

Attention is drawn to an order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 511
3256079

BETWEEN	MOD Applicant
AND	PRZ First Respondent
AND	AFK Second Respondent

Member of Authority:	David G Beck
Representatives:	Applicant self-represented Kirsten McLean, counsel for the Respondents
Investigation Meeting:	3 June 2025 in Christchurch
Submissions Received:	11, 26 and 29 June 2025 from the Applicant 11, 17 and 27 June 2025 from the Respondents
Date of Determination:	22 August 2025

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act) I consider it is appropriate an order that a non-publication order preventing publication of the parties' identities and certain details of their dispute be made. I use random identifiers for the parties.

[2] In order to consider imposing a non-publication order I needed to be satisfied that a sound basis exists for the exercise of the discretion the statute provides as it is apparent non-publication departs from the important principle of open justice.

[3] The full Employment Court in *MW v Spiga Ltd*¹ is a recent decision where the majority held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg*.² The majority in *Spiga* set out a twofold test:

- (1) Firstly, there must be “reason to believe that the specific adverse consequences could reasonably be expected to occur”.
- (2) Secondly, the “Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case”. The Court said this part is a weighing exercise and that equity and good conscience may be involved.³

[4] In the circumstances, I am satisfied that the above test has been met and the parties have expressed no objection to the Authority imposing the non-publication order of its own volition.

Employment Relationship Problem

[5] MOD was employed from August 2020 until August 2023 when the employment ended.

[6] AFK is sole director/shareholder of PRZ. The nature of the work was PRZ was contracted by a third party to manage and work in their business. In this context AFK employed other workers using PRZ as the vehicle for such employment.

[7] Until a bitter separation in August 2023, MOD and AFK had been in a relationship for ten years and have two children born in 2014 and 2016.

[8] MOD claims while being employed and living in a domestic relationship with AFK, the remuneration paid by PRZ was directed by AFK into a bank account that MOD had no effective control of. MOD is seeking wage arrears and wishes to join AFK as a party to the breach of nonpayment of wages to her personal bank account.

¹ *MW v Spiga Ltd* [2024] NZEmpC 147.

² *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

³ Above n 1 at [88] and [89].

[9] The action is contested by AFK, who has argued the wages in dispute while being paid into a personal bank account in his name alongside his own wages, also allowed MOD access to use a credit card linked to the bank account and that MOD used this for household expenses. AFK says he arranged to have MOD's remuneration paid to the bank account and ensured PRZ paid KiwiSaver contributions, deducted PAYE, student loan payments and an ACC levy. However, MOD was not provided with an employment agreement.

[10] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[11] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

[12] MOD and AFK provided written statements and attended the investigation meeting as did another former worker of PRZ who had worked under AFK's direction (the latter person attending by an audio-visual link).

[13] At the end of the investigation meetings submissions were timetabled and provided by the representatives with additional information.

Issues

[14] The issues the Authority must determine are:

- (a) Pursuant to s 9 of the Wages Protection Act 1993 (WPA), is there evidence of compliance with the requirement that "written" consent or a written request had been obtained to allow PRZ to pay remuneration into an account held by a financial institution that was not in MOD's name?
- (b) Did PRZ or AKL stipulate the mode of spending MOD should adhere to, in potential breach of s 12 WPA?
- (c) Can MOD pursue a recovery of wages action pursuant to s 11 WPA and/or s 131 of the Act?

- (d) Acting pursuant to s 133 of the Act, should the Authority award a penalty against PRZ as they did not provide MOD an individual employment agreement.
- (e) What account should be taken of the fact that during the employment relationship the parties were in a domestic relationship.
- (f) Should AFK be held liable for any arrears of wages or any penalty levied on the basis of his involvement in the alleged breaches identified?
- (g) An outline of how costs are to be dealt with.

What caused the employment relationship problem?

[15] PRZ was set up so that AFK could enter into a contractual relationship with a third party to live and work on-site and manage the third party's day-to-day business. This is a reasonably common practice in the industry AFK worked in and it is also reasonably common that couples jointly undertake work for third parties. AFK also indicated past managerial experience in the industry as an employee and as a contractor. AFK acknowledged an awareness of the need to provide workers with employment agreements.

