

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 740
3282999

BETWEEN DAVID SANTIAGO
 QUINTANA ACOSTA
 Applicant

AND MUSA AQEEL
 Respondent

Member of Authority: Alex Leulu

Representatives: Karen Tamayo, advocate for the Applicant
 No appearance by the Respondent

Investigation Meeting: 14 August 2024 in Auckland

Submissions and further 30 August and 9 October 2024 from the Applicant
information received: No information received from the Respondent

Determination: 13 December 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Santiago Quintana Acosta was employed by Musa Aqeel as a painting labourer on 26 June 2023. Mr Acosta resigned from his employment on 9 November 2023. Mr Acosta said he resigned because Mr Aqeel had failed to properly pay him his wages. He sought orders from the Authority requiring Mr Aqeel to pay him arrears for unpaid wages, holiday pay and penalties for several alleged employment breaches.

The Authority's investigation

[2] Mr Aqeel did not participate in the Authority's investigation. On 21 March 2024 Mr Acosta's statement of problem was served on Mr Aqeel's residential address by courier. The courier's record confirmed signed receipt of the statement by Mr Aqeel. On 30 August 2024 Mr Acosta also lodged and served an amended statement of problem which was also served on Mr Aqeel at his residential address on 2 September

2024. Apart from confirming receipt of the statement of problem, Mr Aqeel did not engage further with the Authority's investigation. I am satisfied Mr Aqeel was aware of Mr Acosta's claims against him and the various stages of the Authority's investigation of these claims. This included being made aware of a case management conference on 13 June 2024, the investigation meeting, and a further opportunity extended to him to provide a response to Mr Acosta's written closing submissions.

[3] Mr Acosta also provided evidence confirming Mr Aqeel's email address. Notices, directions, and minutes in respect of this matter were served on Mr Aqeel at his address and by email.

[4] For the Authority's investigation, a written witness statement was lodged by Mr Acosta and he answered questions under oath. His representative, Karen Tamayo also lodged written closing submissions on his behalf.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the ER Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Is Mr Acosta entitled to reimbursement of wages and holiday pay for work carried out during his employment for Mr Aqeel?
- (b) Whether or not Mr Aqeel breached his employer obligations under the:
 - (i) Wages Protection Act 1983 (the WP Act) by making an unlawful deduction from Mr Acosta's wages on 9 September 2023;
 - (ii) Holidays Act 2003 (the Holidays Act) by failing to pay Mr Acosta annual holidays and public holiday payments which were due to him; and
 - (iii) ER Act for failing to keep and provide wage and time records to Mr Acosta upon request.
- (c) For any established breach, to determine whether a penalty is to be imposed against Mr Aqeel for each breach?

- (d) Should either party contribute to the costs of representation of the other party?

Context

Mr Acosta's work arrangement

[7] Mr Aqeel operated a painting business which traded as 'Painters Ink.' In June 2023, Mr Acosta signed an employment agreement to work for Mr Aqeel. As part of the agreement Mr Acosta was to be paid weekly at a rate of \$29.66 per hour. Mr Acosta's agreed hours of work was for at least 30 hours a week.

[8] Mr Acosta started his work for Mr Aqeel on 20 July 2023. As part of his work duties, Mr Acosta would initially provide general assistance to painters who operated in his workplace. As he became more experienced, he also carried out painting duties.

Non-payment of wages

[9] Around September 2023, Mr Acosta claimed the payment of his wages by Mr Aqeel became delayed. He said his last payment received from Mr Aqeel was for work he carried out up until 18 September 2023. He did not receive payment for any further work up until the end of his employment in November 2023.

[10] Mr Acosta continued to work after Mr Aqeel assured him, he would be paid his outstanding wages. On 23 October 2023 Mr Aqeel sent an email to his staff confirming his inability to pay their wages and how he was waiting for contract payments to come through so he could pay their wages.

[11] On 26 October 2023 and 5 November 2023 Mr Aqeel sent further staff emails making allegations against all staff for misrepresenting their times on their timesheets and poor-quality work. In both emails Mr Aqeel confirmed he would not pay wages to his staff unless the poor-quality work had been rectified.

[12] On 27 October 2023 Mr Acosta sent the following message in response to a request by Mr Aqeel for him to work:

Musa, I am not available at the moment. I am facing some personal and financial distress as my wife and I are struggling to pay our daily, weekly and monthly expenses. It would be great if you could pay me the last 6 weeks you owe me so I can catch up with my rent and house expenses. I also need the payslips as we are applying for a loan from our bank to keeps us going and the bank has requested payslips. Thanks.

