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Patangata v Kimiora Limited (Auckland) [2016] NZERA 558; [2016] NZERA Auckland 369 (11 November 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 369
5439516
5439542

BETWEEN LUCIELLE PATANGATA First Applicant

A N D BRENDON FRASER Second Applicant

A N D KIMIORA LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Tiffany Wren, Counsel for Applicant

Natalie Bradley, Counsel for Respondent

Submissions Received: 22 September 2016 from Applicants

6 October 2016 from Respondent

Date of Determination: 11 November 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a substantive determination [2016] NZERA Auckland 288 I determined the claims brought by the Applicants, Ms Lucielle Patangata and Mr Brendan Fraser. The Authority's substantive determination dealt in principle with the employment relationship problem raised by Ms Patangata and Mr Fraser, but ordered that within 28 days of the date of that determination, Ms Patangata and Mr Fraser submit various calculations in order to enable me to make a determination in respect of unpaid holiday pay pursuant to the [Holidays Act 2003](#) and in respect of a breach of the Minimum Wages Act 1983.

[2] The Applicants have now provided submissions with calculations showing in each weekly pay period the gross amount of pay (before deductions), the amount of holiday pay, the actual hours worked, and the minimum wage for that period. Submissions have also been received from the Respondent.

The Respondent's evidence

[3] Mr Poananga's evidence in his witness statement and at the Investigation Meeting was that an amount of 8% of the Applicants gross earnings was included in their gross pay during the period of casual work.

[4] I also note that an unsigned version of the individual employment agreement which Mr Poananga claimed was identical to that provided to the Applicants states at clause 18(a) that: "*The Employee shall be paid Holiday Pay at the rate of 8% of the employees gross earnings*" and at clause 18(b) that: "*The employer shall provide for such payments (Holiday Pay) to be an identifiable component of the employee's regular pay*". I further note that some of the payslips provided state: "*All rates are inclusive of holiday pay, unless by prior arrangement*".

[5] In the absence of any contradictory evidence presented initially and the lack of detail in Ms Patangata and Mr Fraser's original claim I accepted Mr Poananga's evidence that holiday pay was included in the gross payments made to Ms Patangata and Mr Fraser. However the submitted report now produced by Ms Bradley, on behalf of Kimiora, shows clearly that holiday pay was not consistently included in the weekly gross pay for work done by Ms Patangata and Mr Fraser:

- (i) an amount for holiday pay was paid to Ms Patangata on five separate occasions covering the years 2009-2012;
- (ii) Mr Fraser did not receive any payment of holiday pay during the period of his employment with Kimiora;
- (iii) Mr Poananga confirmed that he had withheld holiday pay due to Ms Patangata and Mr Fraser.

[6] No method or explanation has been provided to show how the amount of holiday pay actually paid was calculated, or the period to which it referred. I note that the holiday pay actually paid to Ms Patangata was not taxed for IRD purposes at the time payment was made with no explanation provided.

Gross Earnings

[7] [Section 14](#) of the [Holidays Act 2003](#) defines gross earnings for the purposes of calculating holiday pay due pursuant to [section 28](#) (1)(d). The pay slips provided by Mr

Poananga clearly state the Gross Pay earned by an employee at the end of each work period, which in this case is a weekly basis.

[8] The pay slips are the basis of Ms Wren's submitted calculations on gross pay, and whilst I note Ms Bradley's comment that there is a dispute as to the actual gross pay received by Ms Patangata and Mr Fraser, this is not substantiated with any detailed evidence and in any event the pay slips have been produced over many years without query.

[9] I find that Ms Bradley and Mr Wren's calculations on the amount of gross pay paid to Ms Patangata and Mr Fraser differ greatly, and this, together with the fact that on many of the time sheets produced it is clear that a number of Mr Fraser's worked hours and consequently the associated gross pay, were transferred to Ms Patangata and vice-versa, make it very difficult to calculate with any real accuracy the actual gross pay earned by each of them.

[10] I am therefore utilising the gross pay figure (created from Kimiora's payroll system) provided by Kimiora's accountant Ms Lynn Gillett in respect of Ms Patangata and Mr Fraser covering the period 25 October 2009 to 18 August 2013.

[11] Based on Mr Poananga's evidence (see paragraph 16 below) , the gross pay figures used assume that Ms Patangata and Mr Fraser were paid equal to or above the minimum wage. If that is subsequently shown not to be the case an adjustment will be necessary.

Holiday Pay Calculations 2009-2013

Ms Patangata

Gross Pay \$ 81,064.36

Less holiday pay paid with gross pay 2,270.95

Gross pay for holiday pay calculation 78,793.41

Holiday Pay due at 8% 6,303.47

Less holiday pay already paid 2,270.95

Less holiday pay withheld - ordered

to pay in Determination 24 August 2016 1,421.33

Holiday pay outstanding 2,611.19

Mr Fraser

Gross Pay \$ 32,648.55

Less holiday pay paid with gross pay Nil

Gross pay for holiday pay calculation 32,648.55

Holiday Pay due at 8% 2,611.88

Less holiday pay already paid Nil

Less holiday pay withheld - ordered

to pay in Determination 24 August 2016 605.06

Holiday pay outstanding 2,006.82

[12] Pursuant to determination [2016] NZERA Auckland 266 paragraph [118], Mr Poananga has not provided any details of the holiday pay Ms Patangata and Mr Fraser claimed that he withheld at termination, therefore Kimiora is ordered to comply with the order already made and pay Ms Patangata \$1,421.33 gross and Mr Fraser \$605.06 gross.

