 2016.

[9] Mr David accepted that holiday pay in the sum of \$2,409.64 was owing to Ms Thomas. Ms Thomas’ calculations were that she is owed \$2,430.80 gross in holiday pay.

[10] I have made some calculations which are very close to both those figures. The Authority’s calculations are that from 1 April 2015 to 31 March 2016, according to Inland Revenue Department (IRD) records, Ms Thomas earned \$22,729 gross. In addition, she earned salary in the sum of \$7,224 in the preceding three month period from January to March 2015. My calculation is that the total sum earned was \$29,953

gross and that therefore the holiday pay calculation is \$2,396.24 gross. That is the figure I am going to use in this determination.

[11] I find that Ms Thomas is owed holiday pay of \$2,396.24 under the Holidays Act. David Group is to pay that amount to Ms Thomas.

Penalty

[12] Under the Holidays Act, the Authority is empowered to impose penalties on companies who do not comply with their employment obligations. Under s.75 of the Holidays Act an employer who is an individual and fails to pay holiday pay is liable for a penalty not exceeding \$10,000 and in the event the employer is a company to a penalty not exceeding \$20,000.

[13] David Group acknowledged that the holiday pay was owing and has failed to pay it for ten months since Ms Thomas resigned. Other creditors, presumably, have been paid in advance of Ms Thomas. Understandably, David Group was trying to ensure that it could continue running its business in order to pay creditors such as Ms Thomas. However, a ten month delay is too long in the Authority's view.

[14] In the circumstances, I award a penalty of \$500 under the Holidays Act which is to be paid directly to Ms Thomas. Payment of the holiday pay in the sum of \$2,396.24 gross and the penalty of \$500 are to be paid by David Group to Ms Thomas within 14 days of this determination.

Costs

[15] I am not going to award costs in this matter because neither party has been legally represented.

Certificate of determination

[16] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Ms Thomas be provided with a certificate of determination, sealed with the seal of the Authority, recording that David Group is ordered to pay Ms Thomas the gross sum of \$2,396.24, plus a penalty of \$500 within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority