

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 433

5371160

BETWEEN	PANATDA MAIL Applicant
AND	PATTITA SUMTHONG First Respondent
	MOHAMED SALEM Second Respondent
	OCEAN TASTY SEAFOOD LIMITED Third Respondent

Member of Authority: Eleanor Robinson

Determination: 23 October 2014

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

[1] By determination dated 17 September 2014 ([2014] NZERA Auckland 387), the Authority found that the employer of the Applicant, Ms Panatda Mail, was Ocean Tasty Seafood Limited t/a Ayutthaya Thai Food (OTSF) during the period of her employment from 20 March 2008 until 1 July 2008.

[2] In that determination I have found that Ms Mail may have been owed monies in respect of (i) wages resulting from the payment of wages below the statutory minimum wage at the relevant time, and (ii) statutory leave entitlements.

[3] In order to be able to calculate whether there were monies owed to Ms Mail, I adjourned such calculation until Ms Mail established with the IRD exactly what rate of PAYE tax was paid on her earnings from OTSF as set out in the submitted declaration of earnings. Ms Mail has now supplied that information.

Rate of Pay

[4] Ms Mail commenced employment with OTSF in accordance with a verbal employment agreement, which provided for a net payment of \$100.00 per day, that is, net of any PAYE due on the gross pay which was to be paid direct by OTSF to the IRD as legally required. During the period of her employment Ms Mail believed that PAYE was being deducted from her gross wages and that OTSF was making payment of the PAYE to the IRD.



[5] Ms Mail's claim before the Authority as set out in the Statement of Problem was: "*for unpaid wages being the difference between what was actually paid and the relevant minimum wage*".

[6] However without confirmation of the specific amount of PAYE that should have been, or was deducted, it was not possible to determine whether or not Ms Mail's gross wage was below the relevant statutory minimum wage.

[7] Section 4A(2)(b) of the Tax Administration Act 1994 deems PAYE to be withheld when an employer pays salary or wages net of PAYE, and such deductions are effectively held in trust for the Crown.

[8] The Authority is not in any position to assess the likely taxation of an individual taxpayer, therefore I ordered that Ms Mail establish with the IRD the exact rate of PAYE which was paid, or should have been paid, on her earnings of \$100.00 net of PAYE per day or \$700.00 net of PAYE per week. Upon receipt of this information, together with the relevant proof, I would then calculate the amount due and payable to ensure that Ms Mail, who worked 7 days a week and 11 hours per day, was paid wages equal to or above the relevant statutory minimum wage.

[9] The required information has now been provided, and the IRD has confirmed in writing, that for \$100.00 net per day (\$700.00 net per week) in respect of Ms Mail's employment, and her tax coding:

To March 2008	From April 2008
Gross Wage \$916.00	\$917.00
Less PAYE <u>\$215.53</u>	<u>\$216.79</u>
Net pay <u>\$700.47</u>	<u>\$700.21</u>

[10] The slight difference reflects a change in the ACC premium included in the PAYE figure, and I have rounded, for the purposes of my calculations, the figures to reflect the net pay at \$700.00 with PAYE at \$216.00, and \$700.00 with PAYE at \$217.00 respectively.

[11] Ms Mail's employment covered the period 20 March 2008 to 1 July 2008: during the period 1 April 2007 to 1 April 2008 the NZ minimum wage for an adult was \$11.25 per hour, and during the period 1 April 2008 to 1 April 2009 the NZ minimum wage for an adult was \$12.00 per hour.

[12] Ms Mail's gross wage per hour for the period 20 March 2008 to 1 April 2008 based on wages of \$916.00 gross per week for a working week of 77 hours was \$11.90 per hour. The statutory minimum wage for this period was \$11.25 per hour, therefore for this period I find that Ms Mail's gross wage was above the statutory minimum wage.

[13] Ms Mail's gross wage per hour for the period 1 April 2008 to 1 July 2008 based on \$917.00 gross per week for a working week of 77 hours was \$11.90 per hour. The statutory minimum wage for this period was \$12.00 per hour; therefore I find that for this period Ms Mail's gross wage was \$0.10 per hour below the statutory minimum wage.

[14] The Wages Protection Act 1983 sets out the way wages must be paid, and prevents unlawful deductions from wages. Section 7-9 of the Wages Protection Act 1983 requires employers to pay wages in cash unless the employee agrees otherwise. In this case Ms Mail confirmed that she agreed to and received \$700.00 per week in cash, with the PAYE due on this amount to be paid by OTSF to the IRD. I observe that PAYE due to the IRD would be a lawful and necessary deduction from Ms Mail's gross pay.

[15] During the period 20 March 2008 to 1 April 2008, a period of 12 days, Ms Mail's gross wages are calculated as \$1200.00 paid in cash plus PAYE of \$370.29.

[16] During the period 1 April 2008 to 1 July 2008, a period of 13 weeks, Ms Mail's gross wages are calculated to be \$9,100.00 paid in cash plus PAYE of \$2,821.00. Ms Mail was paid \$0.10 gross per hour, (equating to \$7.70 gross per week) below the statutory minimum wage and therefore is entitled to an additional gross payment of \$100.10.

[17] Section 6 of the Minimum Wage Act 1983 provides that:

.....every worker who belongs to a class of workers, in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

[18] I order that OTSF pay the sum of \$100.10 gross to Ms Mail in respect of the under payment of wages during the period 1 April 2008 to 1 July 2008 calculated by reference to the statutory minimum wage for the relevant period. pursuant to s11 of the Minimum Wage Act 1983 and s131(1)(b) of the Employment Relations Act 2000

[19] The Wages Protection Act 1983 allows for lawful deductions from the gross pay of an employee, and the deduction of PAYE set by the IRD is a lawful deductions. Ms Mail agreed to receive a weekly net payment and for OTSF to pay the required PAYE (although her

agreement was not necessary as s15 of the Wages Protection Act 1983 permits compliance with other statutory provisions such as the Income Tax Act 2007).

