

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 283
5338332

BETWEEN ABDULKARIM T
 ABDULKARIM
 Applicant

AND AZ AUTOMOTIVES
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Jerry Goundar, advocate for Respondent

Investigation Meeting: 23 and 27 May, 22 June 2011

Determination: 1 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Abdulkarim T Abdulkarim has commenced in the Authority a claim to recover \$4,250 arrears of wages from the respondent AZ Automotives Ltd. He was employed by the company as a mechanic and Warrant of Fitness inspector, starting in September 2010 and finishing at the end of February 2011. In his statement of problem Mr Abdulkarim alleged that during the employment AZ Automotives had not paid his wages for nearly two months. Explanations he said he had been given for that situation included that there was no money in the company's account.

[2] AZ Automotives did not respond to the claim after the statement of problem was served on it. The parties were formally notified of an investigation meeting to be held on Monday 23 May 2011. Mr Abdulkarim attended that day and began to give evidence to the Authority about his claim. There was no appearance for or on behalf

of AZ Automotives at the start of the meeting, but about half an hour later an email was received by the Authority from Mr Jerry Goundar who said he could not attend as he was at a funeral in Fiji. He asked the Authority to arrange another time for the meeting “perhaps on Friday or at a later date.”

[3] No statement in reply had been lodged and leave had not been sought by AZ Automotives to reply or respond to the claim out of time. That remains the position.

[4] The meeting was however adjourned and Mr Goundar was advised that it would resume on the Friday 27 May. He was directed by the Authority to bring to it all wage and time records kept for Mr Abdulkarim, as well as records of all payments made to him and deductions made for PAYE and all Work and Income subsidy forms or similar documents.

[5] When the meeting resumed on Friday 27 May some documents were presented by Mr Goundar. They included several pages in the form frequently used by employers and bearing the title ‘Time, Pay and Wages Record.’ The pages were marked as being for the months of September 2010 through to February 2011.

[6] It was immediately obvious from the handwriting on each page of these records that the entries had been made at the same time. Mr Goundar confirmed that he had filled out all the sheets the night before the meeting, using information held by his accountant.

[7] Mr Goundar produced other documents including a hand-written summary showing, he said, that from various sources Mr Abdulkarim had received the shortfall in pay he was claiming and about \$2,500 more than that.

[8] A Skills Investment Subsidy Agreement form as used by Work and Income was also produced by Mr Goundar. That form had been signed by Mr Kevin Goundar as a director of AZ Automotives on 15 November 2010 and also by Mr Abdulkarim and an officer of Work and Income. The form recorded that Work and Income had agreed to pay AZ Automotives Ltd, “the Employer”, of Mr Abdulkarim, “the Employee”, weekly subsidies of \$200 for 25 weeks from 6 September 2010 until 27 February 2011. The form also recorded that AZ Automotives Ltd had agreed to pay Mr Abdulkarim \$14 per hour for a minimum of 30 hours per week.

[9] The subsidy although approved was not paid by Work and Income, because it was not claimed by AZ Automotives. This was because Mr Abdulkarim did not countersign the claim forms as requested by Mr Goundar who he accused of falsifying the amounts shown on the forms as having been paid to him as wages. He said he could not support an untrue statement that he had been paid all wages due to him. Mr Goundar believes the subsidy could still be paid if Mr Abdulkarim signs the forms.

[10] Included in the information provided by Mr Abdulkarim in his statement of problem was a Wage Receipt form which was stamped with the name "A-Z Autos" for the period ending 24 September 2010. It showed that he had worked 40 hours at the rate of "13.75" giving a total of "\$550" paid to him for that week. There were no figures provided for PAYE on the Wage Receipt form.

[11] The copied wage and time record produced by Mr Goundar recorded the hours for each week of employment between September 2010 and February 2011 as "30" and the hourly rate of pay was specified as "17.15". The ordinary pay for each week was shown to be "514.75" and the net pay "420.73". This record Mr Goundar said he had made on 26 May 2011 and which showed hours of work as 30 for every week of the employment, is contradicted by the Wage Receipt given to Mr Abdulkarim in September 2010 which shows his hours as 40, at least for the week ending 24 September 2010.

[12] The record produced to the Authority by Mr Goundar also showed, under a heading "Loan," an amount of \$80 for every week during the period of employment from September 2010 to February 2011. Mr Goundar explained that this loan had been for the purpose of bringing Mr Abdulkarim's pay in the hand up from \$420.73 as shown on the record to \$500 per week.

