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Van Tonder v Avalanche Limited (Auckland) [2017] NZERA 5; [2017] NZERA Auckland 5 (10 January 2017)

Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 5
3000073

BETWEEN KEAGAN BEN VAN TONDER Applicant

A N D AVALANCHE LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person

No appearance by Respondent

Investigation Meeting: 10 January 2017 at Auckland

Written Record of Oral

Determination: 10 January 2017

WRITTEN RECORD OF ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

No mediation

[1] The parties have not attended mediation.

[2] Two mediation dates were scheduled. The first mediation was scheduled to occur on 27 September 2016 and the second on 14 October 2016. The Authority was informed by Mr Van Tonder that on both of these scheduled mediation dates he cancelled shifts with his current employer so he could attend mediation in person.

[3] Mr Van Tonder says that because he was required to take time off work

without pay Avalanche Limited's (Avalanche's) failure to attend mediation cost him

\$240 consisting of the two days of wages he lost.

[4] Apparently on both days that mediation was scheduled to occur, Avalanche made last minute excuses about why it would not be attending mediation.

[5] Mr Van Tonder says Avalanche also declined an offer from Mediation Services to conduct the mediation via telephone conference, which he considers was unreasonable of it to do given he had already taken unpaid time off work to enable mediation to occur.

No Statement in Reply

[6] Avalanche has not filed a Statement in Reply.

[7] Mr Van Tonder's Statement of Problem was served by track and trace courier on Avalanche's registered address for

service on 22 November 2016 and signed for by Emma Walter.

[8] The Authority also wrote to the parties on 09 December 2016 issuing directions and informing Avalanche that because it had not filed a Statement in Reply within time it would now require leave of the Authority to defend Mr Van Tonder's claims.

[9] Avalanche was advised that any such leave application had to be filed by 16

December 2016. That did not occur and the Authority has not heard from Avalanche.

No Appearance at Investigation Meeting

[10] Avalanche did not appear at the Authority's investigation meeting and the

Authority has not had any communication from Avalanche.

[11] I am satisfied that Avalanche was served with the Notice of Hearing by track and trace courier at Avalanche's registered office for service on 20 December 2016. This was signed for by Soal Stevens.

Relevant documentation

[12] Mr Van Tonder filed his employment agreement, his resignation letter, receipts for payment that he had made to his employer and his bank statement showing those payments, and screen shots of text messages between him and Mr Hanna. These text messages show Mr Hanna acknowledged that Mr Van Tonder was owed money and that it would be paid soon.

[13] Mr Van Tonder was employed by Avalanche to work at the Burger Batch from

03 June 2015. He resigned on two weeks' written notice on 12 March 2016, with his last day at work being 25 March 2016.

[14] Mr Van Tonder says he has not been paid his [Holidays Act 2003](#) (HAO3) entitlements because he did not receive any holiday pay in his final pay. Mr Van Tonder says that he has made multiple inquiries with Mr Ryan Hanna (Avalanche's director and 51% shareholder) requesting his final pay and asking why he has not been paid already.

[15] Mr Van Tonder produced a number of text messages to the Authority which shows he had been continually asking to be paid and that Mr Hanna had lead him to believe he would be paid. There is nothing to suggest Mr Hanna disputed Avalanche's liability to pay Mr Van Tonder.

[16] It is evident from the text messages that Mr Hanna was stringing Mr Van Tonder along because he gave a range of reasons why Mr Van Tonder had not yet been paid but why payment was imminent without ever actually paying him.

[17] Mr Hanna's excuses to Mr Van Tonder ranged from Avalanche being short on funds to blaming the accountant.

[18] I have accepted Mr Van Tonder's unchallenged evidence about what he is owed and his calculations quantifying that amount.

[19] Mr Van Tonder says he did not take any paid annual holiday during his employment, but he told the Authority he asked for and received a \$200 one-off payment from Avalanche as an advance on his annual leave.

[20] Mr Van Tonder claims \$1,263.04 in unpaid holiday pay. Mr Van Tonder arrived at that amount by calculating 8% of his total gross earnings of \$18,288 which gives \$1,463.04 to be paid in holiday pay upon termination.

[21] Mr Van Tonder then repaid \$200 from his total \$1,463.04 holiday pay entitlement to account for the advance holiday pay he received while employed. That leaves Avalanche owing him \$1,263.04 in unpaid holiday pay.

[22] I consider it appropriate to exercise the Authority's discretion to award Mr Van Tonder interest on his unpaid holiday pay because Avalanche has had the use of that money at his expense.

[23] Accordingly Avalanche is ordered to pay interest at the current prescribed interest rate of 5%¹ per annum in accordance with s87(3) of the [Judicature Act 1908](#). Interest is to accrue from 25 March 2016 (being the date his employment ended) until the entire amount has been paid in full.

Outcome

[24] I am satisfied on the balance of probabilities that Avalanche owes Mr Van

Tonder \$1,263.04 being unpaid annual holiday entitlements of \$1,463.04 less the

\$200 advance on his annual leave he received in February 2016.

[25] I decline Mr Van Tonder's claim to recover the \$240 lost wages he says he incurred as a result of Avalanche's non-

attendance at mediation on the grounds that there is no jurisdiction to award him that.

[26] Avalanche is ordered to pay Mr Van Tonder \$71.56 to reimburse his filing fee. Interest is awarded at the rate of 5% on this amount of \$71.56 from the date of this determination until the amount has been paid in full.

[27] Avalanche is ordered to pay Mr Van Tonder \$1,334.60 (being \$1,263.04 holiday pay plus the \$71.56 filing fee) plus the total amount of interest owing as per paragraphs [22] and [23] within 14 days of the date of this determination.

[28] I have ordered Avalanche to pay Mr Van Tonder what he is owed within 14 days because he told the Authority that he believes Avalanche is in the process of being sold so he is concerned there is a risk he may not get his money.

[29] Mr Van Tonder has waited long enough for his money and he has also already incurred a loss of \$240 he has been unable to recover because of Avalanche's failure to attend two mediation dates.

1 Regulation 4 of the [Judicature \(Prescribed Rate of Interest\) Order 2011](#).

[30] For those reasons I consider it appropriate to depart from the usual 28 day period for payment which gives time for a challenge to be filed.

[31] I also anticipate that this is the type of matter in which the Employment Court may wish to consider requesting a good faith report from the Authority, should a challenge be filed given Avalanche's failure to participate at all in the investigation process.

Rachel Larmer

Member of the Employment Relations Authority

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