[16] The couple commenced living and working at the disputed workplace in 2020 and at around end of July early August 2020, it was accepted MOD began working in the business alongside two other workers. It was resolved that MOD be paid a salary by PRZ and the gross amounts paid up to August 2023 as evidenced in MOD's IRD statements were:

- 1) Financial tax year 1 April 2020 - 31 March 2021 - \$29,423.09;
- 2) Financial tax year 1 April 2021- 31 March 2022 - \$49,824.39;
- 3) Financial tax year 1 April 2022- 31 March 2023 - \$33,230.76; and
- 4) Financial tax year 1 April 2023- 31 March 2024 - \$22,543.99.

Total: \$135,022.23.

[17] AFK says MOD insisted they were annualised as salary rather than being paid as an hourly worker. MOD rejected this saying it was an arrangement imposed by AFK. As a

result, AKL says they did not record actual hours worked. AFK also claimed MOD was a seasonal worker and suggested MOD only worked 1-3 hours a day, seven days a week between July and November each year. AFK says the casual and personal nature of the relationship and MOD's childcare responsibilities meant they did not execute an employment agreement as they did for other workers. AFK suggested they discussed spreading the salary over a year to allow MOD access to money while not working and so she could build up her Kiwisaver account. AFK also indicated throughout the course of their relationship they experienced financial difficulties with credit card debts and they did not own any major assets such as property, together.

[18] AFK described having two bank accounts with the same bank that they both operated (a current account and the credit/debit card account). He further suggested that MOD had agreed all their wages would go into the debit account and while it was in his name, it was treated as a joint account and MOD had the only debit card relating to the account. The latter also being in AFK's name but he says MOD used it for all her expenses and therefore she effectively managed the account. AFK however, conceded he also used the debit card.

[19] I note in explaining his background, AFK says he migrated to New Zealand in 2005 and had previously worked in the banking industry (albeit in foreign exchange as opposed to retail banking). I reasonably draw an inference from this and AFK's other managerial and business experience, that he generally has a more sophisticated financial understanding than MOD and would objectively be aware that this was not a formal joint banking arrangement and that he retained legal control over the account and credit card, a fact he conceded during the investigation meeting.

[20] AFK retained an accountant to manage PRZ's payroll and annual accounts. AFK says he discussed the payment of MOD's salary being spread over a year with his accountant (impliedly suggesting this was 'income splitting' for tax limitation purposes).

[21] AFK also says he set the household budget and determined what their expenses should be set at. During the investigation meeting, AFK described a view that MOD was not very good with managing money and he had to have a tight rein on spending. AFK also described a previous business experience where because of external pricing factors including a loan and labour costs, he nearly went bankrupt which left them with significant credit card debt. In summary AFK said he worked long hours the work location was fairly isolated and

MOD shopped for both of them and the children. When asked if the pattern of spending caused arguments, AFK said “yes and no” they did not spend much.

[22] Overall, AFK says MOD did not object to their income/spending arrangements until the time of their relationship breakdown between June and August 2023.

[23] The ex-worker who was AFK’s full-time 2IC between 2020 and 2022 and lived in, says he had an employment agreement and his hours of work were recorded. He corroborated AFK’s evidence that MOD was a seasonal worker (“July until approximately the end of August”) and suggested MOD would work 1-3 hours a day for seven days a week during a four-month period. The ex-worker described the AFK/MOD relationship as at times openly tense.

[24] In contrast, MOD says there was an arrangement she would be paid \$48,000 per annum but AFK advised there was no need to record her hours or when asked, provide an employment agreement. MOD says she had no part in the discussion with the accountant about fixing her wages or at any other times and no other dealings with the accountant.

[25] MOD says on average between July and January she worked 6 to 7 hours a day without any days off and during other periods would do relief work for others when they took leave for up to 8 hours a day. MOD says AFK never paid wages into her bank account and when she repeatedly raised this omission, he got angry. MOD described having worked in the same business PRZ contracted, to up till 2020 and being paid an hourly wage for her work that went into her personal bank account and she was provided an employment agreement.

[26] MOD acknowledged access to the credit/debit card and being provided with AFK’s access pin number but she had no dealings with the bank. MOD says AFK directed her spending. MOD said the card was used to pay household bills and children’s clothing but also her car finance repayments. MOD says she had no awareness of the significant credit card debt AFK alluded to, claiming she thought it had been resolved.

