

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 169
3144201

BETWEEN ATTAPORN CHANTAMA
 Applicant

AND MCKERCHAR LAMB LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Brown, counsel for the Applicant
 David McKerchar for the Respondent

Investigation Meeting: 23 September 2022 in Invercargill

Submissions Received: 23 November 2022 from the Applicant
 5 December 2022 from the Respondent

Date of Determination: 6 April 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Attaporn Chantama was employed by McKerchar Lamb Limited to work as a chef. Mr Chantama worked for McKerchar Lamb from 28 May 2018 until November 2018, when he resigned. Mr Chantama then worked for a second period of time in 2019, commencing in January. Mr Chantama says he was employed in this second period up until December 2019 when he resigned.

[2] Mr Chantama claims he was not paid correctly during his employment, including payment for his holiday pay. And he says he resigned because he was not being paid at all by McKerchar Lamb in the latter half of 2019. Based on these two complaints Mr Chantama lodged a statement of problem in the Authority claiming wage arrears and constructive dismissal. Mr Chantama also sought a penalty for McKerchar Lamb's failure to keep wages and time records as required by s 130 of the Employment Relations Act 2000 (the Act).

[3] McKerchar Lamb says:

- (a) Mr Chantama commenced employment in May 2018 as a chef in a Thai restaurant that McKerchar Lamb owned. Mr Chantama resigned at the end of November 2018. This was a voluntary resignation; it does not give rise to any unjustified dismissal claim, and none is claimed.
- (b) Mr Chantama was then employed for a second period from 27 January 2019 until 31 March 2019 as a chef in the Thai restaurant. The termination of Mr Chantama's employment in March 2019 was agreed as the restaurant was closing for renovations. The agreed termination cannot be a basis for an unjustified claim.
- (c) From 1 April 2019 McKerchar Lamb undertook renovations to the restaurant with a view to reopening later in 2019. Mr Chantama was offered new employment once the renovations were complete but he never accepted this offer.
- (d) Mr Chantama was paid correctly for the work he did in both periods of employment – this was based on a salary and included a weekly deduction for rent, power and food, that it provided to Mr Chantama.

The Authority's investigation

[4] The parties were unable to resolve Mr Chantama's claims for wage arrears, unjustified dismissal and a penalty relating to the wages and time records. It is these claims that I investigated and this determination resolves.

[5] I investigated these claims by receiving written evidence and documents, holding an investigation meeting on 23 September 2022, in which I heard oral evidence, and assessing the written submissions of the parties.

[6] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[7] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s 174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174D(2) of the Act.

Wage arrears

[8] Mr Chantama's claim for wage arrears is based on what he claims to be the periods he worked:

- (a) 25 June 2018 to 25 November 2018, when he worked as a chef in the Thai restaurant. This period of employment came to an end when he resigned.
- (b) 27 January 2019 until 31 March 2019, when he returned to work as a chef in the restaurant.

- (c) 1 April 2019 until 10 August 2019, when the restaurant was being refurbished, he did not work as a chef but remained employed during this time.
- (d) 15 August 2019 until 11 September 2019, when he undertook some work assisting McKerchar Lamb with the renovations.
- (e) 12 September 2019 until 15 December 2019, when he was waiting for confirmation of an opening date for the refurbished restaurant. Mr Chantama says he was dismissed in December 2019 because McKerchar Lamb kept postponing the opening of the refurbished restaurant and had not paid him since 31 March 2019.

[9] Mr Chantama says, that for each period of employment he should have been paid as follows:

- (a) For the period 25 June 2018 to 25 November 2018 payment of \$961.54 per week (based on a salary of \$50,000.00 per annum).
- (b) For the period 27 January 2019 until 31 March 2019 payment at an hourly rate of \$20.65, with total hours of 577.4.
- (c) For the period 1 April 2019 until 10 August 2019 payment at the hourly rate of \$20.65, with total hours per week calculated as 62 based on previous averages.
- (d) For the period 15 August 2019 until 11 September 2019 payment at the rate of \$20.65 for 145.5 total hours worked.
- (e) For the period 12 September 2019 until 15 December 2019 payment at the hourly rate of \$20.65, with total hours per week calculated as 30 based on the agreed minimum hours per week.

