



# New Zealand Employment Relations Authority Decisions

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## Orduna v Dotcom (Auckland) [2016] NZERA 628; [2016] NZERA Auckland 83 (11 March 2016)

Last Updated: 30 March 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 83  
5518470

BETWEEN	PAN FILO J ORDUNA JUNIOR First Applicant
	JOHN RYAN TACTAQUIN Second Applicant
	RUTH NOLASCO RELLEVE Third Applicant
A N D	KIM DOTCOM Respondent

Member of Authority: James Crichton

Representatives: Paul Dale with Edwin Telle, Counsel for Applicants

Ron Mansfield with Andrew Schirnack, Counsel for

Respondent

Investigation Meeting: 12 December 2014, 20 March 2015, 13 April 2015, 30-31 July 2015 and 20 August 2015 at Auckland

Submissions Received: 17 December 2015, 3 and 4 March 2016 from

Applicants

2 and 7 March 2016 from Respondent

Date of Determination: 11 March 2016

### SECOND DETERMINATION OF THE AUTHORITY

#### History

[1] In my first determination of the Authority between these parties issued as [2015] NZERA Auckland 377 on 1 December 2015, I set out a detailed chronology of the history of this matter and I do not propose to repeat that in the detail that I have already provided. It is sufficient for present purposes to sketch the highlights.

[2] A statement of problem was filed by the applicants on 12 September 2014 and a statement in reply filed by Mr Dotcom on 29 September 2014.

[3] The evidence of the applicants was taken on 12 December 2014. Mr Dotcom did not appear but was represented by counsel who had a watching brief only.

[4] The matter proceeded again on 20 March 2015 and continued thereafter at various dates until a final hearing of evidence on 20 August 2015.

[5] My first determination on this matter concerned itself exclusively with two preliminary questions. The first was whether the *forum conveniens* is the jurisdiction of Hong Kong or New Zealand and second that Mr Dotcom was either not the employer at all or in the alternative was a joint employer with his now estranged wife, Ms Mona Dotcom.

[6] In respect of the *forum conveniens* argument, I concluded that New Zealand was the forum of convenience and not Hong Kong and in respect of the identity of the employer, I concluded that Mr Dotcom was the only employer.

[7] That first decision of mine has gone on challenge to the Employment Court and because of that fact, I had been asked by Mr Dotcom's advisers to stay my hand in respect of this substantive determination pending a disposition of the challenge by His Honour the Chief Judge in the Employment Court.

[8] That application by Mr Dotcom's representatives was opposed by counsel for the applicants who argued that the proper course was for the Authority to dispose of all the matters before it and then if there were a challenge on the substantive decision of the Authority, that could, at the Court's discretion, be consolidated with the first challenge.

[9] I decided that the proper course was to dispose of the matter in its totality in the Authority and then, as counsel for the applicants has already proposed, if there were to be a challenge to the present determination, it is a matter for the Court's consideration as to whether that fresh challenge should be consolidated with the existing challenge.

### **Employment relationship problem**

[10] Each of the three applicants claims they were unjustifiably dismissed by Mr Dotcom and each claims they are owed arrears of wages. Because of the different factual matrix in each case, it will be convenient if the Authority deals with each of the applicants separately. This is so notwithstanding the extensive common ground between them and I shall endeavour not to repeat material that has already been covered, either earlier in this determination or indeed in the first determination of the Authority.

### **Mr Orduna's claim**

[11] There is uncontroverted evidence that Mr Orduna entered into an employment agreement with Kim Dotcom around 1 December 2010 and that Mr Orduna was employed as a butler, was paid HK\$20,000 per month and was required to work a six day week Monday through Saturday commencing at 7.30am and concluding at

5.30pm. There was provision for the employer to change the hours of work.

[12] Mr Orduna's evidence is that because of what he describes as Mr Dotcom's "*very erratic sleeping pattern*", he (Mr Orduna) regularly worked hours beyond those contemplated by the employment agreement.

[13] Of course, as I have just noted, the employment agreement does provide for flexibility at the direction of the employer. A signal dispute between the parties is just how much extra time Mr Orduna (and his co-applicants) worked beyond the hours contemplated in the main hours of work provision in the document.

[14] Moreover, Mr Orduna accepted in cross-examination by Mr Mansfield both that there was a right of the employer to vary hours (the provision I have just alluded to) and that it was common for butlers to be working when their principal was working.

[15] In any event, there is no claim by Mr Orduna for any additional payment in the first year of the employment, that is up until the date of the raid by New Zealand authorities on the so-called Dotcom mansion north of Auckland which took place on 20 January 2012.

[16] As a consequence of that raid, Mr Dotcom was incarcerated for a period of about a month and Ms Mona Dotcom took over some of the employer responsibilities. But as I have already determined in my first determination, I am satisfied that she did that not because she was taking over as employer but because there were various obligations on her husband as employer which needed to be fulfilled notwithstanding the fact that he was unable to fulfil them because of his incarceration.

[17] Again, it is common ground that while Mr Dotcom was incarcerated, money became tight and there were difficulties paying the totality of the salaries of the household staff, either in part or at all. This was because Mr Dotcom's assets were

frozen as a consequence of the actions of the New Zealand authorities consequent upon the raid.

[18] According to Mr Orduna, at the time of the raid, there were “*about 45 household staff*” and a total of around 90 staff for the whole operation.

[19] Because of the difficulty in paying staff, an opportunity to leave the employment was granted at this time and taken up by the large majority of the staff then employed.

[20] Concentrating on the “*inside*” staff, which according to Mr Orduna totalled 45 prior to the raid, four security guards, two body guards and nine of the Philippino household staff (including all of the applicants) decided to remain in the employment.

[21] Mr Orduna maintains that one of the consequences of this dramatic reduction in staff was the need to work extended hours after the raid and his evidence is that certainly in relation to his own position, he worked without pay and worked “*very long hours and seven days a week*”.