[13] On 3 November 2023 Mr Acosta contacted Mr Aqeel again raising his concerns about not being paid and confirming his unsuccessful attempt to obtain a loan from the bank. Mr Acosta also expressed his concerns about his visa status and how his visa was attached to his work for Mr Aqeel. Mr Aqeel responded by expressing (amongst other things) the financial strains on his business contributing to his inability to pay Mr Acosta's wages.

[14] After not receiving any payment for his work, Mr Acosta contacted Immigration New Zealand (INZ) in respect of his issues with his visa. As a result, he was issued an exploitation visa from INZ which allowed him to work for another employer. Upon receiving his visa Mr Acosta resigned from his employment with Mr Aqeel on 9 November 2023.

[15] After his resignation, Mr Acosta and Mr Aqeel became engaged in ongoing communications about Mr Acosta's wage arrears claims and Mr Aqeel's allegations against Mr Acosta for poor work. The parties unsuccessfully tried to resolve the matter at mediation.

Mr Acosta's evidence

[16] Mr Aqeel had an obligation to keep wage and time records for his employees.¹ Both during and after his employment, Mr Acosta requested copies of his wage and time records from Ms Aqeel. Mr Acosta's earliest request was on 27 October 2023. Mr Aqeel did not provide Mr Acosta the requested wage and time records and therefore was in breach of his obligations under the ER Act.²

[17] Without wage and time records, Mr Acosta submitted various documents in support of his claims against Mr Aqeel. These documents included bank statements, time sheets and numerous text message communications with Mr Aqeel.

[18] In the absence of any wage and time records for Mr Acosta, and Mr Aqeel's failure to participate with the Authority's investigation, Mr Acosta's evidence was accepted for assessing the merits of his wage and holiday arrears claims. In summary,

¹ Employment Relations Act 2000, s 130.

² Employment Relations Act 2000, s 132(2).

Mr Acosta's bank records only show the following payments made to him by Mr Aqeel:³

- 3 August 2023: \$23 per hour at 59.5 hours = \$1,368.50
- 9 September 2023: \$24 per hour at 91.25 hours = \$1,678.75
- 23 September 2023: \$24 per hour at 99.1 hours = \$2,378.40
- 20 October 2023: \$26 per hour at 94.6 hours = \$2,459.60

Wage arrears and deductions

Wage arrears claims

[19] Mr Acosta's primary claims for wage arrears were for work he carried out for Mr Aqeel from 18 September 2023 to the end of his employment. Although Mr Acosta received payments after this date, he claimed these were late payments for work he carried out prior to 18 September 2023.

[20] In accordance with the WP Act, Mr Aqeel was under a statutory obligation to pay Mr Acosta's wages when they became due.⁴ Mr Acosta relied on the following two documents to confirm the hours he had worked from 18 September 2023 to the end of his employment on 2 November 2023:

- (a) Photos of his timesheets he submitted to Mr Aqeel which showed the hours he had worked from 18 September to 13 October 2023; and
- (b) An email he had sent to Mr Aqeel on 3 November 2023. The email was in reply to a request by Mr Aqeel for Mr Acosta to confirm the hours he had recently worked. In the email, Mr Aqeel provided his work hours from 16 October to 2 November 2023.

[21] Based on these records, Mr Acosta claimed he was not paid for working 248.65 hours for Mr Aqeel. He claimed these hours should have been paid at his agreed hourly rate of \$29.66.

[22] Mr Acosta's account of his unpaid hours of work are accepted because his records were a relatively contemporaneous account of his hours worked. Accordingly,

³ Note: the calculation of the 9 September 2023 payment is incorrect and was the subject of Mr Acosta's unlawful wage deduction claim under the WP Act.

⁴ Wages Protection Act 1983, s 4.

he was entitled to payment of these hours at his agreed rate (as set out in his employment agreement). Mr Aqeel is ordered to pay Mr Acosta \$7,374.96 gross in unpaid wages.

Incorrect wage rate

[23] The only information explaining the detail of each of Mr Acosta's four payments were referenced in his bank records. The bank records showed Ms Aqeel's explanation of the amount paid to Mr Acosta which included the number of hours Mr Acosta was paid for and a pay rate for each payment. This information was conveyed within the 'reference' and 'particulars' section of his bank account records. Below was an example of one of the payments:

\$26/PH	94.6hrs	FROM MUSADDIQ AQEEL T/A PAINTERS INK PI:033 \$26/PH 94.6hrs	2,459.60
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[24] Mr Acosta did not receive his contracted payment amount of \$29.66 per hour. According to his bank statement, his four payments were paid as one payment at \$26 per hour, one payment at \$23 per hour and two payments at \$24 per hour.

[25] Mr Acosta said he had raised the pay rate issue with Mr Aqeel during his employment. In response he said Mr Aqeel told him he needed to obtain more experience before he was able to be paid his agreed rate of \$29.66 per hour.

