

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 316
5454093

BETWEEN

ABRAHAM AGUSTIN
First Applicant

NANCY AGUSTIN
Second Applicant

A N D

AUCKLAND HARBOUR OAKS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Nathan Santesso, Advocate for the Applicants
Prashant Malik, Advocate for the Respondent

Investigation Meeting: 8 July 2014 at Auckland

Date of Determination: 18 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants or Mr or Ms Agustin) allege they are owed wages by the respondent (Auckland Harbour Oaks) occasioned by breaches of their respective employment agreements, breaches of the Minimum Wage Act 1983, breaches of the Holidays Act 2003, breaches of the Wages Protection Act 1983, and the Employment Relations Act 2000 (the Act). They seek payment of arrears of wages and interest at 5%.

[2] Auckland Harbour Oaks deny the applicants' claims. Amongst other things, Auckland Harbour Oaks say that the applicants' claims are a function of a dispute between Mr Agustin and Auckland Harbour Oaks in which he became *unruly, disobedient and skipping work* which led to Auckland Harbour Oaks initiating mediation with a view to try and resolve matters by agreement.

[3] Both Mr and Ms Agustin were employed at the hotel property prior to Auckland Harbour Oaks becoming their employer. Both Mr and Ms Agustin commenced their

employment at the property on 21 January 2009 pursuant to individual employment agreements as full time employees.

[4] In late October 2011 Auckland Harbour Oaks took over management of the property and Mr and Ms Agustin were engaged in separate capacities by Auckland Harbour Oaks. Both Mr and Ms Agustin gave evidence to me that from the commencement of their employment with Auckland Harbour Oaks, they were not paid correctly. By way of example only, both Mr and Ms Agustin maintained that at the beginning of the employment, they each of them worked three weeks but were paid for only two. Ms Agustin said that when she inquired about this of the then manager (who appears to no longer be involved in the business) she was told that the money was retained as a deposit. Such an arrangement, if found proved, is a breach of the Wages Protection Act 1983, s.4 of which makes clear that an employer's obligation is to pay to a worker *the entire amount of ... wages (due) to that worker without deduction.*

[5] Mr Agustin has, by common consent, been employed under a succession of different employment agreements with Auckland Harbour Oaks, although the Authority does not have a complete set of signed agreements before it. Mr Agustin's initial employment was effectively in cleaning and maintenance of the public area of the hotel, but it seems to be common ground that about 1 May 2012, Mr Agustin and Auckland Harbour Oaks entered into a new individual employment agreement which added handyman activities to his responsibilities and increased his hourly rate to \$17.50 per hour.

[6] While I do not have a complete signed copy of the employment agreement just referred to, both parties accept that Mr Agustin was employed under it for a period and there is broad consensus about when the employment started and finished under that document.

[7] I do have before me the title page for that agreement and the page identifying the hourly rate and the hours of work. I am satisfied I can rely on that information given the common ground between the parties about that arrangement.

[8] Mr Agustin says that notwithstanding the hourly rate prescribed in that agreement of \$17.50 per hour, which was an increase from \$14 per hour which was the rate he was paid previously, he never ever received the increase. If that claim is proved, that is a breach of the operative employment agreement over the time that that agreement was operative.

[9] On 16 July 2011 or thereabouts, Mr Agustin was employed under his third employment agreement, this time effectively returning him to the range of duties which he performed under the first employment agreement, the principal practical effect of which was to remove the handyman services from the duties required of him. In consequence, Mr

Agustin's hourly rate reverted to \$14 per hour. Once again, Mr Agustin's first week's pay was retained by the employer; Auckland Harbour Oaks apparently said at the time this was a *deposit*.

[10] From the beginning of his employment with Auckland Harbour Oaks, Mr Agustin told me that he was required to work on public holidays and that he did not receive either penal payments for time actually worked or the alternative holiday required by law. If those allegations are made out, then that failure by Auckland Harbour Oaks constitutes a breach of the Holidays Act 2003.