[10] Mr Chantama says that the above payments plus annual holiday pay, calculated at 8% of his total earnings, comes to a total of \$73,474.41 (gross). He also says he was only paid \$11,885.44 (net) so there is a significant amount owing to him.¹

[11] McKerchar Lamb does not accept Mr Chantama's wage arrears claim. It says Mr Chantama did not work all of the time he claimed and that he was paid correctly for the work he did do, including in that payment an amount for rent, power and food which it provided.

[12] Based on these respective positions, there are five steps to resolve the disputed wage arrears claim:

- (a) What periods of time was Mr Chantama employed for and what hours did he work?
- (b) What terms and conditions applied to Mr Chantama's periods of employment, particularly the hours of work and the rate of pay (either salary or wages)?
- (c) Based on the terms and conditions of employment and the hours worked what should Mr Chantama have been paid for each period that he was employed?
- (d) What was Mr Chantama paid by McKerchar Lamb?
- (e) Is there any shortfall between the amount Mr Chantama should have been paid and what he was paid?

¹ I note that in his calculations Mr Chantama offsets the net amount he received against the gross amount he says he is owed to conclude the total wage arrears owed is \$61,588.97 (gross). Putting aside the question of whether the calculations of what he should have been paid and what he was paid are correct, there is an error in offsetting a net amount against a gross amount – the correct approach would be to gross up the net amount he says he received and then offset this gross amount.

What periods was Mr Chantama employed for and what hours did he work?

[13] The first period of employment for Mr Chantama is not disputed. He commenced work on 25 June 2018 and resigned in November 2018 with his last day of work being 25 November 2018.

[14] The second period of employment is disputed. Both parties agree that Mr Chantama commenced work on 27 January 2019.

[15] Mr Chantama then worked as a chef in the Thai restaurant until 31 March 2019, when the restaurant was closed so that refurbishments could be undertaken. Mr Chantama's position is that he continued to be employed during the closure of the restaurant as he was tied to McKerchar Lamb by his visa requirements and that he continued to communicate with McKerchar Lamb through this time and even undertook some work assisting it with refurbishment.

[16] Having considered the evidence of Mr Chantama and David McKerchar, the director and shareholder of McKerchar Lamb, and having looked at the contemporaneous communications I am satisfied that Mr Chantama's second period of employment with McKerchar Lamb came to an end on 31 March 2019.

[17] I am also satisfied that Mr Chantama was not employed again by McKerchar Lamb for a third or subsequent period, either when he claims to have undertaken refurbishment work or when there were discussions about the re-opening of the Thai restaurant and Mr Chantama recommencing employment in the second half of 2019.

[18] The question of how many hours Mr Chantama worked is more difficult to assess. The problem lies in the fact that McKerchar Lamb did not keep wages and time records; it appeared to rely on Mr Chantama working six days a week as required for the restaurant opening hours and being paid a salary for that work.

[19] Mr Chantama kept an incomplete record of the hours he worked in a diary. I have reviewed the written record of hours worked and assessed that against the written and oral evidence of Mr Chantama and Mr McKerchar. My conclusion is that the hours recorded by Mr Chantama are reasonably accurate but do not account for unpaid breaks and the time when the restaurant was shut between lunch and dinner, when Mr Chantama was not required to work.

[20] Based on the evidence I have calculated the total hours worked in each period, this calculation is largely based on the written records of Mr Chantama but allowing a small reduction for periods in the recorded times where Mr Chantama would not have been working. For the first period of employment covering 17 weeks Mr Chantama worked 802.5 hours. In the second period of employment covering 11 weeks Mr Chantama worked 556 hours.

