

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 62
3076372

BETWEEN JEFFERSON DOS SANTOS
Applicant

AND BEST EGGS LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
Matthew Blomfield, advocate for Respondent

Investigation Meeting: 30 September 2020 and on the papers

Submissions and further 21, 22 January and 2 and 9 February 2021 from
information: Applicant
2 February 2021 from Respondent

Determination: 19 February 2021

DETERMINATION OF THE AUTHORITY

- A. Mr Dos Santos is owed arrears of wages. Best Eggs Limited is ordered to pay to Mr Dos Santos arrears of wages and other money payable in the sum of \$25,758 under s 131 of the Act within 28 days of the date of this determination.**
- B. Best Eggs Limited is ordered to pay to Mr Dos Santos the sum of \$338.24 under s 131 of the Act being other money payable by an employer to an employee. Payment is to be made within 28 days of the date of this determination.**

C. Costs.

Employment relationship problem

[1] Mr Dos Santos, is a 50 per cent shareholder of Best Eggs Limited (BEL). He worked for BEL as an employee and alleges he is owed arrears of wages for unpaid hours of work including overtime and holiday pay and seeks reimbursement of expenses he incurred on behalf of BEL.

[2] After initially not engaging with the Authority, BEL wrote to the Authority through a representative on 22 June 2020 and advised:

- a) Mr Paul Greeff the sole director and a 50 per cent shareholder of the company (Mr Dos Santos held the remaining 50 per cent) and Mr Dos Santos were in a de facto relationship during the time they operated BEL;
- b) When the de facto relationship ended Mr Greeff took steps to exit the business;
- c) The business was sold but the money for the sale was never received despite the new owner taking possession of the business;
- d) BEL stopped trading at the beginning of December 2019;
- e) The business is insolvent with substantial debts.

[3] BEL attended an investigation meeting on 30 September 2020 and was granted leave to respond to Mr Dos Santos's application.

[4] BEL says aspects of the work Mr Dos Santos undertook was paid as an employee but the agreement was that other hours worked outside the agreed hours were to be treated as sweat equity as a shareholder.

[5] After hearing evidence from the parties I exercised my discretion under s 159(1)(c) of the Employment Relations Act 2000 (the Act) and directed the parties to use mediation and attempt in good faith to resolve the issues between them.

[6] The parties have advised me they have used mediation but it was not successful in resolving the issues between them.

Issues

[7] In order to resolve Mr Dos Santos' application I must determine the following issues:

- a) What was the relationship between Mr Dos Santos and BEL?
- b) Is Mr Dos Santos owed arrears of wages?
- c) Is Mr Dos Santos owed expenses incurred on behalf of BEL?

[8] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Unpaid sweat equity

[9] Unpaid sweat equity is where owners of a business will work without payment or reward in the hope that their efforts will be reflected in the value of their shareholding in due course. It will often arise where parties put unpaid sweat equity into a business to get it up and running.

What was the relationship between Mr Dos Santos and BEL?

[10] Mr Dos Santos and Mr Greeff were in a de facto relationship at the time they established BEL as a business. The relationship ended in December 2018 and this impacted on the business relationship. The relationship between the two shareholders became acrimonious.

[11] From the documents lodged with the Authority I have concluded that initially the two shareholders agreed Mr Dos Santos would be employed as the General Manager to work 30 hours each week at the rate of \$30 per hour. Mr Greeff outlines this arrangement in an email dated 4 June 2019. Mr Greeff sent this email to his then representative after the business relationship disintegrated. It was produced to the Authority by Mr Dos Santos who has not challenged its accuracy. In his email Mr Greeff explains that the agreed hourly rate was to ensure Mr Dos Santos was engaged at a low tax bracket so that he and Mr Dos Santos would be eligible for the KiwiSaver first home grants.

[12] In 2019 Mr Greeff agreed with Mr Dos Santos to increase the hours of work to 40 per week and this arrangement started on or about 2 April 2019. The bank statements provided by Mr Dos Santos show the increase in payments for wages accordingly.

[13] It was common ground that up to at least December 2018 Mr Greeff worked in the business but did not receive any payment for his contribution. This is because his entire contribution was considered to be sweat equity.

[14] As already stated Mr Greeff and Mr Dos Santos agreed Mr Dos Santos would work a maximum number of hours each week as General Manager for which he would be paid as an employee. From the documents provided by the parties I have concluded that all hours worked by Mr Dos Santos, over and above the agreed hours, were intended to be treated as sweat equity in a similar way as the hours worked by Mr Greeff.

[15] From January 2019 Mr Dos Santos sent Mr Greeff an email setting out the number of hours he worked each week. Initially these emails included the number of “banked hours” over and above the agreed hours. I have concluded this was so BEL could track Mr Dos Santos’s contribution to the business. However, eventually Mr Dos Santos stopped separating out the number of hours worked over and above the agreed hours.

[16] It is apparent that neither Mr Dos Santos nor Mr Greeff discussed or defined how or when the business would be in a position to pay for the “banked hours”. I have concluded it is more likely than not the parties intended that the value of the “banked hours” would be reflected in an increase in the shareholders value when the business was sold.

[17] On the balance of probabilities I consider it more likely than not that while Mr Dos Santos was in an employment relationship with BEL any hours he worked over and above the agreed hours of 30 and subsequently 40 hours per week, were intended to be treated as his unpaid contribution to the business.