[22] Mr Orduna says that there was the first of three meetings between Mr Dotcom and staff held in February 2012 wherein, even on Mr Orduna’s evidence, the promises Mr Dotcom is alleged to have made amounted only to restoring wages unable to be paid during the period of his incarceration and allegedly a promise to pay for “*extra hours we worked*”. Mr Orduna says that Mr Dotcom said at the February 2012 meeting that “*we would be paid for every hour we worked over and above our hours set in our employment agreement*”.

[23] Mr Dotcom’s evidence on the point is directly contrary to that. He refers to discussions with staff and in the context of confirming his promise to restore staff salaries as soon as his income stream permitted, he had this to say in his evidence to the Authority:

*We told the staff that we expected their salary rates to return to the normal rate once the financial situation improved. We did not make a promise as to when this would occur. We also did not promise that we could pay for any additional hours they worked, if they did. They were effectively still to be on a salary.*

[24] Nor does Mr Dotcom accept that staff members such as Mr Orduna worked the sort of extensive hours that he claimed in his evidence. On this point, Mr Dotcom’s evidence is as follows:

*I do not accept that they (the staff) ever worked 24 or 48 hours as claimed. However they did on occasion work up to 10 hours a day. Phil [Mr Orduna] was on call all day on his days on. They had free board and lived at the house, so they were there 24 hours a day, but not actually working. On their time off they were free to leave or to do other activities.*

[25] The evidence Mona Dotcom gave to the Authority’s investigation meeting is consistent with the evidence of Kim Dotcom despite the couple being estranged. She confirmed in her evidence Mr Dotcom’s recollection of the initial meeting with staff early in 2012 (after his release).

[26] Ms Dotcom also was very clear, when being cross-examined by Mr Mansfield, that Mr Orduna might work up to 10 hours in one day but “*would never be required to work 14 hours a day or more and rarely would work 10 hours a day*”. Indeed, Ms Dotcom was adamant that she could not recall “*any occasion when he would work the sorts of hours that he is now claiming*”.

[27] Nor would Ms Dotcom accept the proposition that Mr Orduna had his responsibilities increased after the raid. Her view, simply put, was that he just had to do his job. Indeed, she went further and maintained that prior to the raid, there were so many staff that in truth no one really had to work at all.

[28] Nor would Ms Dotcom agree that Mr Orduna had to do other peoples’ work and her clear view was that Mr Orduna arranged his hours around Mr Dotcom’s somewhat unusual sleeping habits (it seems common ground that Mr Dotcom would regularly work through the night and then sleep most of the day, at least in part

because much of his business activity involved engaging with northern hemisphere parties), but that whatever hours Mr Orduna worked, they were nothing like the hours that Mr Orduna maintained were required of him.

[29] There was a second meeting between Mr Dotcom and staff in about June or July 2012. All three protagonists remember that meeting and all gave evidence about it. The evidence of this meeting is consistent across all three witnesses, namely that Mr Dotcom promised staff that if they stayed in his employ for two years from the date of the raid, they would be paid a bonus which amounted to NZ\$25,000.

[30] Mr Orduna set out in his evidence what a typical day might look like.

[31] The effect of this outline of activities has Mr Orduna rising about 6am, working continuously throughout the day and then on into the night until at least

11pm but also potentially after that if Mr Dotcom still required him or if there were guests at the mansion. He also maintains that he would sometimes receive a summons from Mr Dotcom after he had gone to bed and he would have to get up and

attend to it.

[32] The difficulty with this evidence is twofold. First, Ms Dotcom's evidence is both that Mr Orduna never worked the hours that he now claims he worked and second that Mr Orduna did not fulfil the tasks that he now claims that he undertook.

[33] I have already referred to the evidence that Ms Dotcom gave, both in terms of the span of hours that she said Mr Orduna worked and the nature of the tasks that he performed and I must say I found her evidence persuasive.

[34] First, Mr Dotcom and Ms Dotcom are estranged and so there is no particular reason for Ms Dotcom to give evidence in support of her estranged husband's position. This is particularly the case (and this is my second point), when Mr Dotcom was assiduously maintaining that it was Ms Dotcom who was the employer of the applicants to the exclusion of himself.

[35] There was no evidence that I could see of any collusion between Mr Dotcom and Ms Dotcom and while no doubt, if she were found to be the employer or one of the employers of the applicants, it would be in her interests to limit the amount that might be owed, I formed the view that her evidence was straightforward and truthful

in respect to the hours that Mr Orduna (and the other applicants) worked and the tasks that they allegedly performed.

[36] The third meeting between staff and Mr Dotcom occurred in September 2013 by which time Mr Orduna's evidence is that the relationship between himself and both Mr and Ms Dotcom had deteriorated. Mr Orduna considers this may have been a consequence of the unhappy differences that had come between Mr and Ms Dotcom but in any event he maintains that the employment relationship had deteriorated somewhat.

[37] The September 2013 meeting was covertly recorded by staff and a transcript of that recording has been provided to me.

[38] It is apparent from a careful analysis of the transcript that the fundamental thrust of the meeting concerned the difference between the income tax regime in New Zealand and the income tax regime in Hong Kong, remembering that the employment agreements between Mr Dotcom and all of the applicants were entered into in Hong Kong and all were subject to payment in Hong Kong dollars because it was the intention of the Dotcom family to remain resident in Hong Kong and to simply visit various other jurisdictions (including New Zealand) on an occasional, irregular basis.

[39] But the effect of Mr Dotcom being arrested and subsequently bailed was to preclude him leaving the jurisdiction and that fact had impacts in terms of the employment relationship between Mr Dotcom and his staff. In particular, as is evidenced by this transcript of the September 2013 meeting, staff were particularly exercised by the fact that as workers bound now to the New Zealand jurisdiction, they were having to account to the New Zealand taxation authorities for income tax at a rate significantly greater than would have been the case if they had paid income tax in Hong Kong.

[40] But the transcript of the meeting also has Mr Dotcom promising to pay staff (including the applicants) money he owed them by way of salary on the anniversary of the raid, that is 20 January 2014. The transcript makes clear that he is effectively asking staff for more time because he is unable to afford to make the payment immediately.

