

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 258
3053492

BETWEEN

JIGNESH JAYANTIVAHU
SAVAJ
Applicant

AND

METRO FOODS NZ LIMITED
Respondent

Member of Authority: TG Tetitaha

Representatives: J Savaj in person
No appearance by the Respondent

Investigation Meeting: 29 April 2019 at Auckland

Submissions Received: On the day

Oral Determination: 29 April 2019

Record of Oral
Determination: 2 May 2019

ORAL DETERMINATION OF THE AUTHORITY

- A. Metro Foods NZ Limited is ordered to pay Jignesh Savaj within 14 days of this determination, \$36,853.74 in wage arrears and holiday pay.**
- B. Metro Foods NZ Limited is also ordered to pay within 14 days of this determination a penalty of \$20,000 into the Employment Relations Authority bank account with 50 percent then being paid out to Mr Savaj.**

Employment Relationship Problem

[1] Jignesh Savaj submits he is owed wage arrears and holiday pay by his former employer Metro Foods NZ Limited (MFL). He also seeks penalties for the non-payment of his wages and holiday pay upon termination and the failure to produce a wage and time and holiday leave record.

Non-Appearance by Respondent

[2] The hearing has continued without MFL appearing. The respondent filed a statement in reply but took no further steps. It was sent a copy of the Minute dated 9 April 2019 from a telephone conference setting this matter down for hearing and a copy of the notice of investigation meeting for today's hearing.

[3] An email was received dated 24 April 2019 from MFL director Gurdip Singh. He advised that he had been in India most of last year due to an unwell relative. He had also decided to shut down MFL and advised it has no stock or assets. No other information about MFL's solvency has been provided other than that email.

[4] The Authority officer conducted a search of the Companies Register. He was able to confirm this morning that MFL remains registered with the Companies Office. In the circumstances there is no good reason for MFL's failure to take steps or appear today at the hearing. Therefore, the hearing shall continue in its absence.

No wage, time or leave records

[5] MFL was directed to file the applicant's wage, time and holiday leave record. Its representative advised on 28 March 2019 that it "does not have copies of time and wage records and holiday leave records for the applicant".

[6] I am satisfied that such records do not exist and/or the respondent has failed to produce these. In the circumstances I find this has prejudiced Mr Savaj's ability to bring an accurate claim for wages and holiday leave under s 131 of the Employment Relations Act 2000 (the Act) and under the Holidays Act 1983. This has consequences in terms of my acceptance of his evidence about his hours of work and leave.

No briefs hearing

[7] At the telephone conference on 9 April 2019 Mr Savaj agreed this matter could proceed without him having to file any briefs of evidence in advance. He was directed to provide copies of his text messaging and WhatsApp group chat messages between himself and MFL that showed the dates and type of work instructions he received from MFL. He was also directed to provide a copy of his IRD account records showing MFL's alleged wage and PAYE payments made on his behalf and his personal bank account records showing the net wages he actually received. All of this information has been filed and provided either prior to or on the day of hearing.

Factual Findings

[8] Mr Savaj was employed as an assistant restaurant manager by MFL on 1 August 2017. His job involved preparation and delivery of Indian food to external customers located in Hobson Street and Sandringham Road, Auckland.

[9] The parties signed an individual employment agreement. This provided hours of work of 40 hours each week on Monday to Saturday between 8:00 a.m. to 5:00 p.m. He was also paid \$17 gross per hour.

[10] Mr Savaj submits he worked in excess of 40 hours as directed by MFL. He gave evidence he worked nine hours per day seven days per week until 13 November 2017. Between 13 November and 18 December 2017, his hours increased to ten hours per day seven days per week for a four-week period. This was because the owners were in India and he was left to run the business in their absence. This is supported by the email the Authority received on 24 April 2019 from Mr Singh noted above. His hours then reduced to 9 hours per day seven days per week from 19 December 2017 until termination.

[11] Mr Savaj said he would generally receive text messages with cooking and delivery instructions most days. He produced copies of the text messages to his cell phone from another owner Dipak Patelya and chat between himself and Mr Patelya on a WhatsApp chat group. He would also receive telephone calls with cooking and delivery instructions.

Otherwise the cooking and delivery instructions were set out in a book that was left at the premises.