[27] Overall, MOD says AFK was controlling of her expenditure and she had very limited control over personal spending. AFK provided two credit card transaction records spanning the period 16 October 2020 to 27 January 2023 and 1 May 2023 to 12 August 2023. The

first statement showed 25 transactions with the same business that were evidently personal to MOD and all under \$50 per visit. The second statement was a mixture of purchases that included groceries and other items that could have been for joint or family benefit and a relatively small amount of personal expenditure pertaining to MOD.

[28] MOD provided text exchanges with AFK from early 2023, that demonstrate a deteriorating relationship and AFK being personally abusive and using crude derogatory and impliedly aggressive/controlling language. They demonstrated MOD did latterly raise issues of her pay not being paid into her personal bank account and AFK being openly dismissive of her concerns. MOD also says in leaving the household she sought assistance and support from a Women's refuge provider and the Citizens Advice Bureau.

[29] In a letter of 20 September 2023 to PRZ, MOD's then lawyer, claimed an accumulated salary of \$102,235.59 that had been declared to IRD, was payable to MOD on the basis that "no record exists of these wages actually be paid to [MOD]" and a demand was made pursuant to s 131 of the Act. A request was made for wages, time and holidays records and an employment agreement.

[30] PRZ's lawyer responded by letter of 25 September, counter suggesting MOD only worked 3 hours per day on average between July to November and had been overpaid due to the impact of the salary splitting arrangement as AFK had reduced his wage compared to his proportionate hours worked. The letter asserted MOD had agreed to the arrangement and that "albeit was in [AFKS] name" it was effectively their joint account. They noted both salaries were then paid to the credit card account that MOD had access to and also the joint wages were used to reduce pre-existing debt from a previous business difficulty. It was also noted family expenses such as power and rent were paid from PRZ's business account and car loan payments pertaining to MOD's vehicle were made before the transfer of her wages to the credit account.

[31] MOD's lawyer responded further on 27 September, generally contested that MOD had given no consent to the arrangements in dispute and the full, identified arrears were sought.

[32] The dispute remained unresolved and an application was made to the Authority of 9 October 2023. An unsuccessful directed mediation occurred by audio visual link in

December 2023 due to there being a Protection Order in place. MOD then asked the matter to be paused before the Authority held directions teleconference on 29 January 2025 and an 'in person' investigation meeting was then scheduled on 3 June 2025.

[33] After the investigation meeting concluded, AFK through counsel, provided the Authority with video recordings of MOD in dispute with him and alleged matters that I was unable to verify and were frankly not the business of the Authority as they did not assist with me resolving the compensatory claims made by MOD. In order to resolve MOD's expressed employment relationship problem, I now work through the identified issues.

Issue 1 - Was there written agreement on the manner by which MOD would be paid?

[34] Other than the conflicting evidence about whether consent was obtained to pay both parties wages into one account and to 'annualise' MOD's wages, I was provided with no evidence of a written agreement authorising PRZ to pay MOD's wages into a bank account solely in AFK's name. From the evidence it was reasonably clear AFK directed this action utilising PRZ's accountant and that it benefited AFK by spreading his tax liability and provided him with effective control over the money paid to MOD.

[35] I find s 9 WPA was not complied with. It relevantly states:

9 Agreement as to manner of payment of wages

- (1) An employer may,-
 - (a) with the written consent of a worker; or
 - (b) on the written request of a worker;-

Pay to that worker by postal order, money order, specified cheque, or lodge-ment at a financial institution to the credit of an account standing in the name of that worker or in the name of that worker and some other person or persons jointly, any wages that have become payable to the worker.

Issue 2 – Did PRZ or AFK specify the mode of MOD's spending?

[36] The evidence including primarily AFK'S oral evidence was suggestive of AFK placing restrictions on MOD's expenditure. The evidence was not wholly conclusive as I have weighed up AFK's evidence that this involved effectively how a family should budget and AFK suggested his approach was to address debt issues. I formed the impression from the evidence that budgetary issues were not jointly decided and were a source of tension in

the relationship. However, I was provided no documentation around PRZ or AFK's specific financial situation. In addition, it was apparent that MOD lacked autonomy in being allowed to make decisions on personal expenditure from her own earnings.