[13] Mr Poananga's own schedule A in respect of the holiday pay he withheld at termination is the version updated by him and the difference accounted for in the above figures in schedule 'A'.

Holiday pay due for the final week of employment

[14] I determine that Ms Patangata is due the sum of \$67.20 gross in respect of unpaid holiday pay for the period 18 to 28 August 2013 (calculated as 8% of \$840.00), and Ms Fraser is due the sum of \$64.28 gross in respect of unpaid holiday pay for the period 18 to 28 August

2013 (calculated as 8% of \$803.60).

Summary

[15] In respect of the outstanding holiday pay calculated under this determination I order

Kimiora Limited to pay to Ms Patangata the sum of \$2,678.39 gross, and to Mr Fraser the

sum of \$2,071.10 gross. These amounts are in addition to the amounts ordered in paragraphs

[117] – [118] of determination [2016] NZERA Auckland 288

Minimum Wage Payment

[16] In both his written evidence given by affidavit and evidence under oath at the

Investigation Meeting Mr Poananga stated that Ms Patangata and Mr Fraser's wages were

'topped up' when necessary to meet the applicable statutory minimum hourly wage¹; *"If the pruning work did not reach the minimum wage they were topped up to ensure they were paid minimum wage for the hours they worked."*

[17] Ms Patangata and Mr Fraser are covered by [s.6](#) of the [Minimum Wage Act 1983](#) (MW Act) and belong to a class of workers prescribed under s.4 (a) of the applicable

Minimum Wage Order. Orders do not differ except as to the prescribed rates themselves.

¹ Mr Poananga's witness statement paragraph 8 and 54

4 Minimum adult rates

The following rates are the minimum rates of wages payable to an adult worker:

(a) for an adult worker paid by the hour or by piecework, \$11.25 per hour²:

[18] I do not accept Ms Wren's calculations covering the period 2009-2013 in respect of Ms Patangata and Mr Fraser's claim that they were on a number of occasions during their employment paid below the minimum hourly rate for the following reasons:

(i) The MW Act covers wages paid during the period 1 April to 31 March of the

following year, whereas Ms Wren's calculations refer to calendar years;

(ii) An employer must pay its employees at least the minimum wage set annually under the MW Act. The minimum wage must be paid for each hour worked and cannot be applied on aggregate to take into account wages earned over the minimum hourly rate and payments below the minimum hourly rate. ³

(iii) Ms Patangata and Mr Fraser were paid on a mixture of actual hours worked such as tractor driving, paperwork, or other such tasks and piece rate work e.g. being paid for the number of bins of fruit picked. In all cases they must receive at least the relevant minimum wage for each hour worked.

(iv) The time sheets supplied do in most cases state the hours worked per day, in other cases simply the number of bins, or a

mixture of hourly rates and rates per bin. It is necessary for the parties to provide documentation showing the actual hours worked per day and the amount paid for each day's work;

(v) The switching and subsequent crediting of hours worked between Ms Patangata and Mr Fraser results in incorrect wages paid information appearing on the pay slips, which in turn distorts any minimum wage calculation for that period; and

(vi) The minimum wage set annually under the MW Act does not include any element of entitlement to holiday pay.

[19] I am unable to reach a determination on this issue on the basis of the information as provided.

² Hourly rate changes from year to year, rate shown here for explanatory purposes

³ *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at 32-33

[20] In the event that Ms Patangata and Mr Fraser wish to pursue their claim I find that in order to assess compliance with the MW Act the requirement of s. 4(a) of the applicable minimum Wage Order must be followed. This will require the Applicants, with the assistance of the Respondent, to assess each day worked starting with the first day of both Ms Patangata and Mr Fraser's employment during 2009, to show the actual hours worked and the gross pay received.

[21] The information provided must provide detailed information showing that the Applicants were paid at least the relevant minimum hourly wage rate and if not, were compensated at the appropriate rate, less any payment already made.

Penalties

[22] Ms Patangata and Mr Fraser are both seeking penalties for a breach of the MW Act. Ms Patangata and Mr Fraser claim breaches of the MW Act on the basis that they were paid below the relevant minimum wage of \$13.75 per hour for the hours worked in the weeks 29 July – 4 August 2013; 5-11 August 2013; 12-18 August 2013.

[23] Having examined the relevant time sheets I find that the information is not sufficient to determine whether or not the Applicants were paid above or equal to the minimum wage for each hour worked:

(i) In week commencing 18 August 2013 hours worked are transferred between Ms Patangata and Mr Fraser, making it impossible to state which hours were worked, and by which employee;

(ii) In week commencing 4 August 2013 the hours are aggregated to a weekly basis which is not permitted;⁴ and

(iii) There is a mixture of hours worked and bins picked which requires actual hours and pay for those hours worked.

[24] In determination [2015] NZERA Auckland 288 I determined that the claim related only to wages paid between 28 July 2013 and 28 July 2014. ⁵ In order to establish a basis for a penalty I required calculations showing in each pay period their gross amount of pay, actual

hours worked, and the minimum wage for that period.

⁴ Cf: *Idea Services Ltd v Dickson* [2011] NZCA 14

⁵ Determination [2016] NZERA Auckland 288 at [173]

[25] For the reasons set out in the preceding paragraphs, I decline to determine whether or not penalty action is appropriate until the requested information is provided.

Eleanor Robinson

Member of the Employment Relations Authority