

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 321
3088773

BETWEEN	CARLOS DE SOUSA Applicant
AND	FISA HOLDINGS LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
Ashreen Elliott, Respondent director

Investigation Meeting and on the papers: 14 May 2020

Information received: 29 July 2020, from the Applicant
21 May, 22 May, 21 July and 29 July 2020, from the Respondent

Determination: 14 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From 12 September 2018 until 26 November 2019 Mr De Sousa worked for Fisa Holdings Limited ('Fisa') in a part time front of house role in the café it operates. Mr De Sousa says Fisa owes him wage arrears, sick leave arrears, public holiday pay loading and annual holiday pay. He says these sums were due and owing when his employment ended in late November 2019 and that these sums remain unpaid. Mr De Sousa's claim did not include a claim for alternative holiday pay.

[2] During the investigation meeting Mr De Sousa applied to include in his application a claim for unpaid wages during June and July 2019. The enlargement of the claim was allowed.

[3] Fisa has not filed a statement in reply or filed relevant documents as directed. Information provided by Fisa has been considered in determining this employment relationship problem.

The Authority's investigation

[4] On 23 January 2020 Mr De Sousa filed a statement of problem in the Authority. On 17 February the statement of problem was served on the registered offices of Fisa. Fisa did not file a statement of reply.

[5] By minute dated 16 April the Authority proposed timetabling directions including an investigation meeting by zoom and invited the parties to file any objection to the proposal within seven days of the date of the minute. The minute directed Fisa to file documents related to Mr De Sousa's employment including his employment agreement, wages and time records, holiday and leave records, payslips and final pay details. The minute stated Fisa would require leave to file a statement in reply. The minute and a notice of hearing were served on the parties.

[6] Fisa did not seek leave to file a statement in reply, file a proposed statement of reply or otherwise comply with the directions. Fisa did not contact the Authority.

[7] No representative of Fisa attended at the scheduled start time of the investigation meeting. The Authority Officer attempted without success to contact Fisa to advise the investigation would proceed. Due to a technical difficulty the investigation was unable to proceed by zoom and the Authority took Mr De Sousa's evidence under affirmation by telephone.

[8] Due to the change in investigation meeting format, by minute dated 15 May a summary of Mr De Sousa's evidence was provided to Fisa and a further in person investigation meeting scheduled for 25 May.

[9] On 21 May Ashreen Elliott, a director of Fisa, contacted the Authority by email to advise she had been unaware of Mr De Sousa's claim until the previous day. By minute dated 21 May the Authority recorded, though it was satisfied service requirements for the statement of problem had been met, now Fisa had engaged with the process it should be given a fair opportunity to participate before the matter was finally determined. The investigation meeting was cancelled and a case management call convened which the parties attended.

[10] By minute dated 29 May the directions agreed to during the case management call were recorded for dates by which Fisa was to file and serve a statement in reply, that the parties were to attend mediation within 28 days of the filing of the statement of reply and relevant documents were to be filed. The minute also outlined the issues for investigation and determination, identified documents to be filed by both parties and described the investigation process. Fisa did not file a statement in reply by the directed date.

[11] By minute dated 15 June the parties were directed to attend mediation within 28 days of that date after which, if the employment relationship problem remained unresolved, an investigation meeting would be scheduled. The minute included Fisa would need to seek leave to be heard and confirmed the date by which evidence was to be filed.

[12] By minute dated 17 July the Authority recorded that by the directed dates Fisa had not filed a statement in reply or subsequently sought leave to do so, the parties had not filed the directed documents and, mediation had not been held due to Fisa's actions as advised by the mediation service. The minute recorded variations to the directions had not been sought. The minute proposed to determine the matter on the papers, confirmed the issues to be determined were those identified in the minute dated 29 May and would be based on the information received to date which was also described in the minute. Any opposition to the proposal and further information was to be filed by 23 July.

[13] On 21 July Ms Elliott emailed the Authority outlining circumstances which she stated had impacted Fisa's ability to comply with directions to date including family circumstances and the time it was taking to match up rosters, timesheets and payslips.

Ms Elliott requested more time to gather up the evidence and documents and resolve the issues between the parties. Ms Elliott did not oppose the matter being determined on the papers.

[14] On 22 July the Authority granted Ms Elliott's request for more time, varied the date for filing further relevant information to 30 July 2020 and confirmed after that date it would move to determine the matter.

[15] On 29 July Mr De Sousa filed an IRD summary of his earnings from Fisa and two time sheets, one dated week-beginning 27 October 2019 and the other undated, which appear to be from his employment with Fisa.

[16] On 29 July Ms Elliott emailed the Authority that timesheets and rosters are held by a third party who did the wages from February to November 2019 and this third party refused to return the documents to Fisa. Amongst other matters the email states Fisa has in its possession and control payslips and some copies of timesheets and rosters for the period of claim but:

“it's such a mess that we'd rather try to come to some arrangement and settle this with both parties agreeing on certain issues and matters (as it were) before concluding on a final figure re a rapid settlement. Please feel free to call me or reply to this email for further information if/when so required to, in the hope of bringing this to a fair and reasonable conclusion.”