[11] Ms Agustin was employed throughout the employment as a housekeeper by Auckland Harbour Oaks. She commenced employment at the same time as her husband with Auckland Harbour Oaks and her evidence to me was that the pair of them worked the same hours such that if one of them was on duty the other was as well.

[12] Ms Agustin says that, like her husband, she was subject to the *deposit* regime where Auckland Harbour Oaks retained wages in breach of the law, that she was required to work on public holidays and not paid either penal rates or given alternative days off as the law requires, this being a breach of the Holidays Act 2003, and that for a period of about six months, she effectively was paid almost nothing at all although she continued to work, and the explanation for that was that Auckland Harbour Oaks were paying her wages into her husband's account alongside the wages that were due and owing to him.

[13] I am satisfied on the evidence I heard that Mr and Ms Agustin not only maintained separate bank accounts but had them in separate banks, so it is difficult to see why Auckland Harbour Oaks would have been confused about how to pay Ms Agustin.

[14] Ms Agustin says that her explanation for Auckland Harbour Oaks behaviour is that they decided to do that to make it look as if Mr Agustin was receiving the hourly rate that he was entitled to under the second of his three separate employment agreements when his wage rate went up by almost \$3 per hour and when in fact Auckland Harbour Oaks were not paying him the additional money at all.

[15] First Union have acted for Mr and Ms Agustin in this matter and I am satisfied they have done everything they reasonably could to obtain from the Auckland Harbour Oaks actual wage and time records to help in the computation of Mr and Ms Agustin's claim. Those records have not been forthcoming despite numerous requests.

[16] When I set the matter down for investigation by the Authority, I directed that Auckland Harbour Oaks were to attend my investigation meeting with wage and time records

for Mr and Ms Agustin and any other documentation they had which had not previously been supplied to First Union.

[17] At the investigation meeting, no additional documentation was provided by Auckland Harbour Oaks although their evidence was that they denied breaches of any employment statute and/or breaches of any of the operative employment agreements.

[18] I gave Auckland Harbour Oaks a further opportunity after the investigation meeting to produce wage and time records to assist me to assess the claim for arrears of wages made by Mr and Ms Agustin.

[19] What Auckland Harbour Oaks provided, as First Union correctly identified, is an analysis of, and rebuttal of, Mr and Ms Agustin's claim. The commentary provided is no substitute for the actual wage and time records which are required by law to be available to an affected employee and of course to the Authority itself.

[20] The short point is there is simply nothing before me from Auckland Harbour Oaks which is complete and/or original. I have one complete employment agreement which is supposed to have applied to Mr Agustin, but it is not signed by either Mr Agustin or indeed by Auckland Harbour Oaks. I have two other partial employment agreements relating to Mr Agustin which were filed by First Union on the basis that that is all that they have been able to obtain and one letter of offer relating to Ms Agustin which again does not appear to be a complete employment agreement but is at least signed by her.

[21] Most importantly, there is simply no original wage and time record as is required by s.130 of the Act and/or s.81 of the Holidays Act 2003.

[22] The maintenance of those records is not negotiable. Every employer must maintain those records and must have them available for inspection where requested by somebody entitled to make that request, which of course includes the affected employee and any representative acting on his or her behalf.

[23] In the absence of those records, on a claim such as this brought before the Authority, I am entitled to rely on the evidence furnished by the employee if the terms of s.132 of the Act are met.

[24] As I indicated to the parties during the course of the investigation meeting, if I am satisfied that Auckland Harbour Oaks has either failed to keep or failed to produce wage and time records required by law, and I am satisfied that that failure has prejudiced the employee's ability to make an accurate claim under s.131 of the Act, then I may conclude that

the information provided to me by the employee as to hours and times worked, for instance, and/or wages paid is accurate and can be relied upon for the purposes of giving judgment.

