

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 742
3206439

BETWEEN JOSIAH HARROLD
Applicant

AND SHEA EASTLAKE
Respondent

Member of Authority: Alex Leulu

Representatives: Nathan Santesso, advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 27 July 2023 in Auckland

Further information received: Further information on 25 August 2023 and 15 September 2023.
No information received from Respondent

Determination: 13 December 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Josiah Harrold was employed by Shea Eastlake as a painter and decorator on 11 July 2022. On 9 August 2022 Mr Harrold resigned from his employment after a workplace dispute with Mr Eastlake.

[2] Mr Harrold sought orders against Mr Eastlake for payment of outstanding wages and holiday pay. He also sought orders for penalties to be imposed against Mr Eastlake.

The Authority's investigation

[3] Mr Eastlake did not participate in the Authority's investigation. On 10 January 2022 Mr Harrold's statement of problem was served on Mr Eastlake's last known residential address. It was also sent to an email address provided by Mr Harrold to the Authority.

[4] Although Mr Eastlake did not file a statement in reply for this matter, he did contact the Authority by email on 23 December 2022. He asked the Authority to call him to discuss Mr Harrold's claim and he provided a phone number for him to be contacted on.

[5] On 17 January 2023 an Authority officer called Mr Eastlake to confirm whether a statement in reply would be lodged. Upon discussing the matter with both Mr Eastlake and his partner, it was agreed for Mr Harrold's statement of problem to be served again on Mr Eastlake by email. Mr Eastlake also wanted the statement of problem to be sent to his partner's email address.

[6] All notices and directions were served on Mr Eastlake at his address and by email. Since 17 January 2023, there has been no further contact or information from Mr Eastlake in response to Mr Harrold's claims. Mr Eastlake has had a fair opportunity to attend or provide information to the Authority which is relevant to the investigation and determination of this employment relationship problem.

[7] For the Authority's investigation, a written witness statement was lodged by Mr Harrold, and he answered questions under oath. His partner Nikki Harrold also attended the investigation meeting and answered questions under oath.

[8] 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 submissions received.

The issues

[9] The issues requiring investigation and determination were:

- (a) Was Mr Harrold entitled to reimbursement of the following amounts for his work for Mr Eastlake:
 - (i) \$869.20 gross for unpaid wages in accordance with his employment agreement; and
 - (ii) \$120.00 gross for unpaid annual holiday pay in accordance with the Holidays Act 2003 (Holidays Act)?

- (b) Did Mr Eastlake breach his obligations under both the Act and the Holidays Act? If so should penalties be imposed against him for failing to:
- (i) pay wages to Mr Harrold when they were due to be paid;
 - (ii) pay holiday pay due to Mr Harrold at the end of his employment; and
 - (iii) comply with s 130(2) of the Act?
- (c) For any imposed penalties, to determine whether all or part of the penalties are to be paid to Mr Harrold?
- (d) Should either party contribute to the costs of representation of the other party?

Context

Mr Harrold's initial employment

[10] Mr Eastlake operated a painting and decorating business which traded as "Shades Paint NZ". Mr Harrold first met Mr Eastlake through a friend who was working for Mr Eastlake at the time. Upon meeting Mr Eastlake, Mr Harrold worked a few days of casual work for him around April and May 2022.

[11] Shortly after, Mr Eastlake asked Mr Harrold about whether he would be interested in further work. Mr Harrold was interested and told Mr Eastlake he was eligible for the Work and Income New Zealand (WINZ) Flexi-wage subsidy. This meant he could work for Mr Eastlake with the aim of receiving the skills and experience as a painter. In return, WINZ would pay Mr Eastlake a wage contribution to assist with paying Mr Harrold's wages. Mr Eastlake agreed to employ Mr Harrold on this basis.

The agreed terms of employment.

[12] The terms of Mr Harrold's employment were set out in an individual employment agreement (the agreement). The same agreement was provided to WINZ as evidence of Mr Harrold's employment.

[13] Mr Harrold started work for Mr Eastlake on 11 July 2022. Although his agreement stated he was a casual employee, WINZ required Mr Eastlake to provide Mr

Harrold with no less than 30 hours of work a week. He was to be paid at a rate of \$21.20 gross per hour and he would receive his pay weekly.

[14] The agreement did not specify Mr Harrold's hours of work. However, Mr Harrold said his work was agreed with Mr Eastlake to occur between 7 am - 8 pm. He was to receive a text message the night before the working day to confirm the start time.

