

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 514
3163464

BETWEEN	LJUBISA MIRKOV Applicant
AND	HAELTHTECH NEW ZEALAND LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Ljubisa Mirkov in person Simon Spratt for the Respondent
Investigation Meeting:	4 October 2022 by audio-visual link
Submissions received:	At the investigation meeting
Determination:	7 October 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant, Ljubisa Mirkov, worked for the respondent, Haelthtech New Zealand Limited (HNZL) as a Senior Developer from 1 January 2020 to 30 September 2020. Mr Mirkov says he was not paid his salary for two months during the time he worked at HNZL and is owed holiday pay. He says he and HNZL's former chief operating officer (COO) have previously agreed that the unpaid amount owing is \$42,002.66.

[2] HNZL accepts it owes Mr Mirkov \$42,002.66 and says it has been open with Mr Mirkov about the fact it did not have the funds to pay him, and that it is still struggling financially. It says it is endeavouring to address the payment by pursuing capital funding and business opportunities which will improve its financial position.

What has the Authority's process been?

[3] There is some procedural history to this matter to be recorded.

[4] Mr Mirkov lodged his statement of problem with the Authority on 15 February 2022. It was served on HNZL which then lodged a statement in reply on 30 March 2022.

[5] The Authority attempted to hold a case management conference on several occasions in this matter, having first offered a date of 27 June 2022 for that purpose. On a number of occasions, HNZL failed to respond to the Authority's email correspondence in a timely manner regarding setting the conference down, and at short notice advised it was unavailable to attend. On one occasion Mr Spratt, Chief Executive Officer, director and a shareholder of HNZL, advised of a family bereavement which the Authority sympathised with. As a result, a teleconference was adjourned and later set down for 6 September 2022.

[6] On 6 September 2022 Mr Spratt emailed the Authority at 9.09am stating he had emailed it earlier that week stating he had the "16th in my diary for the call" and had a family bereavement. While the Authority again sympathised with Mr Spratt, the Authority responded advising that it had not received an email earlier that week from HNZL regarding the case management conference, and the Authority intended to hold the conference at 11am as planned. The Authority advised it would then update HNZL as to any arrangements made to progress this matter.

[7] The case management conference was then held by telephone on 6 September 2022 with only Mr Mirkov in attendance. At the case management conference Mr Mirkov agreed the investigation meeting could be held by audio-visual link (AVL) on 4 October 2022. I advised Mr Mirkov he did not need to file any witness statements but if he wished to file any additional documents he could do so by 20 September 2022.

[8] On 12 September 2022 the Authority emailed the parties advising of proposed timetabling orders and sought advice from HNZL as to whether it consented to the investigation meeting being held via AVL. The Authority also made attempts to contact HNZL by telephone regarding the directions and proposed investigation meeting date.

[9] Having received no response from HNZZ, on 16 September 2022 the Authority issued directions, which were served on HNZZ via email to Mr Spratt. A notice of investigation meeting was also emailed to Mr Spratt.

[10] My directions outlined the purpose of the case management conference and the topics discussed. Relevant timetabling directions were recorded as follows:

- a. Mr Mirkov may file additional documents (if any) by 20 September 2022;
- b. HNZZ was to file witness statements (if any) by 27 September 2022;
- c. If HNZZ intended to raise its financial position as to its ability to pay the arrears straight away, it would need to file and serve recent or current financial information for the Authority's consideration by 27 September 2022;
- d. Mr Spratt should advise of HNZZ's ability to attend the investigation meeting via AVL as soon as possible.

[11] Despite a number of follow up phone calls and email correspondence to HNZZ, the Authority received no witness statements or additional information from HNZZ or confirmation regarding its availability to attend the investigation meeting on 4 October 2022.

[12] On 4 October 2022 both Mr Mirkov and Mr Spratt attended the investigation meeting via AVL (using Zoom video conferencing). Mr Spratt attended by audio only, stating he was attending using a phone and could not use video facilities. Mr Spratt consented to the investigation meeting proceeding.

[13] Mr Mirkov and Mr Spratt answered questions under affirmation from the Authority, had the opportunity to ask each other questions and made oral statements regarding matters at issue.

[14] As permitted by s 174E of the Employment Relations Act (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[15] The following are the issues for investigation and determination:

- a. Has HNZZL failed to pay an unpaid salary amount plus holiday pay of \$42,002.66?
- b. If so, should HNZZL be ordered to pay the amounts owing?
- c. Should interest be paid on any amounts owing?

Has HNZZL failed to pay an unpaid salary amount plus holiday pay of \$42,002.66?

[16] The parties are in agreement that HNZZL owes Mr Mirkov \$42,002.66 in salary and annual holiday pay arrears. This comprises of \$30,482.66 gross in salary arrears and \$11,520.00 gross in annual holiday pay arrears.

Should HNZZL be ordered to pay the amounts owing?

[17] Mr Mirkov has attempted to resolve the issue of payment with HNZZL, including having discussions with its former COO after his employment ended and attending mediation with HNZZL.

[18] It is common ground that no payments towards the agreed arrears amount have been made to date. HNZZL does not claim to have made any offers to pay the arrears by instalment over time, but rather argues payment should be deferred until it has arranged capital funding and pursued business opportunities. Mr Spratt gave evidence that HNZZL was not paid a significant amount by a client for a project which resulted in its financial difficulties, but that he is working aggressively to rectify that non-payment. Mr Spratt also stated HNZZL will likely be acquired by another company which may provide it with capital funding in order to be able to pay Mr Mirkov what it owes him.

[19] At the investigation meeting Mr Spratt asked for a further deferment or delay of this matter, by which time HNZZL would have more clarity over its future and finances, and may be in a position to make a proposal to Mr Mirkov. Mr Spratt is concerned that if the Authority makes an order for payment, it may be placed into liquidation.

[20] Mr Mirkov is entitled to payment of the arrears, none of which has been paid in the intervening two years since his employment ended with HNZZL. I do not consider it appropriate to defer my determination of this matter in all of the circumstances.

[21] I note the Authority may order payment of wages or other money to an employee by instalments, but only if the financial position of the employer requires it.¹ HNZN has not made a request to pay the amount owing to Mr Mirkov by instalments and has not provided any documentary information regarding its financial position which would satisfy me its financial position requires it.

[22] I am satisfied that an order for payment of the full amount should be made.

Should interest be paid on any amounts owing?

[23] Mr Mirkov is entitled to an award of interest on the total arrears amount. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Where a person has been deprived of the use of money to which are entitled, it is appropriate to make an award for interest. HNZN is ordered to pay interest using the civil debt interest calculator². Interest on the gross amount of \$42,002.66 is to be calculated from 1 October 2020 until the date it is paid in full.

What are my orders?

[24] Haelthtech New Zealand Limited is ordered to pay to Ljubisa Mirkov the following within 21 days of the date of this determination:

- a. \$30,482.66 (gross) in salary arrears;
- b. \$11,520.00 (gross) in annual holiday pay arrears;
- c. Interest on these amounts as calculated at [22] above.

Reimbursement of filing fee

[25] Haelthtech New Zealand Limited must also reimburse Mr Mirkov the Authority filing fee he paid of \$71.56, within 21 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority

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

² See <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.