[17] On 30 July the Authority wrote to the parties acknowledging the further information received, confirming it would move to determine the matter and that a written determination would be issued in due course.

[18] At date of determination neither Fisa nor Mr De Sousa had made further contact with or provided further information to the Authority.

[19] 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

[20] The issues requiring investigation and determination are:

- (i) Did Mr De Sousa work for Fisa on 24, 25 June, 1, 2, 8, 9, 22 and 23 July, 11, 12 and 26 November 2019?
- (ii) If so, does Fisa owe Mr De Sousa wages?
- (iii) Did Mr De Sousa take days off work due to sickness on 17, 18 and 19 November 2019?
- (iv) If so is he entitled to paid sick leave?
- (v) Did Mr De Sousa work for Fisa on 28 October 2019 being Labour Day;
- (vi) If so, was he paid public holiday pay loading for that day?
- (vii) Does Fisa owe Mr De Sousa holiday pay?
- (viii) If so, how much holiday pay is due and owing Mr De Sousa?
- (ix) Is Mr De Sousa entitled to interest on any arrears of wages due to him by Fisa?
- (x) Is Mr De Sousa entitled to be reimbursed the filing fee incurred in filing his claim?

Relevant law

[21] An employer has a statutory duty to provide a worker with an intended individual employment agreement and retain a copy of the signed agreement: s 63A Employment Relations Act 2000 (the Act)

[22] An employer has a statutory duty to keep wage and time records for each employee and produce such records on request: s 130 of the Act

[23] 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

[24] Where an employer has failed to keep or produce a wages and time record in respect of an employee and that failure has prejudiced the employee's ability to bring an accurate claim for arrears of wages, unless the employer proves those claims are incorrect, the Authority may accept as proved all claims made by the employee in respect of wages paid and hours, day and time worked: s 132 of the Act

[25] An employer has a statutory duty to keep holiday and leave records and produce such records on request: s 81 Holidays Act 2000 (the Holidays Act)

[26] 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

[27] An employer must pay an employee at least time and a half for working on a public holiday: s 50 of the Holidays Act

[28] After 6 months' employment an employee is entitled to five days' sick leave: s 65 of the Holidays Act

[29] An employer has a statutory duty to keep holiday and leave records and failure to keep or provide such records may result in the Authority accepting statements made by an employee as proved: ss 81, 83 of the Holidays Act

[30] Mr De Sousa has not sought penalties against Fisa for breaches of statutory duties alleged and the Authority is unable to impose a penalty of its own motion for such matters. If he had done so Fisa may have been vulnerable to a penalty for failing to comply with its statutory duties.

Background

[31] Mr De Sousa worked for a number of years in a front of house role in the café Fisa took over in September 2018. After Fisa took over running the café Mr De Sousa's employment continued on the same terms and conditions. He was paid \$18 per hour, worked an average of three days per week for seven hours per day, with usual working hours being 8.30am to 4pm with a half hour unpaid break and he was paid weekly.

[32] Fisa did not give Mr De Sousa a written employment agreement when it took over the café. He asked for a written employment agreement and was told it was being amended. After several follow up requests he stopped asking.

[33] In June and July 2019 Mr De Sousa's pay was short. When he queried this he was told Fisa was experiencing problems processing wages and in due course some of the arrears were paid. Mr De Sousa says he is still owed the pay for shifts worked on 24 and 25 June 2019, 1, 2 July, 8, 9 July and 22, 23 July.

[34] On 26 November 2019 Mr De Sousa resigned from his employment with Fisa. When he did not receive his termination pay he emailed his employer on 8 January 2020 asking for the following payments:

- wage arrears for 11, 12 and 26 November 2019;
- sick leave for 17, 18 and 19 November 2019;
- public holiday pay loading for Labour Day 28 October 2019; and
- holiday pay for the period of his employment.

[35] Fisa did not reply to his email and the payments remain outstanding.

[36] Mr De Sousa told the Authority he had been paid out his holiday pay entitlement from his previous employer when Fisa took over the café. He said he had taken no paid sick leave or paid annual holidays during his employment with Fisa. He crossed checked his pay claim against payments received from Fisa into his bank account and the pays were short by the days claimed. Mr De Sousa says he is owed time and a half for working Labour Day 2019.

Determination

[37] Fisa failed to file a statement in reply or file documents as directed. Those directed documents included Mr De Sousa's employment agreement, his wage and time record, his holiday and leave record, payslips and final pay calculation.

[38] Notwithstanding, the Authority has considered the representations made on behalf of Fisa by Ms Elliott including that there appear to be inconsistencies between the rosters and timesheets she reviewed and the hours Mr De Sousa says he worked for Fisa which remain unpaid. The Authority observes Fisa does not deny Mr De Sousa is owed payment for annual holidays, public holiday loading and sick leave. Fisa appears to dispute the wage arrears but has not specified what days it disputes or why.