[15] Mr Eastlake was unable to drive a vehicle because he was disqualified from driving. As a result, Mr Harrold and Mr Eastlake agreed to an arrangement where Mr Harrold would drive to Mr Eastlake's home at the start of the shift. From there he would use Mr Eastlake's vehicle to drive them both to their designated worksite. At the end of the shift, Mr Harrold was to drive Mr Eastlake back to his home. Mr Harrold's hours of work started and finished when he picked up and dropped off Mr Eastlake.

Mr Harrold's work for Mr Eastlake

[16] Initially Mr Eastlake was happy with Mr Harrold's work. Mr Harrold received his first pay on 21 July 2022. Because he did not receive any payslips, Mr Harrold was unsure about which days he was paid for. He assumed his pay covered his work from 11 July 2022 to 21 July 2022.

[17] It was not necessary for this determination to set out details of Mr Harrold's work in the following weeks; except to say the work arrangement did not always go smoothly.

[18] On 10 August 2022 Mr Harrold texted Mr Eastlake saying he would no longer work for Mr Eastlake. In response, Mr Eastlake asked Mr Harrold to confirm his hours so he could arrange final payment.

[19] Mr Harrold sent Mr Eastlake his remaining unpaid hours of work. In response Mr Eastlake sent Mr Harrold a screenshot picture of a pay calculation using the IRD online pay calculation tool. The picture showed a calculation of Mr Harrold's final pay. It also included a breakdown of hours worked, holiday pay and PAYE. Mr Eastlake said he would pay Mr Harrold the amount on 12 August 2022.

[20] Mr Eastlake did not pay Mr Harrold on 12 August 2022. Instead, he disputed Mr Harrold's hours. This led to ongoing text messages between them where Mr

Eastlake also raised other issues including a claim Mr Harrold owed him for petrol money.

[21] Mr Harrold and his advocate unsuccessfully attempted to resolve the matter with Mr Eastlake. Mr Harrold then lodged his statement of problem with the Authority on 21 December 2022.

Mr Harrold's claim for unpaid wages

Unpaid wages and holiday pay

[22] Mr Harrold said he was owed unpaid wages and holiday pay for the period he had worked for Mr Eastlake. He was employed for a relatively short period of time from 11 July 2022 to 9 August 2022. During this time, he had only been paid once.

[23] Mr Harrold's claim for wage arrears was for six days work from 22 June 2022 to 2 August 2022. This equated to \$869.20 gross which is for 41 hours work multiplied by his hourly rate of \$21.20.

[24] Mr Harrold is also claiming \$120 gross in unpaid annual holiday pay. In line with the agreement, Mr Harrold was entitled to be paid annual leave as follows:

The employee will get paid holiday pay at the same time as their regular pay instead of being paid during their holidays. This is known as pay-as-you-go leave and will be paid at a rate of 8% in top of the employee's gross earnings.

[25] Together with the outstanding wage arrears of \$869.20 gross, Mr Harrold would be entitled to holiday pay equal to a further 8 per cent of his wage arrears. This amounts to \$69.54 gross.

[26] Mr Eastlake did not provide Mr Harrold a copy of his wage and time records as requested for by Mr Harrold's advocate. In absence of evidence to the contrary, Mr Harrold's account of wages and holidays (subject to the Authority's holiday pay calculation) is owing to him.

[27] Mr Eastlake must pay Mr Harrold \$869.20 gross for unpaid wages and a further sum of \$69.54 gross for unpaid holiday pay due to him at the end of his employment. This total amount of \$938.74 gross is to be paid within 28 days of this determination.

Interest on the arrears

[28] 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.

[29] It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Harrold is entitled to an award of interest on his wage arrears.

[30] Mr Eastlake is ordered to pay interest, using the civil debt interest calculator, within 28 days of this determination, interest on the sum of \$938.74 gross, being the total of arrears awarded, calculated from 10 August 2022 until the date payment is made in full.¹

Penalties

Mr Eastlake's breaches

[31] Mr Harrold had sought penalties to be imposed against Mr Eastlake for failure to provide wage and time records, non-payment of wages and non-payment of holiday pay. All three breaches by Mr Eastlake had been established. The imposition of a penalty for each breach were appropriate in this case.