[26] Mr Aqeel's alleged view on payment due to experience cannot be accepted. There was no reference in Mr Acosta's employment agreement to any other wage rate apart from the \$29.66 pay rate. There was also no reference to a change in pay rate subject to Mr Acosta's work experience. Mr Acosta's pay rate also started at \$26 per hour and for no clear reason, his rate later dropped to \$23 per hour. In line with his employment agreement, Mr Acosta should have been paid at his agreed rate.

[27] Calculating any arrears owed to Mr Acosta was complicated due to his bank records showing payments to him as net amounts (after tax). Although Mr Acosta agreed the bank records correctly showed his hours worked from the start of his employment up to 15 September 2023, any assessment of his wage arrears needed to account for \$29.66 as a gross rate (before tax).

[28] Mr Acosta submitted to the Authority a claim amount relying on the difference between his hours paid at his contractual rate of \$29.66 (a gross rate) and the rate he

was paid as shown on his bank records (a net rate). This was not the correct approach because any difference would need to account for what his bank records pay rate would have been as a gross amount.

[29] Although there were no IRD records put before the Authority, what Mr Acosta was actually paid should be treated as a net amount (with tax deducted). The Authority's assessment of Mr Acosta's claims required an analysis of what his payment (as shown in his bank records) was in gross figures.

[30] Upon calculating Mr Acosta's claimed hours at his contractual rate and factoring in a PAYE deduction (in accordance with his tax code), it showed Mr Acosta was paid over and above his contractual rate.⁵ Referring to the previous example from Mr Acosta's bank records, it shows Mr Acosta was paid \$443.40 more than what he would have received if he was paid in accordance with his contractual pay rate:

Hours of work: 94.6 hours
Mr Aqeel's calculation:
<ul style="list-style-type: none">• 94.6 multiplied by \$26 equals \$2,459.60 net• Paid in to his bank: \$2,459.60.
Contractual rate calculation:
<ul style="list-style-type: none">• 94.6 multiplied by \$29.66 equals \$2,805.84 gross• Deduct PAYE: \$789.64• Contractual rate calculation: \$2,016.20.

[31] The above calculation shows Mr Acosta was paid above his contractual rate. This calculation outcome was the same for his other three wage rate claims. For this reason, Mr Acosta's wage rate claims are dismissed.

Wage deduction

[32] Mr Acosta claimed he had \$511.25 deducted from his pay on 9 September 2023. His bank records showed he was paid \$1,678.75 for 91.25 hours of work at rate of \$24 per hour. Based on this calculation, he should have been paid \$2,190.

[33] Mr Acosta said the reason for the difference was because Mr Aqeel had deducted an amount due to cleaning costs incurred by the company because of work carried out by him and other staff. Mr Acosta referred to messages sent by Mr Aqeel

⁵ IRD tax calculator - [PAYE calculator - About - Inland Revenue.](#)

to staff on the same day (9 September 2023) explaining wage deductions were made from staff wages because of the alleged cleaning costs. Mr Acosta did not consent to the deduction.

[34] Under the WP Act an employer must not make unreasonable deductions from employees' wages. Deductions are not permitted without an employee's consent.⁶ This obligation was also contained within the employment agreement between Mr Acosta and Mr Aqeel.

[35] There was no evidence to show Mr Acosta had properly consented to the deduction both before and after the deduction was made from his wages. There was also no evidence to show how Mr Aqeel had quantified the deduction amount. Mr Aqeel breached the requirements of the WP Act by deducting \$511.25 from Mr Acosta's account without his consent. Mr Aqeel is ordered to pay Mr Acosta the amount of the deduction of \$511.25.

Holiday pay claims

[36] Mr Acosta made two claims against Mr Aqeel under the Holidays Act. Firstly he claimed he was owed payment for an unworked public holiday which he said was an otherwise working day.⁷ Secondly, he said he had not been paid annual holiday pay at the end of his employment with Mr Aqeel.⁸

[37] Mr Acosta's record shows he had regularly worked Mondays while he was employed by Mr Aqeel. Mr Acosta did not work on Monday 23 October 2023, which was a New Zealand public holiday, Labour Day.⁹ He was entitled to be paid for an amount which aligned with his employment agreement which was eight hours at his contractual rate of \$29.66. This amounted to \$237.28 gross which Mr Aqeel did not pay Mr Acosta and as a result was in breach of the Holidays Act. Accordingly, Mr Aqeel is ordered to pay this outstanding amount for public holidays to Mr Acosta.

[38] Upon finishing his employment for the company, Mr Acosta was entitled to payment of annual leave at the conclusion of his employment. Because Mr Acosta worked for less than a year, he was entitled to eight per cent of his gross total earnings

⁶ Wages Protection Act 1983, s5A.