[20] Section 11 of the Wages Protection Act 1983 provides that

1) *Subject to subsections (2) and (3), a worker may recover from that worker's employer, by action in the Employment Relations Authority, established by the Employment Relations Act 2000, in the prescribed manner,*

a) *any deduction made (otherwise than pursuant to section 6) by that employer from wages that have been paid, or but for that deduction would have been paid, by that employer to that worker, if—*

(i) that deduction was not consented to, or requested by, that worker in writing;

[21] Therefore as Ms Mail consented to the deductions made for PAYE purposes, and as the deductions were lawful, Ms Mail is not entitled to recover directly such deductions by an action in the Employment Relations Authority.

[22] Section 4A(2)(b) of the Tax Administration Act 1994 deems PAYE to be withheld when an employer pays salary or wages net of PAYE, and such deductions are effectively held by the employer in trust for the Crown.

[23] The total amount of PAYE deducted (or withheld) by OTFS of \$3,180.29 should be paid to IRD and accounted for to Ms Mail. Ms Mail confirmed in evidence to the Authority that she had not informed IRD of her OTFS earnings, and I recommend to Ms Mail that she does so now by copying this determination to IRD.

[24] In summary: Ms Mail's earnings in respect of the period of her employment at OTFS are:

	<u>20/3/ to 1/4/2008</u>	<u>1/4 to 1/7 2008</u>	<u>Total Gross</u>
Cash Payment	\$1,200.00	\$9,100.00	\$10,300.00
PAYE	<u>\$370.29</u>	<u>\$2,821.00</u>	<u>\$3,191.29</u>
Total	\$1,570.29	\$11,921.00	\$13,491.29

Under Payment of Minimum Wage_ \$100.10

Holiday Pay

[25] Section 23 of the Holidays Act 2003 deals with the calculation of holiday pay if the employment ends within 12 months, which applies in this case, stating at:s23(2): *An employer*

must pay the employee 8% of the employee's gross earnings since the commencement of employment.....

[26] I order that OTSF pay the sum of \$1,087.31 gross in respect of unpaid holiday pay, less the interim payment of \$700.00 already ordered in the determination dated 17 September 2014 ([2014] NZERA Auckland 387), making a total due and payable of \$387.31 gross.

Statutory Leave Entitlement

[27] I accepted Ms Mail's claims that she was required to and did work 4 statutory holidays during the period of her employment, namely: 21 March 2008, 24 March 2008, 25 April 2008, and 2 June 2008, but that she did not receive the financial recompense as provided under s50 1 (a) of the Holidays Act 2003, which allows for an employee to be paid at least time and a half for the hours worked on a public holiday, and s 56 and s 60 of the Holidays Act 2003 which allows for provision and payment for the alternative holiday.

[28] Ms Mail's gross wage per hour for the period 20 March to 1 April 2008 was \$11.89 per hour or \$130.80 per working day, therefore in respect of the 2 public holidays in this period, Ms Mail is entitled to be paid an additional \$65.40 per day, making a total due and payable of \$130.80 gross.

[29] Ms Mail's gross wage per hour for the period 1 April to 1 July 2008 was \$12.00 per hour or \$132.00 per working day after adjustment to the statutory minimum wage level, therefore in respect of the 2 public holidays in this period Ms Mail is entitled to be paid an additional \$66.00 per day, making a total due and payable of \$132.00 gross.

[30] Section 56 of the Holidays Act 2003 states that if an employee works on a Public Holiday that employee is entitled to another day's holiday (an alternative holiday) instead of the public holiday. Section 60 of the Holidays Act 2003 allows for payment of the alternative holiday and states:

S 60

(1) An employer must pay an employee not less than the employee's relevant daily pay or average daily pay for the day which is taken as the alternative holiday.

(2) Payment for an alternative holiday must be made—

(a) in the pay that relates to the pay period in which the alternative holiday is taken; or (b) if the employee has not taken the alternative holiday before the date on which his or her employment ends,—

(b) if the employee has not taken the alternative holiday before the date on which his or her employment ends-

(i) at the rate of the employee's relevant daily pay or average daily pay for his or her last day of employment;

[31] Ms Mail worked on four Public Holidays and is therefore entitled to four alternative holidays at \$132.00 per day making a total payable of \$528.00 gross.

[32] The total payable in respect of the Statutory Leave Entitlement is \$790.80 gross less the interim payment of \$600 ordered in the determination dated 17 September 2014 ([2014] NZERA Auckland 387), making a total due and payable of \$190.80 gross.

Summary of Payments

[33] **OTSF is ordered to pay to Ms Mail the following sums:**

- (i) An amount of \$100.10 gross in respect of the underpayment of the statutory minimum wage for the period 1 April to 1 July 2008.
- (ii) An amount of \$387.31 gross (\$1,087.31 less \$700.00 interim payment already ordered) in respect of unpaid holiday pay entitlement.
- (iii) An amount of \$190.80 gross (\$790.80 less \$600.00 interim payment already ordered) in respect of statutory leave entitlement.
- (iv) Ms Mail's oral employment agreement was that she was paid net wages in cash with the PAYE being remitted to the IRD by OTSF, therefore an amount of \$3,191.29 as PAYE due in respect of Ms Mail's employment during the period 20 March 2008 until 1 July 2008 was deemed to have been withheld by OTSF. This amount is due be paid to IRD and accounted for to Ms Mail.

Eleanor Robinson
Member of the Employment Relations Authority