[32] In accordance with the agreement, Mr Eastlake was required to pay Mr Harrold his wages. Mr Eastlake failed to meet this obligation and therefore he became liable for a penalty for this breach.²

[33] Mr Eastlake was also required to pay holiday pay to Mr Harrold at the conclusion of Mr Harrold's employment.³ He failed to pay the holiday pay and as a result he breached the requirements of the Holidays Act and became liable to the imposition of a penalty.⁴

[34] Because Mr Harrold had not received his outstanding wages and holiday pay, he needed to take steps to quantify what he was owed. As an employer, Mr Eastlake

¹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

² Employment Relations Act 2000, s 134.

³ Holidays Act 2003, s 27.

⁴ Holidays Act 2003, s 75 & 76.

was required to keep wage and time records for Mr Harrold and to provide a copy of the records to Mr Harrold when requested.

[35] On 30 September 2022 Mr Harrold's advocate requested a copy of Mr Harrold's wage and time records. No records were provided by Mr Eastlake. Consequently, Mr Eastlake also became liable for the imposition of a penalty for failing to provide wage and time records to Mr Harrold.⁵

Penalty amounts to be imposed

[36] Mr Eastlake was liable to a maximum penalty of \$10,000 for each breach. The Act sets out several factors as a guide to determine the appropriate level of penalty for each given case.⁶

[37] Penalties were appropriate in this case because Mr Harrold was entitled to be paid his wages and holiday pay when it was due to be paid. Mr Eastlake's failure to pay these amounts meant Mr Harrold suffered financial hardship. Because he was not paid his wages, Mr Harrold said his family faced significant hardship at the time and had to negotiate payment of their rent with their landlord. They also relied on family for food.

[38] Mr Eastlake's failure to adequately respond to Mr Harrold's attempts to resolve his claims also meant Mr Harrold had to invest time, cost and energy to pursue what was owed to him. This was made even more difficult for two reasons. Firstly, Mr Eastlake's failure to provide wage and time records made it hard for Mr Harrold to quantify exactly what he was owed. Secondly, Mr Eastlake had failed to adequately communicate with Mr Harrold to resolve his disputes. This included Mr Eastlake's failure to participate in the Authority's investigation.

[39] Penalties are necessary to deter Mr Eastlake and others from similar conduct in the future. Considering consistency with penalties imposed in similar cases and the accumulative amount imposed for all of Mr Eastlake's breaches, the appropriate penalty to be imposed would be \$2,000 for each breach.

⁵ Employment Relations Act 2000, s 132(2).

⁶ Employment Relations Act 2000, s 133A.

[40] The total penalty to be imposed on Mr Eastlake is \$6,000 for breaches of both the Act and the Holidays Act. Mr Eastlake is to pay half the penalty amount of \$3,000 to Mr Harrold. The other half of \$3,000 is ordered to be paid to the Authority for transfer to a crown bank account. The total penalty is to be paid within 28 days of the date of this determination.

Costs

[41] Having succeeded in his application Mr Harrold was entitled to an order requiring Mr Eastlake to contribute to his costs of representation. No appropriate settlement offers were made that might have required an upward or downward adjustment of the costs awarded. On the Authority's usual tariff for an investigation meeting, requiring less than a half day of investigation meeting time, the appropriate order of costs was \$2,250.⁷

Orders

[42] For the reasons given in this determination, Mr Eastlake must pay the following sums to Mr Harrold within 28 days of the date of this determination:

- (a) \$938.74 gross as arrears of wages and holiday pay, less any applicable tax;
- (b) Interest on the arrears amount from 10 August 2022 to the date of payment, calculated using the Civil Debt Interest Calculator;
- (c) \$2,250 as a contribution to costs of representation Mr Harrold incurred in pursuing his grievance; and
- (d) \$71.56 in reimbursement of the expense of the filing fee paid to lodge his application in the Authority.

[43] In the event the sums awarded are not paid, Mr Harrold may enforce the orders for payments to be made to him by use of the procedures of the District Court under s 141(1) of the Act. If requested, a certificate of determination is to be issued for that purpose.

[44] Mr Eastlake must also pay a total penalty of \$6,000 to the Authority within 28 days of the date of this determination. On recovering the penalty, the Authority must pay:

⁷ See www.era.govt.nz/determinations/awarding-costs-remedies.

- (a) \$3,000 to Mr Harrold; and
- (b) \$3,000 to a Crown bank account.

Alex Leulu
Member of the Employment Relations Authority