[13] It seemed curious that after Mr Goundar had been directed on 23 May to bring to the investigation meeting all wage and time records kept for Mr Abdulkarim, including records of deductions made for PAYE or other income tax, he had copied them out over several pages the night before that meeting instead of bringing the original records that were apparently held by his accountant. To satisfy its curiosity the Authority issued a witness summons to that accountant requiring him to bring all relevant records in his possession to a further meeting to be held on 22 June.

[14] As the requested information was supplied by the accountant before that meeting he was released from the summons. The information supplied by him was on printed sheets, one for each month from September 2010 through to February 2011. They provided a breakdown of pay for each of four weeks in those months, with the same entry for each week as follows:

	<i>Gross</i>	<i>PAYE</i>	<i>Net</i>
<i>Week 1</i>	\$514.75	\$94.02	\$420.73

[15] The totals paid under each head for the month are given at the bottom of the sheet. For each month of September, October, November 2010, and January and February 2011 the same total amount of \$2,059.00 is shown as the gross pay for Mr Abdulkarim and, after total PAYE deductions of \$376.08 per month, the total net payment is given as \$1,682.92. For the month of December 2010 the standard payments under each column was extended by one additional week from four to five, giving a total Gross of \$2,573.75, PAYE of \$470.10 and total Net pay \$2,103.65.

[16] On the printed sheets there is no information provided as to the hours of work or the rate of pay, but for 40 hours a week the rate works out at \$12.87 per hour and for 30 hours a week the rate is \$17.15 per hour. The records produced by the accountant do not show any payment calculated as due and paid to Mr Abdulkarim for annual holiday pay at the end of his employment in February 2011. The records also do not show any "Loan" of \$80 or any other amount as being paid to Mr Abdulkarim during each week of his employment.

[17] There is no dispute that Mr Abdulkarim did not receive the wages recorded as having been paid to him for every week of his employment. Mr Goundar acknowledged that at times AZ Automotives could not pay Mr Abdulkarim but had made arrangements for him either to be paid later or from a different source of funds.

[18] Mr Abdulkarim's evidence was that when the company could not pay him it became a matter of great concern as he had a young family and the usual bills to pay. He said he obtained money in lieu of wage payments by keeping money that customers of the firm had paid to AZ Automotives for Warrant of Fitness checks or for service and repair work done on their vehicles.

[19] Mr Goundar told the Authority he knew that customers' money was being diverted and kept by Mr Abdulkarim in this way and had approved of the unusual arrangement. He said he had no idea how much Mr Abdulkarim had taken from customer payments.

[20] Other employees of the firm or its associated taxi business had also paid themselves in the same way. Mr Oloapu confirmed to the Authority that he had sometimes paid himself out of the fares paid to him for taxi rides given to customers.

[21] When first asked by the Authority to give details Mr Abdulkarim was unable to say how much he had paid himself in this way. It does not appear that any record was kept in relation to these payments of wages made from customers' money. Not all the money Mr Abdulkarim kept from their payments was kept by him, he said, as some of it was used to buy parts needed for work he was employed to do on vehicles.

[22] Later, when requested again by the Authority, Mr Abdulkarim presented a list of payments that he had kept from particular customers and also amounts he had spent on parts or shared with other underpaid workers.

[23] Mr Goundar said he had been happy with Mr Abdulkarim paying himself in this way. He had not made any complaint to the Police about it and no disciplinary action was taken. It appears to have been a consensual arrangement made so that Mr Abdulkarim could receive some money in lieu of wages which were frequently not being paid to him.

[24] The dispute between the parties is as to the amounts received in total by Mr Abdulkarim. He claims that all up there was a shortfall of \$4,250 in his wages after taking into account the money he retained from customer payments. Mr Goundar on the other hand claims that a total of \$7,203 was paid to Mr Abdulkarim, an amount exceeding the claimed amount. It is broken down into \$483 from Warrant of Fitness money, \$4,640 taken from customers and \$2,080 as a "loan" paid at the rate of \$80 per week to Mr Abdulkarim.

Requirement for employer to keep wages and time record

[25] Under s 130 of the Employment Relations Act 2000 every employer must at all times keep a wage and time record showing in the case of each employee information including "the wages paid to the employee each pay period."

