

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 114
5412852

BETWEEN MARIKE DUNN
 Applicant

AND ANNE PARINGATAI
 t/a PHYSIOPLUS
 Respondent

Member of Authority: M B Loftus

Representatives: Marike Dunn, on her own behalf
 No appearance for the Respondent

Investigation Meeting: 19 June 2013 at Dunedin

Submissions Received: At the investigation meeting

Determination: 19 June 2013

ORAL DETERMINATION OF THE AUTHORITY

[1] This is a claim for money Ms Dunn contends she is due but was not paid by Ms Paringatai. In addition Ms Dunn seeks payment of a penalty ordered in an earlier determination of the Authority (*Duff v Paringatai* [2012] NZERA Christchurch 185, 30 August 2012, Member Crichton).

[2] Ms Paringatai is neither present nor represented today. This is not a surprise. It is not the first time Ms Paringatai has failed to attend an investigation of which she is aware (refer *Casey v Paringatai* [2012] NZERA Christchurch 167 and *Duff v Paringatai* [2012] NZERA Christchurch 185). Her absence did, however, raise the question of whether or not I should proceed.

[3] The application was filed on 7 March 2013 and a copy was, in accordance with the Authority's normal processes, couriered to Ms Paringatai along with advice a

statement in reply was to be lodged within 14 days. Receipt was acknowledged by signature on 8 March but there was no response.

[4] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation, its timetabling and conduct. This was set for 24 April 2013. Ms Paringatai was notified of the telephone conference through documents forwarded by courier and again receipt was acknowledged. Ms Paringatai did not participate in the call which saw the scheduling of today's investigation meeting.

[5] Given the Authority's previous experience of Ms Paringatai a document server was engaged to ensure she received the notice of hearing. It was served on 6 June 2013 but again failed to elicit a response.

[6] Given these facts I conclude Ms Paringatai is aware of the investigation meeting, yet her absence was neither advised nor explained. In the circumstances I know of no reason why I should not proceed. I choose to do so - Ms Dunn is entitled to have her claim determined and Ms Paringatai should not be allowed to avoid her responsibilities by procrastinating.

[7] Ms Dunn was employed by Ms Paringatai as a physiotherapist on 29 November 2010. She resigned on 6 October 2011 as she had not been fully paid for some 35 weeks. Ms Dunn calculates she is owed \$13,993.62 plus holiday pay of \$3,215.38.

[8] Ms Dunn tried to advance her claim through the Department of Labour but Ms Paringatai failed to respond to numerous attempts at contact and/or requests for information. That led to an application before the Authority.

[9] In its determination (1 above) the Authority ordered:

- (a) Ms Paringatai pay a penalty of \$2,000, with payment to be made to Ms Duff for forwarding to Ms Dunn; and
- (b) Ms Paringatai supply Ms Duff with a copy of Ms Dunn's employment agreement along with all time, wage and holiday records within 14 days of the determination.

[10] Ms Paringatai failed to comply with these requirements and nor has she paid any of the alleged arrears. Those failures have led to this application.

[11] Ms Dunn seeks:

- (a) Outstanding wages in the amount of \$13,993.62;
- (b) Outstanding holiday pay in the amount of \$3,215.38;
- (c) \$803.85 being the employer contribution to Kiwisaver that was not forwarded with the employees contribution;
- (d) Payment of the previously ordered penalty;
- (e) Interest on the above amounts; and
- (f) Reimbursement of her filing fee.

[12] Dealing with the arrears claim first. A document prepared by Ms Paringatai when this claim first arose concedes wages are owing but disputes the amount. Ms Paringatai appears to be of the view the underpayment is in the order of \$8,357.30.

[13] I questioned Ms Dunn about her calculations and am satisfied they accurately reflect the amount owing but, in any event, section 132 of the Employment Relations Act 2000 provides that where there is a failure to keep or produce wage records I may accept the claim unless the respondent can prove it is incorrect. Given Ms Paringatai's absence there is no evidence supporting her assessment of the debt or proof Ms Dunn's calculations are incorrect.

[14] In these circumstances I accept Ms Dunn's claim and conclude she is owed \$13,993.62. I order payment accordingly.

[15] The same rationale applies to the claim for holiday pay which means a further \$3,215.38 is payable.

[16] An employer is required by statute to match an employees Kiwisaver contribution. I am satisfied that has not occurred and that is also owing.

[17] Ms Dunn's claim the penalty has not been paid is confirmed by the Department of Labour. That remains payable.

[18] Ms Dunn seeks interest on the above amounts. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Ms Paringatai has, by failing to make payments properly due, continued to have use of money rightfully belonging to Ms Dunn. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[19] The rate to be applied is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011 (2011/177). It is currently 5%. Various portions of the outstanding amount owe from various and differing dates. The calculations are significant. That said, and with the exception of the penalty, all payments were due no later than the date of cessation and for the sake of simplicity Ms Dunn accepts that as an appropriate date from which to calculate interest. As of the date of this determination the amount payable on the wage and holiday arrears is \$1466.30.

[20] The penalty was payable no later than 13 September 2012 and Ms Dunn has been deprived of the use of that money since. That adds another \$71.78 in interest making a total of \$1538.08. That amount is payable and will increase by a further \$2.63 with each calendar day that passes between the date of this determination and payment.

[21] Finally there is the application for costs. Ms Dunn has been successful in her claim and is therefore entitled to a contribution towards the costs she incurred in pursuing it. Those costs, and Ms Dunn's claim, are however limited to the Authority's filing fee of \$71.56. I conclude it appropriate Ms Dunn be recompensed.

[22] For reasons outlined above, I have concluded Ms Dunn is owed various sums in respect to unpaid wages, unpaid holiday pay, penalties, interest and costs.

[23] Ms Paringatai is therefore ordered to pay to Ms Dunn:

- (a) \$17,209.00 (seventeen thousand, two hundred and nine dollars) gross for unpaid wages and holiday pay; and
- (b) \$803.85 being the amount of the employers contribution to Ms Dunn's Kiwisaver account; and

- (c) A further \$2000.00 (two thousand dollars) for the previously ordered penalty; and
- (d) A further \$1538.08 (one thousand, five hundred and thirty eight dollars and eight cents) being interest owing as of the date of this determination. This will increase by \$2.63 (two dollars and sixty three cents) with each calendar day that passes between 19 June 2013 and the date of payment; and
- (e) A further \$71.56 as a contribution towards Ms Dunn's costs.

[24] The above payments are to be made in full no later than 4.00pm on Wednesday 3 July 2013.

[25] In closing I caution Ms Paringatai that failure to comply with the above orders may result in further consequences including, but not limited to, the imposition of fines and/or the sequestration of property.

M B Loftus
Member of the Employment Relations Authority