

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 168
3285719

BETWEEN JONATHAN LEE KAUEGA
Applicant

AND TANIA MARTIN
Respondent

Member of Authority: Natasha Szeto

Representatives: Applicant in person
No appearance by or for the Respondent

Investigation Meeting: 17 December 2024 in Wellington

Submissions and additional information: 15 and 23 January 2025 from the Applicant
No information or response from the Respondent by 31
January 2025

Date: 21 March 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Mr Kauhega was employed by Tania Martin as a company driver in May 2023. Less than four months into the job, Ms Martin started indicating to Mr Kauhega that there was no work available. Mr Kauhega completed a day's work he was not paid for, and was not paid for three weeks when he was available for work. At the end of October Ms Martin proposed to change Mr Kauhega's employment to a contractor, which he declined and that was the end of the employment relationship. Mr Kauhega never received any paid notice. He was not paid holiday pay. This determination resolves whether Ms Martin owes Mr Kauhega wage arrears and holiday pay.

The Authority's Investigation

[2] Throughout the Authority's investigation, there was no engagement by or for Ms Martin including that no statement in reply was filed and she did not attend the Case Management Conference (CMC). I am satisfied that Ms Martin was served the Notice of Investigation Meeting in accordance with the Employment Relations Authority Regulations 2000. The Notice advised both parties that the investigation meeting would proceed on 17 December 2024 at 9:30am and that if the respondent did not attend the investigation meeting, the Authority may, without hearing the evidence from the respondent, issue a determination in favour of the applicant.

[3] Mr Kauhega and his wife and authorised representative, Ms Lal-Kauhega, attended the investigation meeting on 17 December 2024. There was no appearance by or for Ms Martin. Under clause 12, Schedule 2 of the Employment Relations Act 2000 (the Act), I was satisfied there was no good cause shown for Ms Martin's failure to attend or be represented and the investigation meeting therefore proceeded in her absence.

[4] For the Authority's investigation, Mr Kauhega lodged a written statement in advance, and both he and Ms Lal-Kauhega answered questions from me under oath. Following the investigation meeting, I issued a Minute on 13 January 2025, giving both parties an opportunity to address discrepancies in some of the records that had been provided. There was no response from Ms Martin by the deadline.

[5] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[6] The issues that the Authority is to investigate and determine are:

- (a) Whether Mr Kauhega is owed wage arrears for a day of work on 28 September 2023.
- (b) Whether Mr Kauhega is entitled to be paid for days he was available for work but no work was provided from 11 September to 20 October 2023.

- (c) Whether Mr Kauhega is entitled to a paid notice period.
- (d) Whether Mr Kauhega is owed holiday pay.
- (e) Whether Ms Martin should be ordered to pay Mr Kauhega's expenses.

[7] At the investigation meeting, Mr Kauhega confirmed he no longer seeks compensation and just wants to be paid the arrears he says he is owed. Mr Kauhega also says he does not believe he has been paid KiwiSaver correctly, but he accepts that this had not been claimed in his statement of problem and he would not pursue it before the Authority.

Relevant background

[8] Mr Kauhega entered into an Individual Employment Agreement between himself (as the Employee) and Tania Martin (as the Employer) to be a company driver. The agreement was dated 7 May 2023 and Mr Kauhega signed it on 18 May 2023. The agreement states the date of physical commencement of work is to be 22 May 2023. Ms Martin did not sign the agreement despite Mr Kauhega asking her to sign and return a copy to him. However, Schedule 3 of the agreement states that it has been prepared by Tania Martin, and is dated 7/05/23. Based on the evidence before the Authority, I find the agreement was properly entered into and was the basis for the employment relationship that followed.

[9] Relevant to Mr Kauhega's claims, the agreement contains a provision about the hours and days of work as follows:

Various Hours, Depending on Run and Run Completion. 10-12hrs Mon-Fri.

[10] It also contains the following Notice Periods:

Termination notice: 1 Week

Resignation notice: 2 Weeks

[11] The agreement contains a standard provision about Annual Holidays:

Employees are entitled to four weeks paid annual holidays per annum calculated in accordance with the provisions of the Holidays Act 2003 upon completion of 12 months continuous employment with the Employer.