[41] The transcript has Mr Dotcom saying these words:

*And if we pay you the full amount right now, we just can't make it work, it's that simple. We don't have the budget to make it work for six or nine months. Okay? So we need to talk about this and find a solution. Plus in January, I want to that's part of the budget. I want to be able to pay you what I promised.*

[42] This observation appears to be a reference to the commitment Mr Dotcom made to pay a bonus two years after the raid (that commitment being common cause and having been made by Mr Dotcom in the second meeting with staff in June or July 2012).

[43] It is also clear from the transcript that there are numerous references attributed to Mr Dotcom where he says things like "you are all working really hard", "you did work more", "you worked crazy hours", "you worked overtime", and so on.

[44] But despite those generic references to hard work, and even to working overtime, the able counsel for the applicants (and for present purposes Mr Orduna in particular) have been unable to point me to any specific representation made by Mr Dotcom that he would do anything other than repay the unpaid salary still due and owing from the period when staff were not paid their full salary, and would pay them a bonus if they served on his staff for two years beyond the date of the raid.

[45] I understand that Mr Orduna is claiming there was an agreement with Mr Dotcom that all the extra hours worked by Mr Orduna (and others) would be paid for, but I have not been persuaded that the evidence discloses any such understanding. I am satisfied that all Mr Dotcom agreed to do was to pay a bonus after two years' service beyond the raid, and to back pay salary arrears where that was owed.

[46] Nor am I persuaded that Mr Orduna actually worked the additional hours that he claimed he worked. I have already dwelt on the evidence provided to me by Ms Dotcom which as I have noted was consistent with the evidence from Mr

Dotcom. That evidence was to the effect that not only did Mr Orduna (and others) not work the extensive hours claimed, but also that the tasks Mr Orduna gave evidence of having been required to undertake, were not tasks that would ever have been expected of him or indeed that he ever performed.

[47] It is clear from the transcript of the September 2013 meeting that Mr Orduna made it plain to Mr Dotcom in that meeting that he was having financial difficulty and Mr Dotcom went to some considerable lengths to try to explain to him how his position could have deteriorated over time without it being Mr Dotcom's responsibility as employer. Mr Orduna's evidence to the Authority is that he sought alternative employment because of these anxieties about his finances and certainly that evidence is consistent with the remarks attributed to Mr Orduna in the transcript of the September 2013 meeting. Mr Orduna says that he approached Tony Lentino who was a former business partner of Mr Dotcom. Mr Orduna says that Mr Dotcom formed the view that he had provided Mr Lentino with confidential information about Mr Dotcom's affairs, which Mr Orduna denies.

[48] Mr Orduna says that Mr Dotcom confronted him on 18 November 2013 and then promptly dismissed him on that same date. The text of the messages between Mr Orduna and Mr Dotcom are before the Authority but do not assist greatly. They do no more than confirm that Mr Dotcom makes the allegation that Mr Orduna has betrayed his confidence and Mr Orduna denies it.

[49] It is also the case that Mr Dotcom has never particularised the allegation of just precisely what confidence Mr Orduna has betrayed save to allege that he betrayed some family confidence. In any event, it is apparent on the evidence before the Authority that the dismissal was precipitate and completely devoid of any proper process.

[50] Given that Mr Dotcom was persuaded that his confidence had been breached by Mr Orduna, it is incumbent upon Mr Dotcom, under New Zealand law, to give Mr Orduna the opportunity to be heard and to conduct proper inquiries about what Mr Orduna offers by way of explanation.

[51] In the present circumstances, there is none of that; all that happened was that Mr Dotcom formed the view that Mr Orduna had betrayed his confidence with Mr Lentino and Mr Orduna was dismissed on the spot. That is an unjustified dismissal especially as Mr Dotcom has not bothered to explain his conduct or even to seek to mitigate it.

[52] Indeed, Mr Dotcom's evidence on the point was simply that he had dismissed Mr Orduna on the spot, he says after obtaining from Mr Orduna an admission that Mr Orduna had told Mr Lentino about a particular matter concerning Mr Dotcom and his family, specifically an argument between Mr Orduna and Ms Dotcom.

[53] But Mr Orduna's evidence is different; he denies making the admission

Mr Dotcom refers to and he is adamant that all he did was ask Mr Lentino for a job.

[54] As I have already made clear, I am satisfied on the evidence that this was an unjustified dismissal, entirely devoid of any process, whatever version of events is to be preferred. As a matter of fact, this was a summary dismissal effected on one day and Mr Orduna was required to leave the country (admittedly at Mr Dotcom's expense) the following day.

[55] I am satisfied that Mr Orduna has suffered an unjustified dismissal for which, in principle, he is entitled to the consideration of compensation and lost wages, that is wages lost specifically because of the dismissal.

[56] However, I have not been persuaded that Mr Orduna is entitled to any overtime as he has not proven on the balance of probabilities that there was ever any commitment by the employer to pay overtime. Not only are there no statements to that effect in any documentation (or even in the transcript where words are attributed to Mr Dotcom), but Mr Dotcom himself flatly rejects any suggestion that he ever agreed to pay overtime.

[57] What Mr Dotcom says (and it is consistent with the documentation before me) is that he agreed to make up the shortfall underpayment of salary occasioned by his financial strictures, and pay a bonus to staff who worked for two years beyond the date of the raid.

[58] I return to the bonus issue again shortly but in respect of the salary issue, it is also important to note that Mr Orduna was not paid a wage for which overtime has a natural connection but a salary which is effectively an annualised payment made by apportioning periodic amounts. There is no natural connection between a salary payment and the payment of overtime.

[59] Nor is there any provision in the employment agreement, which Mr Orduna's evidence is that he accepts and relied upon, so in the absence of clear evidence that the parties varied the understanding set out in the employment agreement, I have not been persuaded that any additional payment is owed for overtime. Moreover, there is a clear variation clause in the agreement requiring any variation to be in writing.

[60] I turn now to the question of bonus. Mr Dotcom's evidence on this point is crystal clear; he initially indicated in the second meeting that if staff worked for the full two year period after the 20 January 2012 raid, they would be paid the bonus

but subsequently in the September 2013 meeting, Mr Dotcom decided he would pro rata the bonus.