[26] Keeping a record which shows an amount that has not in fact been paid to an employee does not comply with the requirements of s 130. If Mr Abdulkarim was to be underpaid in any week then the actual payment needed to be recorded to satisfy the requirement of showing “the wages paid ... each pay period”. Also, if in lieu of wages he was being paid from customer money that information should have been recorded as well, most likely with further information such as the name of the customer, the amount the customer had paid for work done and the amount kept by Mr Abdulkarim. All of that information was readily able to be obtained and recorded each week. It was the responsibility of the employer to make necessary arrangements for the information to be given to it by Mr Abdulkarim, so that it could be recorded.

[27] The result in this case is that on the employer’s side there is an untrue wage record containing at best unreliable information. Mr Goundar has tried to falsify it further in the hand written record he presented. On Mr Abdulkarim’s side I have some reservations about the accuracy of his quantification of the amount he has claimed, given the lack of reliable wage and time information from the employer and the passage of time which may have affected Mr Abdulkarim’s ability to remember in any detail what money he had received and from whom.

[28] The Authority is asked by Mr Abdulkarim to find that he was underpaid a total of \$4,250. Although that is not by any means certain from the evidence, it is possible. The Act has provided for situations of uncertainty like this at s 132. Where an employer fails to keep a wage and time record as required under s 130, and where that failure prejudices an employee’s ability to bring an accurate claim, the Authority may accept as proved all claims made by the employee in respect of the wages actually paid to the employee. The Authority may accept the claims unless the employer proves they are incorrect.

[29] The Authority is satisfied that AZ Automotives Ltd failed to keep a wages and time record in respect of Mr Abdulkarim, as required by the Act. While in form a record was kept, in content it was an untrue or inaccurate record and therefore did not comply with the requirement of s 132 to show the wages actually paid to Mr Abdulkarim each pay period.

[30] Further the Authority finds that the failure in this regard prejudiced Mr Abdulkarim’s ability to bring an accurate claim. If records had been properly kept the position should have been readily apparent as to whether and by how much he had

been underpaid. AZ Automotives has not supplied any proof that Mr Abdulkarim's claims are incorrect. Although there is uncertainty about them because they are unsupported by any accurate records, it is up to the employer to provide proof. All that Mr Goundar has done is argue with Mr Abdulkarim about how much he retained from customer payments and whether he was paid a loan of \$80 per week. The only record of that is the addition of the \$80 per week "loan" amounts to the handwritten Time, Pay and Wages record presented by Mr Goundar as a true copy of the wages and time record kept by his firm's accountant, which plainly it was not.

[31] The object of s 132 is clearly to prevent a situation where an employer can evade paying wages earned and due by not keeping a proper paper trail of recorded payments made. Without that trail the Authority is in no position to examine closely a claim such as this and be satisfied there is an entitlement to every dollar of it. For an employer the consequence of having s 132 applied by the Authority is the burden to be carried because of a failure to keep the wage and time records as prescribed by the Act.

[32] That failure will also render the employer liable to a penalty (up to \$20,000 in the case of a company) imposed by the Authority under s 130(4) of the Act. Had penalties been claimed by him, the amount recovered by Mr Abdulkarim might well have been around \$3,000 to \$4,000 for breaches including the failure to keep wages and time records and, it appears, a failure in relation to the requirement to have a written employment agreement as required by s 65 of the Employment Relations Act. As penalties awarded by the Authority may be made payable to an employee, had any been claimed by him Mr Abdulkarim may have ended up with an amount close to the amount of unpaid wages he seeks to recover.

[33] Mr Abdulkarim also appears not to have been paid annual holiday pay upon termination of his employment. There was no holiday book or record produced by AZ Automotives. A note at the end of the handwritten February 2011 record reads "1 day off only." On total gross earnings of about \$15,000 he would have been entitled to holiday pay of about \$1,200, calculated at 8%. The claim for \$4,250 will be taken as inclusive of all holiday pay due.

Determination

[34] For the above reasons the Authority is satisfied that Mr Abdulkarim's claim must succeed. Pursuant to s 130 of the Employment Relations Act, AZ Automotives Limited is ordered to pay \$4,250 net to Mr Abdulkarim and to pay interest on that amount at 5% from 1 July 2011. The company is also to reimburse Mr Abdulkarim the filing fee of \$71.56 paid to bring the application.

A Dumbleton
Member of the Employment Relations Authority