[12] When Mr Kauhega started working for Ms Martin, she was the sole director of a company called Underdog Transport Limited which later changed its name to Freight Runners Limited. Ms Martin paid Mr Kauhega's wages under the company name Underdog Transport Limited up until 23 June 2023 and from 28 June 2023 under the name Freight Runners Limited. In reality, there was no change to Mr Kauhega's employment as he was employed by Ms Martin and not either company. Mr Kauhega's understanding was that Ms Martin's companies were set up as third-party contractors to the big courier companies. His continuous employment was with Ms Martin.

[13] Mr Kauhega says he was guaranteed between 50 and 60 hours' work per week under his agreement. His pay rate was \$35.00 (gross) per hour. His work generally started at 6:00am when he arrived at the depot to load packages for delivery, and ended when he had finished unloading at the depot between 5:00 pm and 5:30 pm. His agreement provided for a half hour unpaid meal break, which Mr Kauhega says he never took.

[14] Although his employment agreement referred to timesheets, Mr Kauhega says Ms Martin never asked for them. Instead Mr Kauhega would text her his hours and he was paid weekly on the basis of his total, minus income tax which Ms Martin deducted. At the beginning of his employment, Mr Kauhega told Ms Martin he would be taking two weeks' leave in October, as he was going overseas.

[15] Problems started to arise in the employment relationship in September 2023. Mr Kauhega was away from work sick on Friday 8 September. That Sunday, Ms Martin asked whether Mr Kauhega would be back at work on Monday 11 September. Ms Martin then sent Mr Kauhega the following text:

I don't have any work for you at this stage unless I can get some work through Aramex I'll have to give you 2 weeks notice im [sic] busy this afternoon we will have to deal with this tomorrow and have a meeting.

[16] At the end of the day on Monday 11 September, Ms Martin texted Mr Kauhega again to say that she was trying to organise him a run and "at this stage you're on call".

[17] On 14 September, Ms Martin said she had sourced some work for Mr Kauhega "on call from tomorrow until next Friday". Despite Mr Kauhega responding that he was very keen, the work did not eventuate.

[18] On Friday 22 September, Ms Martin texted:

We are gonna have to have a meeting on Monday so I'll ring you then there's just not even work for me at the moment but I'm taking over 2 runs at pbt which is way better than nzc runs lighter and cruiser.

[19] On 27 September, Ms Martin asked Mr Kauhega to work the following day. Mr Kauhega worked on 28 September from 6:00 am until 5:20 pm. Ms Martin thanked him by text and said he had done an awesome job. Mr Kauhega was not paid for that day. The last wages Mr Kauhega received from Ms Martin were paid on 14 September 2023 and related to work carried out the week prior (4 to 8 September).

[20] Between 2 October and 16 October, Mr Kauhega was away on his planned holiday. When he returned, he asked Ms Martin for an update on his work situation and pay. Ms Martin responded:

I'm in the process of giving you notice I'll be doing that this afternoon and then I'm trying to find the money to pay you ive got insufficient funds I need to come grab the van and sell it.

[21] The next day on 17 October, Mr Kauhega sent Ms Martin an email outlining his dissatisfaction with the situation. He asked for clarity on where his employment currently stood, and said he had been out of work since 11 September 2023 but had not received any formal notice. He asked Ms Martin to "do the right thing and provide me with my notice period and pay me what I am owed under my contract". Ms Martin responded on 17 October: "I've found some work for us". That work did not eventuate either.

[22] Mr Kauhega then asked Ms Martin for a meeting to sort out the situation. This meeting took place on 18 October 2023. Ms Martin proposed to change Mr Kauhega's role to a contractor role with less favourable conditions. This proposal took Mr Kauhega by surprise, and he declined the proposal in an email on 21 October 2023. He again asked to be paid what he was owed and for Ms Martin to "just do the right thing".

[23] Ms Martin acknowledged the email in a text on 21 October. She did not substantively respond, but said she would pick up the work van the next day. That was the last contact Mr Kauhega had with her.

Analysis

[24] The law requires Mr Kauhega to be paid for work he completed. Mr Kauhega was also entitled under the terms of his employment agreement to be provided with 10 to 12 hours' work a day from Monday to Friday. He had a notice period of one week (termination) or two weeks (resignation) under his agreement. In terms of holiday pay, Mr Kauhega was entitled to be paid 8% of his gross earnings at the end of his employment, given that he had worked for Ms Martin for less than 12 months.¹

Is Mr Kauhega owed wage arrears for a day of work on 28 September 2023?

[25] Mr Kauhega claims he worked for a day on 28 September 2023 and he was not paid for it.