[61] That said, there is a claim before the Authority for the bonus to be pro rated in respect of Mr Orduna and Mr Dotcom acknowledges that no bonus was paid to Mr Orduna.

[62] The reason no bonus was paid to Mr Orduna by Mr Dotcom is that Mr Dotcom regarded the “*breaches of confidentiality*” by Mr Orduna and the other two applicants as effectively negating the commitment to pay a bonus to those three individuals.

[63] The alleged breach of confidentiality in Mr Orduna’s case included the matter on which he was dismissed, but also included his involvement in a TV3 programme about working for Mr Dotcom which, put loosely, Mr Dotcom claimed was an example of staff “*dishing the dirt*” on him and his family.

[64] So the question for me is whether Mr Dotcom is right to regard the bonus as a discretionary item which enabled him to effectively change his mind when he felt Mr Orduna (and the other applicants) had let him down.

[65] I am satisfied that it is available to Mr Dotcom to decline to pay the bonus payments that he would otherwise have made. Mr Dotcom relies on a clear provision in Mr Orduna’s employment agreement to require Mr Orduna not to betray any confidences. There is a general

*... duty of good faith, trust and confidence owed by you to the employer ... and (that duty) ... (is) without prejudice to other duties whether fiduciary or otherwise owed by your to the employer ... whether express or implied.*

[66] In addition, there is an explicit confidentiality provision which required Mr Orduna to treat any information he acquired about the employer or the employer’s products, customers, business etc as confidential and not to be divulged to any third party, failure to do so potentially resulting in legal action and the clause being expressed to survive the termination of the agreement.

[67] Clearly then, confidentiality in its broadest sense was important to Mr Dotcom and in signing the employment agreement, Mr Orduna agreed to abide by the terms of that agreement including those confidentiality provisions.

[68] Given that Mr Dotcom made his promise to pay a bonus orally, that bonuses generally are at law discretionary in character, it seems to me, on the balance of probabilities, that Mr Dotcom can elect not to be bound by his previous verbal promise.

[69] That leaves only the question of whether Mr Orduna has lost wages directly attributable to the personal grievance he suffered. I am satisfied that he has. On the termination of his employment, Mr Orduna was earning \$3,400 per month whereas the replacement income he obtained soon after dismissal in his home country of the Philippines, was just \$405 per month.

[70] Mr Orduna seeks a total of \$61,950 and encourages me to exercise my discretion in that regard. The 21 months sought is the period from the date of the dismissal down to 20 August 2015, the last day of my investigation meeting in the matter.

[71] I think the proper approach is to consider how realistic it is for Mr Orduna to maintain that, but for the dismissal, he would have remained in the employment. I consider that it was rather unlikely that Mr Orduna would have remained in the employment for that length of time but for the dismissal. This is because my considered view is that because of his financial difficulties, Mr Orduna would sooner or later have wanted to either earn better money in New Zealand or in the alternative earn similar money but in a more tax efficient environment.

[72] I reach this conclusion because Mr Dotcom carefully identified in the meeting with staff of which we have a transcript that Mr Orduna’s financial difficulties (which are acknowledged) were not necessarily a consequence of Mr Dotcom’s failures but were partly a function of the sudden and unexpected impact of the New Zealand tax authority’s regime on the salary which was originally to be paid in Hong Kong dollars and on Mr Orduna’s decision to invest in certain assets in his home country including a home with a mortgage and a motor car.

[73] Accordingly, I think the proper course of action is for me to award Mr Orduna the sum of \$8,850 gross being three months salary of the difference between what

Mr Orduna would have earned when employed by Mr Dotcom and what he now earns.

### **Mr Tactaquin**

[74] Mr Tactaquin was employed in terms of an individual employment agreement in similar terms to the agreement executed between Mr Orduna and Mr Dotcom. Mr Tactaquin’s employment agreement was signed in August of 2011 but work pursuant to the contract appeared to have commenced on 1 July 2011. Mr Tactaquin was employed as a personal assistant for Mona Dotcom.

[75] Like Mr Orduna, his employment was structured in Hong Kong dollars and the terms of the employment included a commitment by the employer to meet all board and lodgings.

[76] Again like Mr Orduna, Mr Tactaquin had a New Zealand working visa issued by immigration officials.

[77] Working hours were set out in the employment agreement as from 9am to 5.30

Monday to Friday but with a right for the employer to change start and finish times and the days on which Mr Tactaquin was to work. Moreover, the agreement gave the employer power to vary those hours in accordance with the employer's reasonable requirement "*without further remuneration*". Unlike Mr Orduna's employment agreement, this agreement does not provide for time off in lieu to compensate for any additional hours worked.

[78] Like Mr Orduna, Mr Tactaquin maintained that up to the date of the raid (20 January 2012), he worked longer hours than his employment agreement provided for but that he was happy in his work.

[79] Like Mr Orduna, Mr Tactaquin claims that after the raid he worked "*at least 16 hours per day and seven days per week*" and he sets out in his evidence a typical day.

[80] Again the difficulty with this evidence is that Ms Dotcom, who I have already indicated I thought was a credible witness, clearly and explicitly rejected the suggestion that he worked anything like the span of hours he claims in his evidence or indeed that he was responsible for the range of duties that he claims to have performed.

[81] Ms Dotcom's evidence on Mr Tactaquin, with whom she worked closely because he was her personal assistant, is that he certainly worked longer hours after the raid, perhaps up to 10 hours a day, but :

*... on days he worked long hours I would not require him to work the next day. He never worked 16 hours a day seven days a week. ... That claim is just ridiculous – no one was required to work seven days a week.*

[82] But if there is dispute about the hours that Mr Tactaquin worked and the functions that he performed and therefore the amount of money (if any) he is owed at the conclusion of the employment, there was also dispute on the evidence about whether Mr Tactaquin was dismissed or resigned. His evidence is that he was:

*... supposed to be going home to the Philippines for a holiday. However I was told on 3 October 2013 on the day I was leaving that I was not wanted back.*

[83] That is contested evidence. Ms Dotcom was adamant that Mr Tactaquin had not been dismissed, either by her or by Mr Dotcom. She says:

*He packed all his clothes and shoes so he was leaving of his own volition.*

[84] Ms Dotcom was clear that Mr Tactaquin was not just going to the Philippines for a holiday. He took all his shoes and clothes and she was equally plain that neither she nor Mr Dotcom told him not to come back.

