

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 31  
3038558

BETWEEN

RAVNESH NAIDU  
Applicant

AND

SWEET PASTRY  
WHOLESALEERS LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person  
No appearance for Respondent

Investigation Meeting: 21 January 2019

Oral Determination: 21 January 2019

Record of Oral  
Determination: 23 January 2019

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**DETERMINATION OF THE AUTHORITY**

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**A. Mr Naidu has succeeded in his claim for arrears of wages. Sweet Pastry Wholesalers Limited is ordered to pay to Mr Naidu the following amounts under section 131 of the Employment Relations Act 2000 within 14 days of the date of this determination:**

- a) \$17,231.22 for unpaid wages;**
- b) \$2,151.08 for unpaid holidays;**

c) **\$290.36 in recovery of mileage allowance.**

**B. Sweet Pastry Wholesalers Limited is ordered to reimburse the filing fee of \$71.56 within 14 days of the date of this determination.**

#### **Employment relationship problem**

[1] Mr Naidu worked as an Indian Chef for Sweet Pastry Wholesalers Limited from 3 July to 5 December 2017. Mr Naidu claims he has not been paid all of the wages owed to him including for his notice period, his holiday pay and for his mileage.

[2] Mr Naidu's employment was subject to the terms of a written employment agreement signed by the parties on 15 May 2017.

#### **Procedural history**

[3] Mr Naidu lodged his statement of problem with the Authority on 6 September 2018. Ms Shalini Ram is the Managing Director and sole shareholder for Sweet Pastry. Ms Ram was asked to confirm her preferred address for service. After confirming the Authority should use her email address the statement of problem was served using the email address on 10 September.

[4] Despite being out of time to lodge its statement in reply, Ms Ram applied for an extension to lodge the statement in reply on 3 October. The extension was granted and the statement in reply was to be lodged and served by 12 October 2018. A copy of the applicable form was emailed to Sweet Pastry for its completion.

[5] By 15 October 2018 no statement in reply had been received from Sweet Pastry. In order to progress the matter I directed that the matter be set down for an investigation meeting on 29 November. Both parties were provided with the opportunity to object to the proposed hearing date.

[6] Mr Naidu was unable to attend the investigation meeting on 29 November due to other work commitments. A new date of 21 January 2019 was scheduled for the investigation meeting.

[7] Ms Ram emailed the Authority on 14 November seeking a further extension to lodge the statement in reply. I granted an indulgence by allowing the extension and leave to respond or reply out of time. A third copy of Form 3 was emailed to Mr Ram. The statement in reply, due on 29 November was not lodged.

[8] The parties had not attended mediation. Given the engagement by Sweet Pastry in November the parties were referred to mediation which was set down for Friday 18 January. Mediation did not take place. On the morning of the mediation Ms Ram notified Mediation Services that she was not available.

[9] At the commencement time of the investigation meeting Sweet Pastry failed to attend or be represented. This is despite the Authority sending an email to Ms Ram at 9.00 am reminding her of the scheduled investigation meeting. The Authority Officer contacted Sweet Pastry by phone at 10.26 am to ascertain Ms Ram's intentions regarding her attendance at the investigation meeting. Ms Ram contacted the Authority at 11 am and advised the Authority Officer that she would await the determination. Later that morning Ms Ram emailed the Authority advising that she was unable to attend due to her son's health.

[10] I am satisfied Sweet Pastry was served the Notice of Investigation Meeting. On 13 November Ms Ram confirmed to the Authority that 21 January for the investigation meeting was "okay" for Sweet Pastry.

[11] Despite all of the opportunities provided to Sweet Pastry to engage in the Authority's processes it has failed to do so. As provided in clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act) I proceeded to act fully in this matter as if Sweet Pastry had engaged in this process or was represented.

### **Issues**

[12] In order to resolve Mr Naidu's employment relationship problems I must determine what, if any, arrears or wages and other money is owed to him.

[13] 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 orders made as a result. It has not recorded all evidence received.

### **Arrears of wages**

[14] Mr Naidu claims he has not received payment for all wages and holiday pay owed to him and also seeks payment of two weeks' notice.

[15] Sweet Pastry did not require Mr Naidu to complete time sheets. Instead Mr Naidu sent a text each week advising Ms Ram of the number of hours he had worked that week. During his employment Mr Naidu maintained his own records of the times he worked each day for this purpose. The Authority has been provided with a copy of these records. I am satisfied they are an accurate record of the dates and times Mr Naidu worked for Sweet Pastry.

### ***Unpaid wages***

[16] The employment agreement provided for payment of a salary of \$52,000 per annum and 45 hours work each week to be worked Monday to Friday inclusive. Mr Naidu was entitled to take a 30 minute lunch break each day at 1.00 pm.

[17] Despite agreeing that the days of work would be Monday to Friday, Mr Naidu was required to work Saturdays and sometimes worked on a Sunday. At the time the employment agreement was entered into the parties both anticipated Mr Naidu would work 45 hours a week. I have concluded the salary of \$52,000 must have been struck with the agreed number of hours in mind.