[39] The Authority accepts as proved all claims made by Mr De Sousa:

- (i) Fisa's failure to produce to the Authority documents which it has a statutory duty to keep and produce and which are relevant to the matters to be determined by the Authority has prejudiced Mr De Sousa's ability to bring an accurate claim.
- (ii) Fisa's failure to produce the directed documents is in the face of repeated directions from the Authority to do so and extensions granted at Fisa's request to produce the directed material.
- (iii) Fisa's assertion that the relevant material is detained by a third party is inconsistent with reasons given earlier to the Authority for not filing as directed and does not explain why Ms Elliott has not filed documents she was directed to file which appear to be in Fisa's possession and control.
- (iv) Mr De Sousa has given evidence to the Authority of wages paid, hours, days and time worked and time taken off due to sickness.
- (v) Mr De Sousa has provided rosters which support, at least in part, the arrears claimed.
- (vi) Mr De Sousa has provided evidence that he raised an arrears claim directly with his employer.
- (vii) Mr De Sousa has provided an IRD summary of earnings which records total earnings he received from Fisa for the period 1 April 2019 – 30 November 2019 and which corroborates his evidence of usual hours and shifts worked.

Wage arrears

[40] Mr De Sousa is entitled to be paid by Fisa for hours he worked at the agreed rate of pay. Fisa is ordered to pay Mr De Sousa wage arrears totalling \$1386.00 (gross) because he has established he worked eleven shifts of seven hours for which he should have been paid \$18.00 per hour.¹

Sick leave

¹ Mr De Sousa worked for Fisa on 24, 25 June, 1, 2 July, 8, 9 July, 22, 23 July and 11, 12 and 26 November 2019.

[41] Mr De Sousa was entitled to paid sick leave after six months employment with Fisa at a rate equivalent to his relevant daily pay.² Fisa is ordered to pay Mr De Sousa sick leave arrears totalling \$378.00 (gross) because he has established he took three days sick leave after his entitlement accrued.³

Public holiday pay loading

[42] Mr De Sousa is entitled to be paid time and a half for every hour worked on a public holiday.⁴ Fisa is ordered to pay Mr De Sousa \$63.00 (gross) by way of public holiday loading for work performed on the Labour Day public holiday celebrated on Monday 28 October 2019.

Holiday pay

[43] As an employee Mr De Sousa was entitled to holiday pay upon the termination of his employment calculated at eight per cent of his gross earnings.⁵ The IRD document records Mr De Sousa's gross income received from Fisa for the period 1 April 2019 to 30 November 2019 totalled \$12,093.75. These gross earnings are to be augmented by the awards of \$1386.00 in wage arrears, \$378.00 in sick leave arrears and \$63.00 in public holiday loading. The holiday pay calculation for gross earnings for the period 1 April 2019 to 30 November 2019 is \$1113.66.

[44] In addition, the Authority is satisfied Mr De Sousa worked at least three shifts of seven hours per week for Fisa throughout his employment. Mr De Sousa's holiday pay claim is further augmented by \$786.24 holiday pay calculated at eight per cent of notional gross earnings for the period 12 September 2018 to 31 March 2019 being the period not covered by the IRD record⁶.

[45] Fisa is ordered to pay Mr De Sousa \$1899.90 in holiday pay entitlements within 14 days of the date of this determination.

Interest

² There is no evidence to suggest it is not possible or practicable to determine Mr De Sousa's relevant daily pay: ss 9, 9(A) of the Holidays Act.

³ Mr De Sousa took sick leave on 17, 18 and 19 November 2019.

⁴ Refer [26] above.

⁵ s 27 Holidays Act 2003

⁶ 26 weeks x \$378.00 (usual weekly pay) x eight per cent = \$786.24

[46] Mr De Sousa 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.

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

[48] Fisa Holdings 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 \$3726.90 from 27 November 2019 until the date payment is made in full.

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

Filing fee

[50] The filing fee of \$71.56 is an amount Mr De Sousa can reasonably recover from Fisa Holdings Limited. Fisa Holdings Limited is to pay the sum of \$71.56 to Mr De Sousa within 14 days of the date of this determination.

Summary of orders

[51] The Authority orders as follows:

- a) Within 14 days of the date of determination Fisa Holdings Limited is ordered to pay Mr De Sousa the following sums:
 - (i) wage arrears of \$1386.00
 - (ii) sick leave arrears of \$376.00
 - (iii) public holiday pay loading of \$63.00
 - (iv) holiday pay of \$1899.90
 - (v) filing fee of \$71.56

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

- b) Within 14 days of the date of determination Fisa Holdings Limited is to calculate and pay Mr De Sousa interest on wage arrears, sick leave arrears, public holiday pay loading and holiday pay as awarded in paragraph [48] above.

Marija Urlich
Member of the Employment Relations Authority