[85] Mr Tactaquin on the other hand, although his written briefs of evidence are vague about the detail of the alleged dismissal, maintained in his oral evidence given on 20 August 2015 that the night before he left New Zealand on his holiday to the Philippines, Ms Dotcom told him he was not coming back, that is that Ms Dotcom dismissed him. But that is inconsistent with Mr Tactaquin's final written brief of evidence filed in the Authority in February 2015 where in para.19 he has this to say:

*There was no animosity between Mona [Ms Dotcom] and I ... because it wasn't her who terminated me from my job but it was Kim Dotcom.*

[86] The only thing that the evidence seems to be in agreement about is that

Mr Tactaquin's employment ceased on his departure from New Zealand on 3 October

2013. Mr Tactaquin urges on me the proposition that he was dismissed but appears confused about who was responsible for this, alleging in different statements that both Ms Dotcom and Mr Dotcom were responsible.

[87] In his oral evidence to the Authority's investigation given on 31 July 2015, Mr Dotcom appeared ready to concede that it was he who had dismissed Mr Tactaquin, that he had done it because of an argument Mr Tactaquin had with Ms Dotcom and that there was "*no process around the dismissal*" and that he "*... refused to provide Mr Tactaquin with a reference*".

[88] Mr Dotcom also was very clear in his evidence that he considered that Mr Tactaquin had misappropriated family moneys from Mona Dotcom. The amount is significant, around \$800,000 of money provided allegedly by Ms Dotcom to Mr Tactaquin's personal account. Mr Tactaquin says that this money was for Dotcom family purposes and there is a schedule and other

documentation relating to the account before the Authority.

[89] While Mr Dotcom continues to make the allegation, he admitted in evidence that he had not looked at the material that has been provided and he continued to maintain in his oral evidence that he had still not been provided with an accounting for this sum of money. That statement has to be treated with caution though given that he also admitted that he had not bothered to look at the material that had been provided so it is difficult to see how he can be so clear that the money remains unaccounted for.

[90] On the other side of the ledger, Mr Tactaquin emphatically denies wrongdoing, agrees that the money was provided to him by Ms Dotcom, says that it was provided for Dotcom family purposes, and that he dealt with it appropriately at all times.

[91] In addition, Mr Dotcom also complains that Mr Tactaquin was one of the three persons (the three applicants) who breached his confidentiality by speaking to the TV3 programme about their experiences in working at the Dotcom mansion. Mr Dotcom says this was in breach of Mr Tactaquin's contractual obligations.

[92] Even if that were found to be true, and there was no investigation around the matter at all, the dismissal is still completely unjustified as being absolutely devoid of any process. Despite Mr Tactaquin's confusion about what happened, Mr Dotcom

readily accepted in cross-examination that he had been responsible for dismissing Mr Tactaquin and it is apparent on his evidence that the reasons for that dismissal were neither the alleged misappropriation of the \$800,000 (which on Mr Dotcom's evidence he did not find out about until after he and Ms Dotcom separated), or the alleged breach of confidentiality but simply that there had been some argument between Mr Tactaquin and Ms Dotcom which resulted in Mr Dotcom feeling it necessary to terminate Mr Tactaquin's employment.

[93] Clearly there was some sort of disagreement between Mr Tactaquin and

Ms Dotcom although there is nothing in her evidence that confirms that.

[94] Nor is there any agreement about when that disagreement might have taken place. Mr Wayne Tempero gave evidence for Mr Dotcom in my investigation meeting. Mr Tempero is a security consultant who looked after Mr Dotcom and managed his security detail.

[95] Mr Tempero's evidence is that he drove Mr Tactaquin to Auckland international airport on the day that Mr Tactaquin left the country and that there was an argument in the car between Mr Tactaquin and Mona Dotcom who also travelled on that journey which resulted in the termination of the employment, but at the behest of Ms Dotcom and not Mr Dotcom.

[96] While I found Mr Tempero an absolutely straightforward and persuasive witness, neither Ms Dotcom nor Mr Tactaquin agree with what Mr Tempero's recollection was. In particular, Mr Tactaquin denies that it was Mr Tempero who took him on his last journey to Auckland international airport, or at least denies that Mr Tempero was driving the vehicle for the whole of the journey. Mr Tactaquin says that there was a break in the journey when Mr Tempero left the vehicle that Mr Tactaquin and Ms Dotcom were in and went off in another vehicle with Mr Dotcom.

[97] Similarly, as I have already noted, Ms Dotcom was adamant that she did not dismiss Mr Tactaquin and indeed her evidence is that neither did Mr Dotcom although he subsequently admitted that he dismissed Mr Tactaquin.

[98] While I think the state of the evidence on this point is thoroughly unsatisfactory, there is an admission of sorts from Mr Dotcom that he did dismiss Mr Tactaquin, that he did it without any due process and that he did it because of an

argument between Mr Tactaquin and Ms Dotcom and I think I have to take that admission on face value and conclude as a consequence, for reasons I have already enunciated, that the dismissal was an unjustified one.

[99] I turn now to consider the other extensive claims made by Mr Tactaquin which mirror those made by Mr Orduna albeit that Mr Tactaquin's claims are understandably for different amounts. Mr Tactaquin's claims are even more significant than Mr Orduna's and totally nearly \$360,000. The heads of claims include compensation for the unjustified dismissal, but at a level, like Mr Orduna's claim, which is far in excess of anything the Authority has ever awarded in its history, together with income lost by the dismissal, unpaid bonus and unpaid overtime.