What terms and conditions governed Mr Chantama's periods of employment?

[21] Mr Chantama's first period of employment was on terms and conditions set out in an unsigned employment agreement (IEA1). Mr Chantama was to be paid a salary of \$50,000.00 per annum. The expected hours of work, which the salary would cover, were 10:00 am – 2:30 pm then 4:30 pm to 8:30 pm Tuesday to Sunday. This was 45 hours per week over the six days – excluding the unpaid meal breaks. However, Mr Chantama's salary was to also cover any additional work that might be required.

[22] In addition to the terms and conditions set out in IEA1 McKerchar Lamb also arranged accommodation for Mr Chantama, paying rent and power for this and it also provided food – essentially Mr Chantama was able to eat his meals at the restaurant. IEA1 did not include any reference to accommodation and food being provided or any charge for that.

[23] Mr McKerchar says he agreed to arrange accommodation and food and pay for it through the company on the understanding that Mr Chantama would pay the cost for this to McKerchar Lamb by deduction from his salary.

[24] Mr Chantama says the provision of free accommodation and food was a condition of his employment; it was not something he agreed to pay for.

[25] I am not satisfied, on the evidence in my investigation meeting that McKerchar Lamb agreed to provide accommodation and food to Mr Chantama as a condition of his employment i.e., it was not free, but rather it provided this on the understanding that Mr Chantama would contribute to the cost, which McKerchar Lamb would deduct from his salary.

[26] The problem for McKerchar Lamb is that there is no record of what was agreed would be deducted for accommodation and food either in IEA1 or elsewhere. In the absence of an agreed amount of the contribution for the accommodation and food costs I will only allow a deduction consistent with the Minimum Wage Act 1983. That is, my conclusion is there is a term of Mr Chantama's employment that he would pay 15% of what his wages would be when calculated at the applicable minimum wage for his accommodation and food.²

[27] Mr Chantama's second period of employment was on different terms and conditions. A draft employment agreement (IEA2) had been sent to Mr Chantama in November 2018 which was offered to him as new terms and conditions replacing IEA1 as McKerchar Lamb was looking to reduce its costs to enable it to continue to operate the restaurant. Mr Chantama did not accept the new terms offered back in November 2018 and chose to resign instead. However, when he accepted the second period of employment he did so, in my view, on the terms set out in IEA2.

[28] IEA2 set out that Mr Chantama would be paid a salary of \$40,000.00. The expected hours of work, which the salary would cover, were 10:30 am – 1:30 pm then 5:00 pm to 8:00 pm Tuesday to Sunday. This was 36 hours per week over the six days. Mr Chantama's salary

² Section 7 Minimum Wage Act 1983.

was to also cover any additional work that might be required. IEA2 also contained a clause that authorised McKerchar Lamb to deduct from Mr Chantama's salary amounts it paid on his behalf for rent, electricity and food, with the deduction estimated to be \$250.00 - \$300.00 per week. In the absence of evidence to support the higher figure I will allow a deduction at the rate of \$250.00 per week.

What should Mr Chantama have been paid for each period of employment?

[29] For the first period of employment Mr Chantama should have been paid a weekly salary of \$960.54 or the minimum wage for the hours worked if this exceeded the salary amount.³ I calculate the salary amount to be \$16,346.14 and the minimum wage amount to be \$13,241.25. The amount that can be deducted for board is \$1,986.19.

[30] So, this means for the first period of employment Mr Chantama should have been paid \$16,346.14 in salary plus annual holiday pay on this amount of \$1,307.69. McKerchar Lamb could deduct \$1,986.15 for board from this amount. Therefore, the total payable to Mr Chantama was \$15,667.68.

[31] For the second period of employment Mr Chantama should have been paid salary at a rate of \$769.23 per week. This is a total of \$8,461.53. The minimum wage amount for the hours worked for this period is \$9,174.00. So, Mr Chantama should have been paid this minimum wage amount plus annual holiday pay of \$733.92. McKercher Lamb could deduct \$2,750.00 for board. The total payable was therefore \$7,157.92.

