

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 103
3250939

BETWEEN	MUSTAFA PALUT Applicant
AND	ARTWORKS MANAGEMENT LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person No appearance by the Respondent
Investigation Meeting:	16 February 2024 in Auckland
Determination	23 February 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Mustafa Palut, a work visa holder from Turkey, brings a claim of breach of contract against his former employer, Artworks Management Limited (AML or the company) which traded as the Morocana Club, a restaurant/night club that operated on Quay Street in the Auckland City Business District (Morocana).

[2] There has been no engagement by AML with the Authority's investigation of this employment problem and as a result, Mr Palut's claims against it have gone unchallenged.

How did the Authority investigate?

[3] A case management conference was held on 13 December 2023 which Mr Palut attended. There was no appearance by a representative for AML especially its sole director and shareholder, Aziz Chtouk.

[4] A copy of the Authority's minute of the teleconference, Mr Mustafa's statement of problem and support documents, and notice of investigation meeting were couriered to AML's registered office address as well as to Mr Chtouk's last known address as recorded in the Companies register.

[5] Regulation 17(1)(b) of the Employment Relations Authority Regulations 2000 provides for effective service on a New Zealand corporation if the notice, order, or document is left at its registered office. The regulation reflects s 387(1)(c) of the Companies Act 1993 which allows for any document, writ, summons, notice, or order in any legal proceedings to be served on a company by leaving it at its registered office or address for service.

[6] This is what occurred here in relation to serving the above documents on AML. A track and trace report from New Zealand Couriers shows that the minute, statement of problem, support documents and the notice of investigation were left at its registered office address and address for service, both of which are the same. It has been established therefore that the company has been served with a copy of the present proceedings. It is AML's responsibility to maintain an updated registered office which is capable of receiving and acknowledging all communications and notices that may be addressed to it.

[7] The same cannot be said however for Mr Chtouk whose last known address with the Companies Office was used as a postal address for the same documents. Because I am not able to safely discount the real possibility that he no longer occupies this address, it has not been sufficiently shown that he is aware of the proceedings against his company. For this reason, I am not able to join him as a party under s 221 of the Employment Relations Act 2000 (the Act) as a person involved in a breach of employment standards under ss 142W and 142Y. As a result, the present proceedings will stay afoot for AML only.

[8] A representative for the company did not appear on the morning of the investigation meeting. After a 10 minute adjournment, the investigation commenced in AML's absence pursuant to cl 12 schedule 2 of the Act which enables the Authority to act fully in the matter before it as if the company had duly attended or been represented.

[9] 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. It has not recorded all evidence and submissions received.

What are the issues?

[10] The issue requiring investigation and determination is whether the applicant is owed salary or wages and the quantum of wage arrears if any.

What are the relevant facts?

[11] Mr Palut was working 25 to 30 hours per week for his previous employer when he happened to see an advertisement on Seek for a 40-hour per week duty manager role for Morocana. After applying successfully for the role, Mr Palut was provided with an employment agreement that stated his normal hours of work were 40 hours per week, that he was to be paid \$32 per hour, and if AML terminated his employment, he was to be provided with two weeks' written notice.

[12] Mr Palut commenced employment with AML in early May 2023. He repeatedly asked Mr Chtouk for a payslip because payment of his wages was sporadic and was often less than his actual hours worked. To appease him, Mr Chtouk increased Mr Palut's wages sometime in July 2023 to \$35 per week but no payslips were provided.

[13] As duty manager, Mr Palut was responsible for about 20 other hospitality and security staff, some of whom he hired himself via a recruitment agency. He regrets doing so as the staff he recruited left their employment shortly afterwards because their wages had not been paid. When staff started to complain to him that they had not received their wages, he was not able to help them because he was in the same position himself. This was in spite of Morocana's bank account statements that showed it was a busy nightclub that was "making good money" which included making over \$60,000 on one night.

[14] For this reason, Mr Palut decided to stay on in the hope that he would eventually be paid his outstanding wages. However, in mid-September 2023, Morocana closed its doors without explanation and stopped trading leaving Mr Palut and several other staff and creditors out of pocket.

How much is Mr Palut owed?

[15] Under oath, Mr Palut stated that he had not been paid for 150 hours of work which included his last two weeks of employment. Mr Chtouk had also failed to provide Mr Palut with a minimum of 40 hours of work per week as required by his employment agreement resulting in a shortfall of 52.42 hours. Mr Palut stated that he is owed an alternate holiday for working two public holidays on 5 June and 14 July 2023 (the King's birthday and Matariki), both of which were working days for him.¹ Mr Palut further stated that he is owed annual holiday pay on his gross wages which he never received when Morocana suddenly stopped trading.

[16] In support of Mr Palut's statement of problem is a list of his work hours from 5 June to 2 September 2023, a period of 89 days. The total number of hours was 467.58 hours, but this is an estimate as it is unclear whether Mr Palut made the correct allowance when converting minutes to their decimal equivalent.