[100] I am satisfied that Mr Tactaquin is entitled to compensation for the unjustified dismissal and in addition is entitled to a contribution to the loss he has sustained in wages as a direct consequence of the unjustified dismissal, but on reasoning which mirrors my conclusions in respect of Mr Orduna, I am not satisfied that Mr Tactaquin is entitled to the bonus or is entitled to any so-called unpaid overtime.

[101] Dealing very briefly with those two last mentioned items, my conclusion is that the bonus is a discretionary payment and not a contractual entitlement and that a verbal promise to pay can be withdrawn, as it has been in this case.

[102] On the overtime question, without labouring points that I have already made at some length in the last section of this

determination, I am simply not persuaded that there is a contractual entitlement to overtime when the operative individual employment agreement makes it absolutely plain that no such payment will apply and where the same agreement also makes clear that the employer can ask for reasonable additional hours.

[103] On top of that, I have found on the balance of probabilities that Mr Tactaquin did not work the hours that he claims to have worked and in that regard I prefer the evidence of Ms Dotcom, Mr Dotcom and Mr Tempero, all of whom gave very clear evidence about the sorts of hours that staff in general and Mr Tactaquin in particular worked. That evidence is completely inconsistent with Mr Tactaquin's claims and I prefer that evidence to Mr Tactaquin's evidence.

[104] It follows that I conclude Mr Tactaquin has no legal entitlement to overtime payments and even if he did, he did not work overtime that would justify any such payments.

[105] That leaves the question of compensation to which Mr Tactaquin is entitled, subject to any issues of contribution and I will deal with that aspect in the final section of the determination.

[106] Wages lost as a consequence of the dismissal needs to be referred to next. Mr Tactaquin was paid \$5,842 per month when he was employed by Mr Dotcom; he did not find employment in the Philippines until August of 2015 and then at only \$624 per month.

[107] Applying the same logic that applied in respect of Mr Orduna, I am not persuaded that any greater sum needs to be awarded than the three months' salary which amounts in this case to \$17,526.

### **Ruth Relleve**

[108] Ms Relleve entered into an employment agreement with Mr Dotcom which is in exactly similar terms to the employment agreement executed by Mr Orduna save for the difference in the rate of pay.

[109] The employment agreement was entered into on 3 October 2011 and the employment commenced seven days later on 10 October 2011. Ms Relleve was employed as a personal assistant/butler.

[110] Again, there is the allegation that Ms Relleve was required to work long hours and a section of one of her written briefs of evidence sets out the extent of the hours required of her and the range of duties she was expected to perform after the raid happened on 20 January 2012.

[111] Again, a similar pattern is repeated to that which applied in respect of the two other applicants; a claim for an extraordinary number of working hours and a claim for a range of household duties being required.

[112] As to the sheer number of hours, Ms Relleve alleged that she was working "*at least about 16 hours a day and seven days a week*". Again that view is dismissed out of hand by the witnesses for the employer. Ms Dotcom says that no one worked 16 hours a day and that the only time that Ms Relleve worked continuously was immediately after the raid when Ms Dotcom agrees that Ms Relleve worked 14 days "*on the trot*" but never worked more than eight hours a day even during that period.

[113] I heard evidence from Mr Tempero who looked after Mr Dotcom's personal security and as a consequence was intimately involved in the household's activities. He expressed the general view, without being specific as to individuals, that an allegation that people were working 15 or 16 hours a day was "*rubbish*" and he went on to say "*the fact that they on the site did not mean they were working*". This last statement was a reference to the fact that the applicants all lived onsite and were provided with free board and lodgings and so staff could depart the workplace outside of their normal working hours, if they chose, or in the alternative, they could simply stay onsite but not actually be working.

[114] For similar reasons to those that I advanced in respect of Messrs Orduna and Tactaquin, I am not persuaded that there was ever any commitment by Mr Dotcom to pay overtime nor am I persuaded that there is any evidence of hours being worked in excess of the contractual arrangements.

[115] I reach the first conclusion because of the terms of the employment agreement; a salary is the basis of the remuneration and there is a specific contractual provision making it clear that additional hours may be required (that is beyond the specified hours in the employment agreement), and those hours are to be worked "*without further remuneration*".

[116] So as well as there being no contractual basis for the payment of overtime, and no evidence whatever of any promise by Mr Dotcom to pay overtime, there is also in my view evidence sufficient on the balance of probabilities to enable me to conclude that there was no overtime worked.

[117] In that latter regard, the three applicants not surprisingly all support each other, but the independent evidence (Mr Tempero, for instance), clearly think the claims for overtime have no merit whatever. Mr Tempero has no axe to grind and by all accounts was close to Ms Relleve in particular so it is difficult to understand why he would reach the conclusion he does unless there is a basis for it.

[118] Furthermore, neither Ms Relleve nor either of the other applicants ever complained to anyone about the alleged failure to pay overtime. It is common ground

that Ms Charlotte Lawrence and latterly Ms Heather Robertson were engaged by the employer to deal with staff wages and taxation issues after the raid. Neither Ms Robertson nor Ms Lawrence had any contact at all from Ms Relleve or indeed either of the other two applicants claiming the payment of overtime.

[119] Indeed, in each of the applicants' cases, they were provided with a breakdown of their final pay and on each occasion that breakdown did not include any overtime component and on each occasion Mr Orduna, Mr Tactaquin and Ms Relleve all accepted the calculation at face value.

[120] Given that they are now claiming a large amount of money in unpaid overtime, it is difficult to understand why they would have accepted their final pays if there had been an outstanding overtime claim.

[121] Moreover, having carefully read through the transcript of the final meeting, I am satisfied that there is no evidence in that document of Ms Relleve or either of the other two applicants asking about the payment of overtime. That is completely inconsistent with the statement of problem. If this were a genuine claim made on a proper basis, surely it is not unreasonable to expect that the claimants would consistently seek to have that payment made, but in fact the first occasion on which the payment is sought would appear to be the filing of the statement of problem in the present proceeding.

[122] I conclude then that Ms Relleve is not entitled to any overtime.

[123] The next question is whether she was unjustifiably constructively dismissed. I

have concluded that she was not unjustifiably constructively dismissed.

