

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 416
3078453

BETWEEN

DEBORAH ANNE
COLCLOUGH
Applicant

AND

LIVE IT UP LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
No appearance for the Respondent

Investigation Meeting: On the papers

Information received: 24 and 25 September 2020, from the Applicant
No information received from the Respondent
9 September 2020 from third party

Determination: 13 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Deborah Colclough worked for Live It Up Limited (LIUL) from October 2016 until 19 November 2018 when she resigned. She seeks orders for payment of wage arrears of 105 hours, termination holiday pay and interest on those sums.

[2] LIUL has not filed a statement in reply, filed relevant documents as directed or otherwise participated in the Authority process.

The Authority's investigation

[3] On 31 October 2019 Ms Colclough filed a statement of problem in the Authority. On 8 November at Ms Colclough's request her application was put on hold because, as she advised the Authority, she had entered an arrangement with LIUL to resolve her wage arrears. On 1 July 2020 Ms Colclough contacted the Authority to progress her claim because LIUL had not paid the arrears as it said it would. On 6 July the statement of problem was served on the registered offices of LIUL.

[4] By minute dated 4 September 2020 the Authority identified the issues to be investigated and determined, proposed timetabling directions including that the matter be determined on the papers after the Authority had confirmed the contents of any statements and taken affirmations of the witnesses. The parties were invited to file any objection to the proposal within seven days of the date of the minute. The minute directed LIUL to file documents related to Ms Colclough's employment including her employment agreement, wages and time records, holiday and leave records, payslips and final pay details. The minute stated LIUL would require leave to file a statement in reply. By the same minute the Authority directed LIUL's accountant to file information within its possession and control relevant to Ms Colclough's claim.¹

[5] LIUL's accountant filed all directed information including a leave balance report and pay summary for Ms Colclough. Ms Colclough filed witness statements in support, pay slips and IRD earnings summary for the relevant period. This information was served on LIUL. LIUL did not seek leave to file a statement in reply, file a proposed statement in reply or otherwise comply with the directions. LIUL did not contact the Authority or provide any comment including on the information received from the accountant.

[6] The Authority notified the parties of a date witness affirmations would be taken which duly occurred on 8 October 2020. No representative of LIUL attended.

¹ The direction was made pursuant to section 160(1)(a) of the Employment Relations Act 2000.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the 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 information received.

Issues

[8] The issues identified for investigation and determination are:

- a. Does LIUL owe Ms Colclough wage arrears for 105 hours worked?
- b. If so, at what rate of pay should the wage arrears be calculated?
- c. Is holiday pay to be calculated on any arrears?
- d. Does LIUL owe Ms Colclough termination pay including holiday pay?
- e. If so, how much termination pay is owed to Ms Colclough?
- f. Is an award of interest on any arrears warranted?
- g. If Ms Colclough's claim is successful is she entitled to be reimbursed the Authority filing fee of \$71.56?

Relevant law

[9] Where there has been a default in payment to an employee of wages an employee may bring a claim for recovery of arrears: s 131 of the Act

[10] Where an employee's employment has come to an end before annual leave has been taken an employer is obliged to pay annual holiday pay in the final pay: s 27 of the Holidays Act 2003.

[11] Ms Colclough has not sought penalties against LIUL for breaches of statutory duties alleged and the Authority is unable to impose a penalty of its own motion for such matters. If she had done so LIUL may have been vulnerable to a penalty for failing to comply with the statutory obligations it owed Ms Colclough.

Discussion

Arrears of 105 hours

[12] The Authority is satisfied LIUL owes Ms Colclough wage arrears of 105 hours for that total of hours worked between the week ending 7 October 2018 to the week ending 18 November 2018. Documentation filed includes:

- A letter under the director's name, Robert Semple, dated 30 May 2019 acknowledging the unpaid hours and agreeing to pay them in weekly instalments through the accountant;
- Numerous emails and text messages from Ms Colclough to Mr Semple following up the wage arrears; and
- Pay summary and pay slips which do not record payments for the period of claim.

[13] Ms Colclough is entitled to be paid by LIUL for hours she worked at the agreed rate of pay, which was \$19.00 per hour.² LIUL is ordered to pay Ms Colclough wage arrears totalling \$1995.00 (gross) because she has established she worked 105 hours for which she should have been paid \$19.00 per hour.

Holiday pay

[14] As an employee Ms Colclough was entitled to holiday pay calculated and paid when her employment ended.³ The pay records show Ms Colclough's leave balance when her employment ended was 52.57 hours calculated at \$1074.20.⁴ The pay records further show Ms Colclough was not paid out that leave balance in her final pay.⁵

[15] In addition, Ms Colclough is entitled to be paid holiday pay on the 105 hours wage arrears calculated at eight per cent of the gross total.

² Refer Ms Colclough's witness statement and the pay summary report.

³ Holidays Act 2003, s 27.

⁴ Refer leave balance report "Live It Up Limited Annual Leave Liability Deborah Anne Colclough".

⁵ The last pay slip Ms Colclough received is dated 30 September 2018 which corresponds with the pay summary report for the amount of \$414.71.

[16] LIUL is ordered to pay Ms Colclough \$1233.80 in holiday pay entitlements within 14 days of the date of this determination.⁶

Interest

[17] Ms Colclough is entitled to an award of interest on the total wages claimed including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[18] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[19] Live It Up Limited is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:⁷

- (i) Interest on the sum of \$3228.80 from 18 November 2018 until the date payment is made in full.

[20] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Filing fee

[21] The filing fee of \$71.56 is an amount Ms Colclough can reasonably recover from Live It Up Limited. Live It Up Limited is to pay the sum of \$71.56 to Ms Colclough within 14 days of the date of this determination.

Summary of orders

[22] The Authority orders as follows:

- a) Within 14 days of the date of determination Live It Up Limited is ordered to pay Ms Colclough the following sums:

⁶ \$1074.20 + \$159.60.

⁷ www.justice.govt.nz/fines/civil-debt-interest-calculator

- (i) wage arrears of \$1995.00
- (ii) holiday pay of \$1233.80
- (iii) filing fee of \$71.56

b) Within 14 days of the date of determination Live It Up Limited is to calculate and pay Ms Colclough interest on wage arrears and holiday pay as awarded in paragraph [19] above.

Marija Urlich
Member of the Employment Relations Authority