[37] I find there was no compliance with s 12 WPA that relevantly states:

12 Employer not to stipulate as to mode of spending wages

No employer shall impose any requirement on any worker as to the place or manner in which or any person with whom that worker shall expend wages received by that worker, or dismiss any worker on account of any place or manner in which or any person with whom the worker expends those wages.

Issue 3 – Can MOD pursue a wages recovery action?

[38] While the parties did not sign an employment agreement it was not contested that MOD entered an employment relationship. If I find that there was a default in the payment of wages, s 131 of the Act is the appropriate vehicle for the recovery of arrears of any wages.⁴

Issue 4 – Should a penalty be imposed for PRZ's failure to provide an employment agreement?

[39] MOD seeks a penalty under s 63A(3) of the Act be imposed for the breach of the statutory requirement to provide an employment agreement at the commencement of employment. AFK admits an awareness of the need to provide workers with employment agreements and evidence disclosed he did so for other workers but due to the domestic relationship and from his perspective, casual nature of the engagement, he did not turn his mind to the provision of an employment agreement.

[40] In the wider circumstances I find it is not appropriate to levy a penalty for statutory non-compliance but observe that imposing a level of formality although avowedly artificial when parties work closely together, is a good idea to avoid disputes over entitlements and legal rights should a personal relationship breakdown. Likewise, obligations to keep wage, time and holidays records essentially avoid disputation.

⁴ Employment Relations Act 2000, s 131.

Issue 5 – what account should be taken of the parties’ domestic relationship?

[41] The Employment Court in *Dillon v Tullycrine Ltd* concerning the nature of an employment relationship observed in the context of a “family arrangement”:

.... the Courts have recognised that there is a presumption of fact against an intention of creating legal relations. This presumption derives from experience of life and human nature which shows that, in such circumstances, men and women usually do not intend to create legal rights and obligations but intend to rely solely on family ties of mutual trust and affection. ⁵

[42] However, the court (Judge Holden) while highlighting that each case needs to be carefully considered in context, immediately qualified the above statement by acknowledging that “there are circumstances where one family member is vulnerable to exploitation by others by virtue of the family relationship”. ⁶

[43] In the circumstances, there was evidence that MOD had experience in the industry and had been working as an employee for the third party prior to being engaged by AFK. I am also satisfied on the evidence provided that MOD was vulnerable and that AFK was a dominant and controlling party in the employment relationship.

[44] I find that in this context, MOD was entitled to more autonomy over the terms of her employment relationship and control over her own earnings despite the family relationship.

Issue 6 – Is AFK liable for any wage arrears owed to MOD?

[45] PRZ was incorporated on 17 February 2012 and AFK is listed as its sole director and shareholder. At the time of issuing this determination the New Zealand Companies Register notes PRZ is in the process of being removed from the register. The industry it operates in is described and the period for objection to such has lapsed.

[46] On 4 October 2023, AFK registered a new company and he is listed as the sole director and shareholder. The industry it operates in is described in terms identical to PRZ.

[47] AFK during the investigation meeting openly conceded he formed the new company and has taken steps to wind down PRZ to avoid MOD’s claims. He also indicated his new

⁵ *Dillon v Tullycrine Ltd* [2020] ERNZ 125 at [30] citing *Jones v Padavatton* [1969] 1 WLR 328 (EWCA) at 332.

⁶ Above at [31].

company is engaged in the same contract work as undertaken when MOD was employed. Effectively he described it as I “just changed the name of the business”. AFK argued MOD was employed by PRZ and by implication cannot recover any arrears from the company as MOD did not object to its removal from the companies register or seek to have the company restored.

[48] In contrast, MOD seeks to have AFK as sole director and shareholder joined as a second respondent to these proceedings and in the event the first respondent (PRZ) is unable to meet any orders of the Authority, then AFK be ordered to meet any awards granted to MOD. When represented, MOD’s application to the Authority suggested this claim was feasible in accord with sections 142W,142X and 142Y of the Act.

[49] If I find that PRZ was MOD’s employer then MOD cannot proceed to make a claim against the company unless it is restored to the Companies register.