⁷ Holidays Act 2003, s 49.

⁸ Holidays Act 2003, s 27.

⁹ Holidays Act 2003, s 44(1)(j).

at the end of his employment.¹⁰ Mr Acosta was not paid any annual holidays for his employment for Mr Aqeel and accordingly, Mr Aqeel had breached the Holidays Act in respect of this requirement.¹¹

[39] Given Mr Acosta was paid in net amounts, a calculation had to be made to determine what Mr Acosta's payments would have been in gross amounts. This calculation showed his four payments equalled \$11,701.52 gross based on the following:¹²

- 3 August 2023: \$1,821.60 gross (\$1,368.50 paid net amount)
- 9 September 2023: \$3,065.25 gross (\$2,190 correct net amount)
- 23 September 2023: \$3,346.44 gross (\$2,378.40 paid net amount)
- 20 October 2023: \$3,468.23 gross (\$2,459.60 paid net amount)

[40] The annual leave arrears calculation also needed to factor in the wage arrears (\$7,374.96 gross) and public holiday amounts (\$237.28 gross) found owed by Mr Aqeel to Mr Acosta which together came to a total of \$7,612.24 gross. Together with the gross amounts calculated from his bank records (\$11,701.52), Mr Acosta's total gross earnings was assessed at \$19,313.76 gross. Calculating eight per cent of this total gross earnings amount in accordance with the Holidays Act, Mr Acosta's annual leave arrears came to \$1,545.10 gross. Mr Aqeel is ordered to pay Mr Acosta this amount in the form of unpaid annual holidays.

Penalties

[41] Mr Acosta sought penalties to be imposed against Mr Aqeel for failure to keep and provide wage and time records, and unlawful deduction and non-payment of public and annual holiday pay. These breaches by Mr Aqeel were established and the imposition of a penalty against him is appropriate in this case.

[42] As a result of these breaches, Mr Aqeel was liable to a penalty for each breach. The maximum penalty for each breach was \$10,000. Determining an appropriate amount is guided by the factors listed under s 133A of the ER Act. These factors include, taking into account the object of the ER Act which includes acknowledgement

¹⁰ Holidays Act 2003, s 27.

¹¹ Holidays Act 2003, s 75 & 76.

¹² Note: the 9 September 2023 figure accounts for what Mr Acosta should have been paid because he was paid less because of the deduction from his wages.

of the inherent inequality of power in employment relationship and promoting the effective enforcement of employment standards.¹³

[43] In this case, Mr Aqeel failed to effectively communicate with Mr Acosta key aspects of his employment which included not providing him with wage and time records and not properly explaining why a deduction was made from his wages. The effect of these failures by Mr Aqeel meant:

- Mr Acosta was unable to show the bank evidence of income to secure a loan from the bank; and
- The failure to receive payment of annual holidays at the end of his employment meant Mr Acosta was unable to have some form of financial stability to support what was already a difficult financial situation for him (noting these circumstances were caused by Mr Aqeel's failure to pay his wages).

[44] Applying those factors here, and considering the nature of Mr Aqeel's breaches, a global penalty is appropriate in this case. In assessing the range of penalties set in similar cases, the appropriate penalty to be imposed against Mr Aqeel is a total penalty of \$15,000. Mr Aqeel is also ordered to pay \$10,000 of the total penalty to Mr Acosta to compensate him for the inconvenience and resources expended in pursuing the payments relating to statutory entitlements.

Summary of orders

[45] In summary of the findings reached in this determination, the following orders are made:

- (a) Mr Aqeel must pay Mr Acosta:
 - (i) \$7,374.96 gross in unpaid wages;
 - (ii) \$511.25 for an unlawful deduction;
 - (iii) \$237.28 gross for an unpaid public holiday payment; and
 - (iv) \$1,535.10 gross for unpaid annual holiday pay.

- (b) With each breach under the ER Act, the Holidays Act and the WP Act, Mr Aqeel must pay the Authority a global penalty of \$15,000. On recovering the penalty, the Authority must pay:

¹³ Employment Relations Act 2000, s 3.

- (i) \$10,000 to Mr Acosta; and
- (ii) \$5,000 to a Crown bank account.

(c) All payments referred to in these orders must be made within 28 days of the date of this determination.

Costs

[46] Although Ms Tamayo appeared on behalf of Mr Acosta, she confirmed she was not paid for her assistance. For these reasons, Mr Acosta had not incurred costs of professional representation and therefore no order of costs is made for this matter.

[47] However, Mr Acosta had incurred the costs of filing fee of \$71.56 which can reasonably be recovered. Mr Aqeel is also ordered to pay Mr Acosta the sum of \$71.56 within 28 days of the date of this determination

Alex Leulu
Member of the Employment Relations Authority