[26] Relevant text messages support Mr Kauhega's claim that he advised Ms Martin of his finish time of 5:20 pm, when Ms Martin asked. Mr Kauhega followed this up on 6 October by email, and on 16 October by text message. Ms Martin's responses were that she did not have the money to pay him. Mr Kauhega's bank records demonstrate that his last pay was on 14 September 2023. The IRD records provided contain no records of payments made to him in September at all.

[27] Based on the evidence before the Authority, I accept Mr Kauhega worked on 28 September 2023 and was not paid. Based on Mr Kauhega's usual pattern of working from 6:00 am and his text confirming the finish time of 5:20 pm, I am satisfied Mr Kauhega is owed wages of \$35.00 per hour for 11.5 hours worked on 28 September, which is a total of \$402.50 (gross) and I order that to be paid.

Is Mr Kauhega entitled to be paid for days he was available for work but no work was provided?

[28] Mr Kauhega says between 11 September and 20 October 2023 he was available for work (except for days he was on annual leave) and only worked one day (28 September) for which he was not paid. He says he should have been paid for days he was available to work and was not paid.

[29] Under his employment agreement, Mr Kauhega was entitled to 10 to 12 hours of work between Monday and Friday. Mr Kauhega was available for work and

¹ Holidays Act 2003, section 23 and section 27.

expected to work between 11 September and 20 October 2023 except for two weeks when he was on annual leave and one day when he did actually work on 28 September which has been separately addressed. That leaves 19 days in the relevant period that Mr Kauhega was available for work and was not paid. His agreement says he could have expected a minimum of 10 hours' paid work for each of those days. That amounts to 190 hours at \$35.00 (gross) per hour, a total of \$6,650.00 (gross). I order that to be paid.

Is Mr Kauhega entitled to a paid notice period?

[30] Under his employment agreement, Mr Kauhega was entitled to be paid one week's pay on termination of his employment by Ms Martin or two weeks on his resignation. I find his employment was terminated when Ms Martin attempted to change his working arrangement from employment to contracting. He was not paid any notice and was entitled to one week. This amounts to 50 hours at \$35.00 (gross) per hour, totalling \$1,750.00 (gross) and I order that to be paid.

Is Mr Kauhega owed holiday pay?

[31] Mr Kauhega says he had accrued annual leave of approximately eight days and he was not paid for this. Section 23 of the Holidays Act 2003 provides that where employment ends within 12 months, annual holiday entitlements will be paid out at 8% of gross pay, minus any days paid for annual holidays.

[32] To calculate what Mr Kauhega is owed in holiday pay, it is necessary to determine what Mr Kauhega's gross pay would have been. As noted above, there is some discrepancy in the records. I conclude that the IRD record does not reflect the total amount of Mr Kauhega's earnings from his employment with Ms Martin. Based on his bank account records, Mr Kauhega earned a total of \$22,440.33 (net) which amounts to \$30,121.25 (gross). In addition, based on the arrears I have found owing for unpaid wages including his notice period, Mr Kauhega could have expected to be paid a further \$8,802.50 (gross) by the end of his employment.

[33] Mr Kauhega was entitled to be paid 8% holiday pay on the total amount earned while employed by Ms Martin and he was not paid any holiday pay. That is 8% of \$38,923.75 (gross) which amounts to \$3,113.90 (gross). I order that to be paid.

Expenses

[34] Under clause 14, Schedule 2 of the Act the Authority is able to order any party to pay such costs and expenses as the Authority thinks reasonable.

[35] Mr Kauhega was not legally represented and so is not entitled to legal costs. However, he did incur expenses of the Authority's filing fee of \$71.55 and parking costs of \$30.00 to attend the Authority's investigation meeting because of Ms Martin's non-engagement in the investigation. I consider it appropriate he is reimbursed for these expenses which are within my discretion to order. I order Ms Martin to pay Mr Kauhega's expenses of \$101.55.

Orders

[36] Tania Martin is ordered to pay Jonathan Lee Kauhega the following amounts within 28 days of the date of this determination:

- (a) \$402.50 (gross) for work on 28 September 2023;
- (b) \$6,650.00 (gross) for days Mr Kauhega should have been paid between 11 September and 20 October 2023;
- (c) \$1,750.00 (gross) notice period;
- (d) \$3,113.90 (gross) in holiday pay;
- (e) \$101.55 expenses for filing fee and parking.

Natasha Szeto
Member of the Employment Relations Authority