[124] She says that she was effectively driven out of the employment by being "*bullied and harassed*" by Ms Dotcom in particular and that in consequence her resignation was effectively a forced termination of the employment which would not have happened but for the behaviour of the employer.

[125] The difficulty with that thesis is that there is ample evidence that Ms Dotcom and Ms Relleve were on good terms both before, during and after the employment ended and there is email traffic to confirm that and there is independent evidence from Ms Lawrence and from Mr Tempero that Ms Relleve had left the employment

because she had found alternative employment which suited her better, particularly because of her disgruntlement about the necessity to pay income tax in New Zealand.

[126] Both Ms Lawrence and Mr Tempero understood that Ms Relleve was resigning because she had found another job.

[127] As I have already noted, Mr Tempero in particular thought highly of Ms Relleve and the feeling was mutual. She said in her oral evidence that Mr Tempero was "*like a father to me*".

[128] Ms Lawrence said that she:

*... ran into [Ms Relleve] on her departure from New Zealand at Auckland international airport as I returned with my daughter from an overseas trip. She appeared to be excited about her new job. She did not mention any bullying or any dissatisfaction with her employment at the Coatesville mansion.*

[129] The reference to bullying in that quotation concerns Ms Relleve's evidence that she was driven out of the employment by Ms Dotcom's behaviour, but as I have already noted, the evidence on that is simply against her. If there had been bullying or harassment one would have thought someone would have been aware of it (other than the three applicants whose evidence about each other's position has to be treated with some degree of caution). None of the independent witnesses (Ms Robertson, Ms Lawrence or Mr Tempero) saw any evidence of bullying or harassment and it is difficult to understand why, if there were bullying and/or harassment, Ms Relleve did not complain about it to the employer. Certainly Ms Dotcom was as clear as could be that there was never any suggestion made to her by anybody that she was bullying any staff member.

[130] My conclusion then is that Ms Relleve was not unjustifiably dismissed but resigned of her own free will and I am not persuaded that she is owed any sums as a consequence of the conclusion of the employment either. In that regard I rely on the observations I have already made at some length earlier in this determination concerning her two co-applicants/

## **Determination**

[131] I have concluded that Mr Orduna and Mr Tactaquin have both been unjustifiably dismissed while I have rejected Ms Relleve's claim that she was unjustifiably dismissed.

[132] It follows that both Mr Orduna and Mr Tactaquin are entitled to the consideration of remedies, but I must first address the question whether either of them has contributed in any way to the circumstances giving rise to their personal grievance

for unjustified dismissal.

[133] Having reflected on the matter, I am satisfied that there is no evidence that Mr Orduna or Mr Tactaquin contributed in any way to the circumstances giving rise to their personal grievance. In respect of Mr Orduna, I found as a fact that he had been dismissed by Mr Dotcom after being accused of breaching the Dotcom family's confidentiality by allegedly passing information to a Mr Tony Lentino. Mr Orduna denied the allegation then and denies it now and I do not accept the contention made for Mr Dotcom that Mr Orduna made admissions on the matter at the time of dismissal.

[134] Even on Mr Dotcom's evidence, there is no measured consideration of the matter, no process for investigating whether there is any truth or not in the allegation and not even any consideration about whether, in a balanced sense, dismissal was an appropriate response. Accordingly, I conclude that Mr Orduna made no contribution to the circumstances giving rise to his dismissal.

[135] The circumstances in which Mr Tactaquin was dismissed are still shrouded in confusion; I heard a variety of explanations about what had happened including more than one version of events from Mr Tactaquin himself. I am, however, satisfied that there was an unjustified dismissal for reasons that I have already explained and so far as I can discern it, it would seem that Mr Tactaquin was dismissed for falling out with Ms Dotcom. Given that the circumstances in which that may have happened are not clear, I am unable to form any proper view about whether Mr Tactaquin contributed or not to the circumstances giving rise to his dismissal and I have reached the conclusion that I must proceed on the footing that he made no contribution to those circumstances because it presumably is in the interests of Mr Dotcom to persuade me by evidence that Mr Tactaquin did contribute to the personal grievance.

[136] I turn next to the quantum of the compensation that ought to be awarded. The quantum claimed by Mr Orduna and Mr Tactaquin is simply beyond the range of awards made in this Authority. Moreover, I accept the submissions for Mr Dotcom to the effect that there is precious little evidence of any compensatable non-economic loss from either Mr Orduna or Mr Tactaquin and accordingly, only a very modest award could be contemplated.

[137] I am satisfied that Mr Orduna is entitled to a payment of compensation under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act) in the sum of \$4,000 and Mr Tactaquin is entitled to a payment of \$3,000 under [s.123\(1\)\(c\)\(i\)](#) of the Act.

[138] For reasons that I have already made clear, I am not persuaded that Ms Relleve was unjustifiably constructively dismissed. The evidence seemed to me to be equivocal as to whether there ever was a dismissal.

[139] Given my findings that Mr Orduna and Mr Tactaquin have been dismissed, both are entitled to a contribution to the wages that they have lost as a consequence of the dismissal and I have already made findings in respect of both the wages due to Mr Orduna and the wages due to Mr Tactaquin.

[140] I now order that Mr Orduna is to receive \$8850 gross as a contribution to the wages that he lost as a consequence of the dismissal pursuant to [s.123\(1\)\(b\)](#) of the Act and Mr Tactaquin is to receive the sum of \$17526 in respect of the wages that he lost as a consequence of the dismissal in terms of the same section of the Act.

[141] I have reached the conclusions I have concerning lost earnings for Mr Orduna and Mr Tactaquin because I am not satisfied that either of them has either proved the loss of income that they claim to have suffered or indeed have satisfied the onus of mitigating their losses.

[142] As to the first, I agree with submissions for Mr Dotcom that the evidence for Mr Orduna is contradictory given he says both that he was unable to find work and that he had a "online clothing shop". Again, as counsel for Mr Dotcom points out, there is an inherent contradiction in the evidence in his brief of 15 September 2014 that he is "unable to find work" and yet his counsel in closing submissions written at the end of last year indicate that he mitigated his loss by obtaining employment shortly after he returned to the Philippines.