Arrears of wages

[18] There are three elements to Mr Dos Santos' claim for arrears of wages. He claims he did not receive payment for all hours worked, is owed for annual holidays not taken and is owed payment for working on public holidays.

Payment for hours worked

[19] Mr Dos Santos agrees he and Mr Greeff entered into an arrangement as shareholders that BEL would pay him 30 hours each week and any additional hours would be banked as sweat equity. That agreement changed in April 2019 when Mr Dos Santos and Mr Greeff agreed he would be paid for 40 hours each week.

[20] The onus rests on Mr Dos Santos in the first instance to prove his arrears of wages claim. The claim for payment of overtime has not been successful. I have concluded that all hours worked over and above the agreed hours were worked as sweat equity. However, Mr Dos Santos has established the following claims to my satisfaction.

June 2018

[21] Mr Dos Santos did not receive any payment of wages for the pay periods 20 and 27 June 2018 inclusive. He is owed wages amounting to \$1,800 gross being two weeks at \$900 gross per week.

July to September 2018

[22] Mr Dos Santos did not receive payment of wages for the pay periods 11 July to 5 September 2018 inclusive. He is owed wages amounting to \$8,100 gross being nine weeks at \$900 gross per week.

September to November 2018

[23] For the pay periods 12 September to 29 November 2018 inclusive Mr Dos Santos received payment of \$600 gross per week. This is a shortfall of \$300 gross per week. He is owed arrears of wages amounting to \$3,600 gross being 12 weeks at \$300 gross per week.

Conclusion

[24] Mr Dos Santos is owed the sum of \$13,500 gross as unpaid wages.

Annual holidays

[25] Mr Dos Santos says he did not take any holidays during his employment and is owed payment for outstanding holidays. BEL has not challenged Mr Dos Santos' evidence that he did not take annual holidays. It is apparent from the bank statements provided to the Authority that Mr Dos Santos was not paid holiday pay at the end of his employment with BEL.

[26] Mr Dos Santos commenced employment on or about 3 July 2017. Under s 16 of the Holidays Act 2003 (HA) Mr Dos Santos became entitled to four weeks annual holidays on 3 July 2018. Mr Dos Santos left his employment on or about 21 June 2019. At the time his employment ended Mr Dos Santos was entitled to payment for the untaken annual holidays and a payment equivalent to eight per cent of his gross earnings for the period 3 July 2018 to 21 June 2019.¹

[27] Best Eggs Limited is ordered to pay to Mr Dos Santos the sum of \$7,128 gross under s 131 of the Act. This sum has been calculated as follows:

- a) Four weeks at \$900 per week equating to \$3,600; and
- b) Eight percent of \$44,100 gross earnings equating to \$3,528.

Public holiday pay

[28] As an employee Mr Dos Santos was entitled to receive payment at the rate of time and a half for time worked on public holidays together with payment for an alternative holiday.

[29] Mr Dos Santos says he worked on public holidays as follows:

- a) 2017 3 days;
- b) 2018 9 days;
- c) 2019 7 days.

[30] Mr Dos Santos has not specified which of the public holidays he worked. BEL has not challenged Mr Dos Santos's claim. There is no dispute that Mr Dos Santos received payment at his ordinary rate for time worked on public holidays. He is entitled to payment at half time extra for the hours he worked on each of the days.

¹ Holidays Act 2003, ss 24 and 25.

[31] Based on the agreed hours of 6 hours per day I have calculated Mr Dos Santos's entitlement to half time extra for each hour as follows:

- a) 2017 18 hours at \$15 per hour equals \$270;
- b) 2018 54 hours at \$15 per hour equals \$810;
- c) 2019 42 hours at \$15 per hour equals \$630

[32] Mr Dos Santos is entitled to a payment of \$1,710 gross for work undertaken on public holidays.

[33] In addition Mr Dos Santos is entitled to payment of an alternative holiday for each of the public holidays worked. Mr Dos Santos is entitled to 19 days of six hours per day at the rate of \$30 per hour. This equates to a total of \$3,420 gross.

[34] Mr Dos Santos is entitled to payment of the sum of \$5,130 gross under s 131 of the Act for work carried out on a public holidays.

Conclusion

[35] Best Eggs Limited is ordered to pay to Mr Dos Santos arrears of wages and other money payable in the sum of \$25,758 under s 131 of the Act within 28 days of the date of this determination.

Expenses

[36] Mr Dos Santos claims for expenses he says remained unpaid when he left the business on 21 June 2019. He claims the sum of \$350.

[37] The bank statements lodged by Mr Dos Santos shows expenses were paid by BEL during Mr Dos Santos's employment. On that basis I accept expenses were payable.

[38] Mr Dos Santos has provided evidence to show that he incurred expenses on behalf of BEL on 13 June 2019 relating to petrol, diesel and oil. The total sum of those expenses amount to \$338.24.

[39] Best Eggs Limited is ordered to pay to Mr Dos Santos the sum of \$338.24 under s 131 of the Act being other money payable by an employer to an employee. Payment is to be made within 28 days of the date of this determination.

Costs

[40] Costs are reserved. The parties are invited to resolve any question of costs between them. I record here that Mr Dos Santos was not represented throughout these proceedings.

[41] If the parties are unable to resolve the matter Mr Dos Santos shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. BEL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority