

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 221
3170448

BETWEEN ANUP GAUTAM
Applicant

AND REPAIR PLUS LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Lin (Kevin) Lu for the Respondent

Investigation Meeting: 18 November 2022

Submissions received: At the investigation meeting and on 8 December 2022
from the Applicant
29 November 2022 from the Respondent

Determination: 4 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Anup Gautam was employed as an ICT Technician by Repair Plus Limited (Repair Plus) signing an individual employment agreement (IEA) on 6 March 2018 and commencing work on 8 May 2018. Mr Gautam's employment with Repair Plus came to an end on 12 August 2021 and he claims that he is owed wages for hours worked but for which he was not paid, payment for unpaid annual holidays, and payments relating to alternate holidays for working on public holidays that were not taken during his employment.

The Authority's investigation

[2] An initial case management conference was held on 29 June 2022 at which directions were made for the timetabling of written witness statements and the exchange of relevant documents. At that time, there had been no engagement with the Authority by Repair Plus despite it having been served the statement of problem lodged by Mr Gautam and having been given notice of the case management conference. There was no appearance at that case management conference on behalf of the Repair Plus. Mr Lin (Kevin) Lu, the sole director of Repair Plus, later, on 15 August 2022, advised the Authority that he did not attend because he was 'busy'.

[3] On 14 July 2022 Mr Lin (Kevin) Lu, the sole director of Repair Plus, telephoned the Authority and advised that he wanted to lodge a response to Mr Gautam's statement of problem. Mr Lu lodged a letter by way of reply to the statement of problem on 5 August 2022.

[4] On 5 September 2022 a further case management conference was held. Mr Lu attended on behalf of Repair Plus. At the case management conference, I granted leave for Repair Plus to reply or respond to the statement of problem. I also directed the parties to mediation, with their agreement, and provided a revised date by which Repair Plus could lodge any statements or provide additional information if mediation was unsuccessful.

[5] Mr Gautam provided a statement of evidence to the Authority. Repair Plus did not provide the Authority with any statements or other relevant information, other than the statement in reply, by the time it was directed to do so. On 9 November 2022 the Authority contacted Mr Lu again noting that no statements of further information had been received. The email in which that was communicated also advised that the scheduled investigation meeting would be proceeding regardless.

[6] An investigation meeting was held in Wellington on 18 November 2022. Mr Lu did not attend the investigation meeting and there was no appearance by Repair Plus, despite it having been served with notice of the investigation and reminded that the investigation meeting would be proceeding. Mr Gautam was the only witness at the investigation meeting, and I questioned him under affirmation.

[7] On 23 November 2022 Mr Lu requested that he be able to provide additional documents for consideration by the Authority. By Minute dated 23 November 2022 I granted leave for Repair Plus to provide any additional information and further documents were received on 29 November 2022. That Minute also set out a summary of evidence given by Mr Gautam at the investigation meeting to ensure Repair Plus the opportunity to respond to issues raised by Mr Gautam.

[8] Repair Plus provided a short response, together with some additional documents, on 29 November 2022. Mr Gautam, in accordance with directions previously issued, provided a response to Repair Plus's submissions on 8 December 2022.

[9] As permitted by s174C(4) of the Employment Relations Act 2000 (Act), the Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

[10] 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 submissions received.

The issues

[11] The issues requiring investigation and determination were:

- (a) Is Mr Gautam entitled to payment of wages for additional hours worked but not paid?
- (b) Is Mr Gautam entitled to payment for unpaid annual holidays?
- (c) Is Mr Gautam entitled to payment for unpaid public holidays and/or alternate holidays?

Is Mr Gautam entitled to payment for additional hours worked?

[12] Mr Gautam claims that he was underpaid by 12 hours per week for the duration of his employment, in that he worked 47 hours per week but was only paid for 35 hours per week.

[13] A default in payment of wages under an employment agreement may be recovered by action commenced in the Authority¹, and such recovery action may be commenced despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.²

[14] Mr Gautam gave evidence that he requested wage and time records from Repair Plus, but that a complete copy of the records have not been provided. Mr Gautam submitted that Repair Plus failed to produce the relevant wage and time records and that that his ability to calculate the sums he is owed has been prejudiced by that failure. Repair Plus has not shown that that evidence is incorrect. Having regard to s 132(2) of the Act, I accept the evidence provided by Mr Gautam as to the wages actually paid to him, and as to hours, days, and times worked by him.

[15] Mr Gautam claims that he commenced employment with Repair Plus on a full-time basis, that when he started he was on a restricted visa, and that Repair Plus took advantage of the situation by having him work more hours than those for which he was paid. Mr Gautam's evidence was that when he took issue with the arrangement with Mr Lu he was told that if he wanted to be paid for the additional hours then he would be asked to leave.

[16] Mr Gautam provided the Authority with an individual employment agreement (IEA) dated 6 March 2018. The IEA provides that Mr Gautam's hours would be 35 per week and would be entitled to a half hour lunch break each day. It also provided that Mr Gautam would be paid \$37,620 gross per annum, or \$723.46 gross per week.

[17] Repair Plus has not challenged the evidence of Mr Gautam as to his actual hours of work, nor has it provided evidence suggesting Mr Gautam did not work the hours he is claiming. Indeed, in the material provided by Mr Lu on 29 November 2022, Mr Lu noted acceptance that Mr Gautam worked six days a week from the commencement of his employment.

[18] Payslips produced by Repair Plus show that Mr Gautam's ordinary pay was recorded as being for 35 hours per week. Those payslips, whilst a complete record was not provided, span a period between 2 December 2018 and 25 July 2021. Each of the

¹ Employment Relations Act 2000, s 131(1).

² Employment Relations Act 2000, s 131(2).

payslips refer to Mr Gautam being paid a salary of \$723.46 and working 35 hours per week. They contain no reference to overtime worked.

[19] Mr Lu provided material in written form following the investigation meeting claiming various things, including that Mr Gautam was initially offered employment on the basis he would be paid 'annual wages' of \$37,620 working 6 days a week. Mr Lu also says that Mr Gautam requested payment be made on a 35-hour basis to meet his immigration requirements and to ensure he was paid a minimum wage of \$19.97, and that there were in fact two IEA's signed but that he has been unable to locate the other one. He says that the IEA produced by Mr Gautam was just signed for immigration purposes.

[20] Repair Plus submits that Mr Gautam worked six days per week and never complained during his employment. He also says that Mr Gautam initially offered to work without payment at all and that he paid him more than he asked for. Such assertions do not justify the failure to make correct payment of wages, nor do they excuse Repair Plus from its relevant obligations under the IEA.

[21] I accept Mr Gautam's evidence and find that he worked 47 hours per week for the duration of his employment, but that he received payment for only 35 hours per week. Consequentially, Mr Gautam is entitled to payment, at the applicable rate of \$20.67 per hour, of 12 hours per week, that being a sum of \$240.04 gross per week, for the duration of his employment.

[22] Mr Gautam worked between 8 May 2018 and 12 August 2023, a period of 1023 of his ordinary working days, or 146.14 working weeks. Mr Gautam is entitled to payment of unpaid wages for that period in the amount of \$35,079.45.

Is Mr Gautam entitled to payment for unpaid annual holidays?

[23] Mr Gautam evidence is that he took some annual leave during his employment, but that five weeks of annual leave remained owing as at the time his employment ended.

[24] Repair Plus provided a range of documents recording that Mr Gautam had requested and/or taken annual leave at various times during his employment. Those documents form an incomplete and unsatisfactory record of the relevant entitlements.

Further, the limited documents provided indicate that many of the recorded absences related to days on which Mr Gautam was ill, rather than having been on annual leave.

[25] Mr Gautam was entitled to four weeks annual leave per year in accordance with clause 8.1 of his IEA and s 16 of the Holidays Act 2003. Repair Plus was obligated to make payment of any outstanding annual holidays when Mr Gautam's employment came to an end.³

[26] I accept Mr Gautam's evidence as to there being five weeks owing. Based on his correct rate of pay and hours of work, being his ordinary weekly pay, I find that Mr Gautam is entitled to payment of \$4,857.45 for unpaid annual holidays.

Is Mr Gautam entitled to payment for unpaid public holidays and/or alternate holidays?

[27] Mr Gautam claims that he is entitled to payment for alternate days accrued as a result of having worked on public holidays, but that he did not take during his employment.

[28] Clause 8.2 of Mr Gautam's IEA⁴ provided that, in addition to any other payments, he was to be entitled to an alternate holiday when he worked any public holiday that would otherwise be a working day for him.

[29] Mr Gautam's evidence was that he did not work Christmas and Boxing Days, and that he only worked on the afternoon of ANZAC days. During the period 8 May 2018 and 12 August 2021 there were 31 Public Holidays.

[30] I accept Mr Gautam's evidence as to his working on public holidays for which he was not provided or paid for days in lieu. Having regard to Mr Gautam's evidence as to the public holidays he did not work, and the absence of reliable wages and time records, I find that Mr Gautam worked a total of 25 public holidays on days that would otherwise be working days for him.

[31] Mr Gautam, having not taken any of the alternate days, was entitled to payment for them when his employment ended.⁵

³ Holidays Act 2003, s 27.

⁴ The IEA being consistent with the requirements of the Holidays Act 2003, s 56.

⁵ Holidays Act 2003, s 60(2)(b).

[32] I find that Mr Gautam is entitled to payment for having worked on 25 public holidays at the rate of his average daily pay. I find Mr Gautam is entitled to payment for unpaid alternate holidays of \$4,047.88.

Orders

[33] Repair Plus Limited is ordered, within 28 days of the date of this determination, to make payment to Mr Anup Gautam the following sums:

- (a) \$35,079.45 arrears of wages for hours worked.
- (b) \$4,857.45 as payment for annual holidays not paid.
- (c) \$4,047.88 as payment for alternate days not taken for working public holidays; and
- (d) \$71.56 in reimbursement of the filing fee.

Costs

[34] Neither party was represented and so there is no issue as to the costs.

Rowan Anderson
Member of the Employment Relations Authority