[143] The position is similar with Mr Tactaquin who in a brief of his evidence again dated 15 September 2014 claimed to be unable to even apply for roles in the Philippines because he did not have a certificate of service and yet again the submissions filed on his behalf by counsel confirm that he was employed. Similarly to Mr Orduna, the evidence provided by Mr Tactaquin that he did anything to mitigate his loss is scant indeed.

[144] Because I have not been persuaded that Ms Relleve was dismissed from her employment, no issue about lost wages arises.

[145] I turn now to the question of the bonuses which all three applicants say remain unpaid. I have concluded that the bonuses are a discretionary item and that it would be inappropriate of me to compel Mr Dotcom to honour the verbal intimation that he made on the point.

[146] The starting point has to be the employment agreements between Mr Dotcom and each of the applicants. All of the applicants make clear in their evidence that they relied on that employment agreement, Mr Orduna perhaps more so than the other two applicants. In any event, it is the operative employment agreement whether they chose to emphasise that in

their evidence or not. There is a standard variation clause in the agreement which says “*no changes may be made to this employment agreement unless approved in writing by Mr Dotcom*”.

[147] There is no evidence whatever that Mr Dotcom ever did anything of the kind; all that happened was that Mr Dotcom made an oral intimation that he would pay what counsel for Mr Dotcom elegantly refers to as a loyalty bonus and I consider that the submission made for Mr Dotcom that it is available to him to conclude that the applicants had not shown him the loyalty that he expected, and arguably that the contract of employment mandated.

[148] Put shortly though, there is no contractual entitlement to a bonus but there is a clear provision in the employment agreement requiring any changes to be in writing. There has been no written agreement to pay a bonus and that seems to me to conclude the matter.

[149] I note for the sake of completeness that the discretionary nature of the bonus payment urged on me by counsel for Mr Dotcom is best demonstrated by the fact that some staff were paid a bonus, including ironically Mr Orduna who received \$16,000

from Mr Dotcom by way of a bonus. That seems to me to demonstrate the discretionary nature of the transaction.

[150] I have also not been persuaded that the applicants are entitled to overtime payments. Again there is no contractual entitlement to the payment of overtime. Indeed the reverse is the case because the employment agreements of all three applicants clearly establish that they are not entitled to additional remuneration if they work additional hours and this of course is consistent with employment on a salary rather than on a wage.

[151] Moreover, there is simply no evidence at all that Mr Dotcom ever agreed to pay overtime. The best that the applicants can adduce is some observations that Mr Dotcom is recorded as having made in the transcript of the September 2013 meeting where he made reference to the applicants (and other staff) working very hard, working long hours and the like, but none of that translates into a binding commitment to pay overtime in contravention of the clear contractual provision.

[152] Again, it is worth repeating the reference to the variation clause in all three agreements which make plain that any changes to the employment agreement must be in writing from Mr Dotcom.

[153] Moreover, I heard evidence from both Ms Robertson and Ms Lawrence who at different times were responsible for attending to the salary payments and tax issues for the Dotcom staff. Neither of them had heard from any of the applicants seeking payment of overtime and there was no other evidence from any other independent person that such a claim was made or indeed ever advanced. Each of the applicants admitted under cross-examination that they had never raised the matter during the employment or indeed at the end of it and all of them agreed with the evidence from Ms Lawrence that they had accepted the calculation she had done of their entitlement to a final pay.

[154] Even later, Ms Robertson did work for the Dotcom family in putting together an employment agreement which may have applied to the employment going forward. On her evidence, she worked closely in that regard with Mr Orduna who had a sort of de facto role as a leader of the Philippino staff.

[155] Mr Orduna did not seek the inclusion of an entitlement to overtime in the prospective new employment agreement which one would have thought he might

have, if he genuinely believed there was an entitlement to overtime in the then current environment.

[156] Neither party (Mr Dotcom or the applicants) kept any record of hours worked. Mr Dotcom presumably did not maintain such a record despite having professional human resources advice because his staff were salaried but if there were a conviction from staff that they had some legal entitlement to overtime, it is difficult to see why they would not have maintained any record and yet it is clear on the evidence of all three applicants that none of them did.

[157] I am satisfied then that there is no force in the applicants' submission that Mr Dotcom has failed in his duty by not keeping a record of hours worked as is required by [s.130\(1\)\(g\)](#) of the Act because it is apparent that, given the staff were salaried and there was adequate provision in the employment agreement for hours of work and changes to those hours of work, there was no requirement to retain a record of hours “*for the purpose of calculating the employees' pay*”. Such a requirement can only exist if there is a necessity for those records to be kept in order for that calculation to be undertaken.

[158] I have also made findings that express some grave reservations about the evidence advanced by the applicants concerning the additional hours they claim to have worked. I made clear that I preferred the evidence of Ms Dotcom and of witnesses who were independent of the family like Mr Tempero who expressed the gravest scepticism about those claims and indeed at one point in his oral evidence suggested that the claim of a 16 hour day was simply a lie.

[159] Because of the findings of fact that I have made, and in particular my jaundiced view of the applicants' claims about the hours that they actually worked, I am not persuaded that there can be any adverse finding against Mr Dotcom in respect of the Minimum Wage Act; on the basis that the applicants were working the span of hours broadly contemplated by the

employment agreements, there would appear to be no breach of the Minimum Wage Act given that there would need to be a monetary allowance included in total remuneration for board and lodging particularly but also for other incidents of the employment such as free medical care and flights to the applicants' home country.

[160] The claim for penalties while made in the statement of problem was not the subject of any detailed development during the extensive investigation that I conducted and I am satisfied there is no proper basis on which I can require Mr Dotcom to respond. The Authority needs to tread cautiously before seeking to either impose a penalty or indeed require a responding party to answer allegations of this nature: *Matsuoka v. LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165 applied.

#### **Costs**

[161] Costs are reserved.

James Crichton

Chief of the Employment Relations Authority

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