[50] I am convinced on the evidence that AFK is a person involved in a breach of minimum standards pursuant to the definition set out in s 142W(1) (a)-(d) of the Act being generally a failure to ensure MOD was paid an appropriate minimum wage under the Minimum Wage Act 2003 for the identified hours worked and holidays under the Holidays Act 2003.

[51] I find it is appropriate in the circumstances to grant MOD leave to recover the identified arrears below from AFK in his personal capacity pursuant to 142Y of the Act, that relevantly states:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee’s employer any wages or other money payable to the employee if –
 - (a) There has been a default in the payment of wages or other money payable to the employee; and
 - (b) The default is due to a breach of employment standards; and
 - (c) The person is a person involved in the breach within the meaning of section 142W.

[52] This finding is reinforced by an alternative view of the unusual facts in this employment relationship problem that do not evidence an employment relationship between MOD and PRZ as they have not as an entity at any time fully remunerated MOD.

[53] It is open to the Authority as an alternative finding, to consider that AFK employed MOD directly in his personal capacity and is liable for arrears owed. There was no employment agreement in place; MOD had no say in the arrangement made by AFK to pay both their annualised salaries into AFK's personal bank account and the only access MOD had to money for family expenditure was at the fiat of AFK allowing her to access his bank credit card.

Issue 7 - Assessment of Remedies

[54] Given the above finding MOD is entitled to consideration of compensation for arrears of wages not paid to her personal account for her own exclusive use.

[55] In the absence of any wage and time records, I am charged with assessing what would be a fair and reasonable approach to the wage arrears claimed. The total amount claimed due in underpaid wages was not conceptually well-established as it did not relate to the hours worked that MOD accepts was seasonal.

[56] Since no wage time and holidays records were kept, s 132(2) of the Act and s 83(4) Holidays Act 2003 apply, so that the evidence given by MOD may be accepted but must be the subject of careful assessment as to its reasonableness in all the circumstances that included the sharing of income and living costs.⁷

[57] In the circumstances, I find that it is equitable to resolve the employment relationship problem by awarding MOD unpaid wages which in the absence of an employment agreement I will use the applicable at the time minimum wage for calculating arrears owed. I accept the employment was seasonal and amounted to four months each year for four years (with one month in the final year) which is a total of 52 weeks. The calculation is broken down as follows:

⁷ *Shah Enterprise NZ Limited and Sapan Jagdishbhai Shah v A Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177, EMPC 1/2021 at [26].

- 1) 2020 – 16 weeks @ 28 hours per week @ applicable adult minimum wage (AMW) rate of \$18.90c per hour = \$8,467.20 (gross).
- 2) 2021 – 16 weeks @ 28 hours per week @ applicable AMW of \$20.00 per hour = \$8,960.00 (gross).
- 3) 2022 – 16 weeks @ 28 hours per week @ applicable AMW of \$21.20 per hour = \$9,497.60 (gross).
- 4) 2023 – 4 weeks @ 28 hours per week @ applicable AMW of \$22.70 per hour = \$2,542.40 (gross).

Total = \$29,467.20 (gross).

[58] I also find that it is appropriate to compensate MOD for holiday pay owed at 8% on the total amount due which is \$2,357.38 (gross).

[59] I have also considered AFK's limited evidence of an ongoing difficult financial situation and am satisfied in all the prevailing circumstances that it is appropriate to exercise the Authority's discretion under s 123(2) of the Act to order the arrears owed should be paid by six equal monthly instalments.

Outcome/Orders

[60] I have found that:

- (a) AFK is personally liable for default in the payment of wages and other monies due to MOD by failing to pay MOD's wages into her personal account and he owes wage arrears.
- (b) AFK must pay MOD the sums below in six equal monthly instalments with the first instalment falling due on Monday 5 October 2025 and each instalment one month thereafter on the first Monday of each month, with the last payment falling due on Monday, 2 March 2026:
 - (i) \$29,467.20 (gross) wage arrears pursuant to s 131 of the Employment Relations Act 2000; and

(ii) \$2,357.38 (gross) holiday pay.

Costs

[61] Costs are reserved.

[62] The parties are strongly encouraged to resolve any issue of costs between themselves.

[63] If the parties are unable to resolve costs, and an Authority determination on costs is needed, MOD may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum AFK will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[64] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

David G Beck
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1