[17] Mr Palut's employment agreement required AML to provide him with two weeks' notice before terminating his employment which he also never received from Morocana when it ceased trading. Set out below is the Authority's calculation of Mr Palut's wage arrears claim under s 131 of the Act:

Wage arrears (150 hours at \$35 per hour)	\$5,250
Shortfall in hours worked (a total of 52.42 hours; 6.47 hours at \$32 per hour (\$207.04) and 45.95 hours at \$35 per hour (\$1,608.25))	\$1,815.29
Holiday Pay arrears (an additional payment of 0.5 being time and a half for working on King's birthday (\$112) (0.5 x 7 hours worked x \$32 per hour) and Matariki (\$157.50) (0.5 x 9 hours worked x \$35 per hour))	\$269.50
Holiday Pay (payment in lieu for two public holidays worked; King's birthday (\$256) (8 hours x \$32 per hour) and Matariki (\$280) (8 hours x \$35 per hour))	\$536

¹ Holidays Act 2003, s 56.

Two weeks' notice not provided to Mr Palut; ² (40 hours per week at \$35 per hour x 2 weeks)	\$2,800
Annual holiday pay arrears of eight percent as stipulated, ³ on gross earnings, ⁴ estimated at \$27,036.09 (\$5,250 + \$1,815.29 + \$269.50 + \$536 + \$2,800 + \$16,365.30) ⁵	\$2,162.89
TOTAL ARREARS	\$12,833.68

[18] There being no response from AML, the Authority orders it to pay Mr Palut \$12,833.68 in wage arrears no later than 12 pm Friday 15 March 2024.

Should interest be awarded?

[19] The Authority has the power under cl 11 sch 2 of the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Mr Palut has been deprived of the use of \$12,833.68 since late September 2023. AML is ordered to pay interest on this amount from 1 October 2023 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.⁶

Has Mr Palut incurred any reasonable expenses?

[20] Given the outcome of this investigation in which Mr Palut has been successful, it is appropriate that AML reimburse the filing fee of \$71.55 that Mr Palut paid to lodge his statement of problem with the Authority.

Is Mr Chtouk a person involved?

[21] I find that there is good evidence to indicate that Mr Chtouk is a person involved in a breach of employment standards. At the investigation meeting, Mr Palut showed me his bank account which showed a \$900 wage payment from Mr Chtouk that he paid personally rather than through AML. Mr Palut stated that this was how Mr Chtouk typically paid his wages. I note also that it was Mr Chtouk who reassured Mr Palut that

² Clause 23.2 of Mr Palut's individual employment agreement.

³ n 1, s 23(2).

⁴ n 1, s 14.

⁵ Based on 467.58 hours worked at \$35 per hour, see [16] above.

⁶ www.justice.govt.nz/fines/civil-debt-interest-calculator

he would receive his wages which resulted in Mr Palut staying on with AML ultimately to his financial detriment.

[22] There is a *prima facie* case against Mr Chtouk under s 142Y of the Act. However, before he can be joined to this employment problem and be held personally responsible for the orders made against his company in the event that it is unable to pay these, there would need to be some reliable evidence of personal service of Mr Palut's statement of problem on Mr Chtouk. While a copy of the proceedings was sent to his last known address, I cannot discount the real possibility that he no longer lives there.

[23] Should Mr Palut have new information as to Mr Chtouk's whereabouts, he may wish to re-apply to the Authority for leave under s 142Y of the Act for Mr Chtouk to be named as a person involved in a breach of employment standards. However, this would have to be a separate application that is to be determined on its own merits.

What is the outcome?

[24] The Authority orders Artworks Management Limited to pay Mustafa Palut the following monies no later than 12 pm Friday 15 March 2024:

- (i) \$12,833.68 in wage arrears;
- (ii) interest on \$12,833.68 from 1 October 2023 until the date payment is made in full; and
- (iii) reasonable expenses of \$71.55 being the Authority's filing fee.

[25] In the event the respondent fails to pay any of the monies by the due date, Mr Palut may ask the Authority Officer to provide him with a certificate of determination which he may then use to enforce as a judgment debt with the civil, fines, collections unit of the District Court.

[26] To be clear, I have considered whether to impose lost wages and compensation for Mr Palut as personal grievance remedies for unjustified disadvantage and unjustified dismissal. However, these personal grievances were not expressly pleaded or sought for in Mr Palut's statement of problem and there is a question as to whether these grievances were raised with AML within the 90-day period under s 114 of the Act. For these reasons, it would not be appropriate to consider these remedies now.

What about costs?

[27] The Authority's Practice Direction (effective 1 February 2024) sets out in one document various aspects of its investigatory process, including the steps normally taken and how costs arising out of the process are dealt with by the Authority. Because Mr Palut has throughout this process represented himself, he has not incurred any costs in having a lawyer or an employment advocate represent him in the Authority. As such, this is case where costs shall lie where they fall.

Peter Fuiava
Member of the Employment Relations Authority