[18] During his employment Mr Naidu received payment of his wages on an adhoc basis. Mr Naidu often went without payment for a number of weeks. On the limited number of occasions Mr Naidu received payment of his wages Sweet Pastry did not use the agreed salary rate of \$1,000 per week when calculating Mr Naidu's wages. Instead it calculated and paid his wages using an hourly rate of \$17.50 for each hour worked.

[19] The total net wages paid to Mr Naidu during his employment equated to \$7,380.94. Using the tax calculator on the Inland Revenue's website I have calculated this as a gross amount of \$9,657.28.

[20] Mr Naidu was entitled to receive the payment of his wages at the contracted amount. Mr Naidu worked for 23 weeks. He should have been paid a total of \$23,000 gross for the hours he worked on Monday to Friday.

[21] The employment agreement does not specify what payments will be made to Mr Naidu for hours worked in excess of the 45 or on Saturdays and Sundays. In the absence of any evidence to the contrary I have concluded that payment for work carried out on a Saturday and Sunday is additional to the hours covered by the annual salary. Mr Naidu worked an additional 175 hours on Saturdays and Sundays amounting to unpaid wages of \$3,888.50. I have calculated this by using an hourly rate of \$22.22 which is Mr Naidu's salary divided by the weekly hours agreed to in the employment agreement.

[22] In total Mr Naidu should have received payment of wages amounting to \$26,888.50. I have calculated Mr Naidu was paid wages during his employment totalling \$9,657.28 gross. Mr Naidu is entitled to recover the outstanding balance of \$17,231.22 gross. Sweet Pastry Wholesalers Limited is ordered to pay to Mr Naidu the sum of \$17,231.22 gross within 14 days of the date of this determination.

### *Notice*

[23] The employment agreement required two weeks' notice to terminate the employment relationship. Mr Naidu seeks payment of two weeks' notice. He was given notice on 21 November, which was confirmed in a text message on 23 November that his employment would terminate on 5 December.

[24] Mr Naidu was required to take paid annual leave from 21 November until his employment ended on 5 December. The leave was in advance of his entitlement falling due as Mr Naidu had not worked 12 months and so he did not have any entitlement to paid holidays.

[25] Section 20 of the Holidays Act 2003 provides for an employer to allow an employee to take an agreed portion of the employees annual holidays in advance. The requirement of agreement is essential. An employer cannot compel an employee to take annual leave in advance.

[26] I find on the balance of probabilities there was no agreement Mr Naidu would use anticipated leave instead of working out his notice period. This requirement was forced on him by Ms Ram.

[27] In any event no payment was made by Sweet Pastry for the last two months of Mr Naidu's employment. I have concluded that the time worked between 21 November and 5 December should not be counted as annual leave. I have taken this two week period into account when calculating Mr Naidu's outstanding wages.

### ***Holiday Pay***

[28] Mr Naidu has not received any payment for holiday pay. His employment ended within 12 months. Under s 23 of the Holidays Act Mr Naidu is entitled to recover an amount equal to 8 percent of his gross earnings. Taking into account his arrears of wages and the wages paid to him during his employment Mr Naidu's total gross earnings were \$26,888.50.

[29] Sweet Pastry Wholesalers Limited is ordered to pay to Mr Naidu 8 percent of his gross earnings in the sum of \$2,151.08 gross within 14 days of the date of this determination.

### **Mileage**

[30] During his employment Mr Naidu used his own vehicle to pick up and drop off supplies. Sweet Pastry and Mr Naidu agreed that he would be reimbursed for his mileage at the rate of 0.77 cents per kilometre. Mr Naidu kept a record of his mileage which amounts to 506.96 kilometres.

[31] Mr Naidu received two payments of \$50 during his employment as part payment of the mileage. He claims the balance of \$290.36.

[32] Mr Naidu is entitled to recover mileage for travel undertaken in his own vehicle. Sweet Pastry Wholesalers Limited is ordered to pay to Mr Naidu the sum of \$290.36 within 14 days of the date of this determination.

### **Costs**

[33] Mr Naidu has been successful in his claims. He is entitled to be reimbursed his filing fee on this matter. Sweet Pastry Wholesalers Limited is ordered to pay to Mr Naidu the sum of \$71.56 within 14 days of the date of this determination.

### **Certificate of determination**

[34] Pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000 Naidu is to be provided with a certificate of determination, sealed with the seal of the Authority recording that within 14 days of the date of this determination, Sweet Pastry Wholesalers Limited is to pay Mr Naidu:

- unpaid wages and holiday pay of \$17,231.22 gross under s 131 of the Employment Relations Act 2000;
- unpaid holiday pay of \$2,151.08 under s 131 of the Employment Relations Act 2000;
- unpaid mileage allowance of \$290.36 under s 131 of the Employment Relations Act 2000;
- costs of \$71.56.

Vicki Campbell  
Member of the Employment Relations Authority