What was Mr Chantama paid and is there any shortfall?

[32] Mr Chantama's Inland Revenue records show he was paid \$18,855.00 (gross) by McKercher Lamb for the two periods of employment. Mr Chantama says he received less than the correct net amount for this sum but I am not satisfied on the evidence I heard that this is correct. I take the Inland Revenue amounts as being accurate.

³ Based on my conclusion as to the hours worked as set out in paragraph [20].

[33] So, there is a difference between what Mr Chantama should have been paid and what he was paid. He should have been paid \$22,825.60 (gross) for both periods of employment and he received only \$18,855.00 (gross). Therefore, the amount payable to him as wage arrears is \$3,970.60 (gross).

Unjustifiable dismissal

[34] Based on my conclusions regarding the periods that Mr Chantama was employed and how those periods came to an end there is no basis for his unjustifiable dismissal claim:

- (a) For the first period of employment, Mr Chantama resigned voluntarily. This was not a dismissal, constructive or otherwise. And, I note Mr Chantama has not claimed unjustified dismissal in respect of the first period of employment.
- (b) The second period of employment came to an end by mutual agreement because of refurbishment of the restaurant. This is not the basis for an unjustifiable dismissal, constructive or otherwise.
- (c) Mr Chantama was not employed in December 2019 when he alleges was dismissed through McKerchar Lamb's actions.

Wages and time records

[35] Mr Chantama says McKerchar Lamb failed to keep wages and time records as required by s 130 of the Act. This is correct; McKerchar Lamb have not produced wages and time records for Mr Chantama.

[36] Mr Chantama says, based on this failure I should award a penalty against McKerchar Lamb pursuant to s 130(4) of the Act.

[37] Mr Chantama's right to bring this action for recovery of a penalty arises under s 135 of the Act. Section 135(5) states that any action to recover a penalty must be commenced

within 12 months of the date when the cause of action became known or when the cause of action should reasonably have become known.

[38] This means Mr Chantama should have started the action seeking a penalty within 12 months of him knowing McKerchar Lamb had not kept wages and time records or when he would reasonably have known. And this creates a problem for Mr Chantama's action.

[39] On 18 December 2019 Mr Chantama requested a copy of his wages and time records through his lawyer. In that correspondence Mr Chantama did not say he intended to seek a penalty if the wages and time records were not produced.

[40] On 3 February 2020 McKerchar Lamb responded to the request from Mr Chantama through its lawyer writing to Mr Chantama's lawyer. In that correspondence it provided a copy of his employment file and advised that the wages and time records were kept by Inland Revenue.

[41] So as of 3 February 2020, McKerchar Lamb had not provided the wages and time records and had advised that it did not have wages and time records. So, Mr Chantama knew at this point there was a failure to keep wages and time records.

[42] Mr Chantama did not respond to this correspondence until 1 March 2021 when Mr Chantama's lawyer wrote to McKerchar Lamb's lawyer setting out various claims and seeking, amongst other things, a penalty for the failure to keep wages and time records.

[43] On this basis Mr Chantama commenced the recovery of a penalty over 12 months after he knew of the cause of action. And this is too late pursuant to s 130(4) of the Act. Mr Chantama's action for a recovery of a penalty cannot proceed.

Summary

[44] Mr Chantama's wages arrears claim is successful. McKerchar Lamb must pay Mr Chantama \$3,970.60 (gross). This amount is to be paid within 14 days of the date of this determination.

[45] Mr Chantama's unjustifiable dismissal claim is not successful.

[46] Mr Chantama's application for a penalty to be paid by McKerchar Lamb for failing to keep wages and time records is denied as it was not commenced within the requisite 12 month period.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Chantama may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum McKerchar Lamb will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[48] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁴

Peter van Keulen
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.