Determination

[25] In the present case, the Authority is faced with plain evidence of a succession of breaches of the employment statutes by Auckland Harbour Oaks and plain evidence about the amounts of money actually received by the applicants.

[26] The applicants' evidence discloses breaches of a number of the employment statutes as well as breaches of the operative employment agreements. If accepted, the applicants' evidence suggests a woeful inadequacy in the payroll management of Auckland Harbour Oaks at the relevant times. I did gain the impression from the evidence given for the employer that there had been some difficulties in that area and that some of the persons responsible may no longer be involved.

[27] But that does not excuse the employer's failure to pay wages in accordance with the law and to maintain proper records of that payment.

[28] I am satisfied on the evidence I heard that Auckland Harbour Oaks has failed absolutely to maintain proper original wage and time records of Mr and Ms Agustin's employment because if those records were available then presumably they would have been provided to me when I asked for them. I am also satisfied that Auckland Harbour Oaks have failed absolutely to pay Mr and Ms Agustin correctly during the totality of the employment and accordingly I am satisfied that Mr and Ms Agustin are entitled to an order for arrears of wages.

[29] Mr and Ms Agustin were, despite their limited English, compelling witnesses and they provided, with the assistance of First Union, an extensive bundle of documentation identifying what they had been paid and what they ought to have been paid.

[30] By contrast, while I have no reason to doubt the attempts by Mr Malik and Ms Dubey for Auckland Harbour Oaks to explain the position, the short point is that in the absence of actual wage and time records, explanation is impossible.

[31] Auckland Harbour Oaks continue to maintain that their payment regime is correct, but that is difficult to square with the evidence of Mr and Mrs Agustin and impossible for the Authority to verify because the employer has failed to provide actual wage and time records as the law requires.

[32] Auckland Harbour Oaks maintain that if Mr or Ms Agustin had raised the matter with them earlier, the matter could have been resolved promptly. But the evidence I heard suggests that Mr and Ms Agustin did that on a regular basis and got no satisfaction at all.

[33] In the end, I am satisfied on the evidence I heard that the evidence of Mr and Ms Agustin is to be preferred over the evidence of Auckland Harbour Oaks, given no actual wage and time records have been produced to justify Auckland Harbour Oaks' conclusion.

[34] On that basis then, I am satisfied that Auckland Harbour Oaks owes to Mr Agustin the sum of \$38,832.46 net and to Mrs Agustin the sum of \$39,970.60 net both figures being an amalgam of all of the outstanding wages due and owing to each of the employees.

[35] Those figures are obtained by aggregating the payments made to each employee as disclosed in their respective bank accounts, and setting that off against what Mr or Ms Agustin appear to be entitled to, either by force of contract or statute, or both.

[36] First Union has provided the Authority with a spreadsheet detailing the calculation and I feel able to rely on that computation by virtue of power conferred on me by s.132 of the Act, the terms of which I referred to earlier in this determination and which I specifically addressed during the investigation meeting.

[37] Those payments are to be made by Auckland Harbour Oaks to Mr and Mrs Agustin within ten days of the date of this determination by lodgement to the bank accounts of Mr and Mrs Agustin.

[38] Interest is also sought; while I am sympathetic to the claim, the challenge of calculating interest in any logical fashion given that wages have been due and owing over the whole of the employment but always on a piecemeal basis, makes the computation too challenging to contemplate.

[39] There is a claim for penalties before the Authority. I propose to defer consideration of that claim in the hope that Auckland Harbour Oaks satisfy the wage arrears order made in this determination. If the wage arrears are not paid in accordance with this determination, then leave is reserved for a further application to the Authority (without additional fee) to have penalties set.

[40] I make this decision because my sense of the evidence from Auckland Harbour Oaks is that previous management of this property may have been unsatisfactory and an attempt is being made to put matters right.

Costs

[41] There is no issue as to costs in this matter.

James Crichton
Member of the Employment Relations Authority