[12] Having heard from Mr Savaj I accept the parties agreed he work the hours he has stated at \$17 per hour. There is no evidence to contradict he did work these hours or should not have expected to be paid for his work at that rate. The substantial evidence in the form of the text and WhatsApp chat as well as Mr Savaj's description of the work that he was doing at that time that supports this. The evidence in the text and WhatsApp chat showed he was not working 40 hours as set out in the employment agreement. The messages showed that he was in fact working a number of Saturdays and Sundays and most public holidays.

[13] Therefore I find Mr Savaj worked the following hours:

- (a) From 1 August to 13 November 2017 – 9 hours per day seven days per week for fifteen weeks totalling 945 hours at \$17 per hour or \$16,065 gross wages;
- (b) From 13 November to 18 December 2017 - 10 hours per day, seven days per week for five weeks totalling 350 hours at \$17 per hour or \$5,950 gross;
- (c) For the period 18 December 2017 to 18 August 2018 nine hours per day, seven days per week for thirty four weeks totalling 2,142 hours at \$17 per hour or \$36,414 gross. This period includes 26 December 2017 when Mr Savaj did not work but should be paid because it was a public holiday.

[14] Therefore, Mr Savaj should have been paid \$58,429 gross wages or \$1,082 gross wages per week. Using his tax code M he should have received \$876.60 net per week or \$47,336.40 net wages.¹ Mr Savaj's bank accounts showed he only received \$16,660 net wages from MFL. He is therefore owed net wages of \$30,676.40.

Annual Leave

[15] Mr Savaj states he took no annual leave days at all. This is supported by the text messaging and WhatsApp chat he has produced. At the time of termination, he was entitled

¹ Calculations undertaken using the online IRD PAYE calculator

to four weeks leave and 8% of the final two weeks gross pay. Therefore, for the four weeks leave he is entitled to \$1,082 gross or \$876.60 net wages per week totalling \$3,506.40 net.

[16] His ordinary weekly pay should have been \$1,082 gross. Two weeks gross wages were earned following his anniversary date totalling \$2,164 multiplied by 8% is \$173.12 gross or \$152.54 net. Therefore, Mr Savaj is owed \$3,658.94 holiday pay.

Public Holidays

[17] The text messages in WhatsApp show Mr Savaj received cooking and/or delivery instructions on nine public holidays. Mr Savaj's oral evidence showed he also worked Auckland Anniversary on 29 January 2018 although there is no text message to show this. I am satisfied by his evidence and the texts and messaging that there was a pattern of him working most public holidays. He accepts he did not work Boxing Day 26 December 2017.

[18] I accept he worked ten public holidays. Therefore, he is owed time and a half for the nine hours worked on each public holiday. This is an additional \$8.50 per hour worked at 90 hours which total \$765.

[19] He is also owed a further ten days alternative leave. The average daily rate at the time of termination was \$175.34 per day. Therefore, he is owed \$1,753.40 alternative days leave.

Penalties

[20] There have been proven breaches of the following Acts:

- (a) Section 130 of the Act by the failure to keep or produce a wage and time record;
- (b) Section 81 of the Holidays Act 1983 by the failure to keep or produce a holiday leave record;
- (c) Section 4 of the Wages Protection Act by the failure to pay wages when the wages became payable to Mr Savaj;
- (d) Section 27 of the Holidays Act 1983 by the failure to pay the holiday pay owed following termination.

[21] I have taken into account s 133A of the Act and recent Court dicta regarding quantum of penalty. For the purposes of this application I have determined a global penalty of \$20,000 is justified. This is because:

- (a) The breaches appear deliberate.
- (b) The losses suffered by Mr Savaj are significant, totalling \$36,853.74. I am also satisfied by his oral evidence of the damage he and his family suffered financially by unpaid wages. He terminated his employment because MFL did not pay his wages on time or even at the level of 40 hours per week. The amounts paid varied from zero in April 2018 to \$1,000 in November 2017. There is pattern of underpayment shown even at the rate of 40 hours per week. He has had to relocate to Hamilton for work and also gave evidence of his vulnerability due to the fact his work visa was tied to this employer, MFL told him to leave if he was dissatisfied. It took 6 months to find new employment during which Mr Savaj had to work for nothing or substantially less than the agreed wage.
- (c) The penalty of \$20,000 is proportionate to the loss suffered by Mr Savaj.
- (d) No restitution or compensation for Mr Savaj's losses has been paid by MFL.
- (e) Although MFL alleges it is impecunious it has produced no evidence of this other than an email. It has also taken no steps to defend its position or provide information to the Authority towards mitigation of penalty amounts. Therefore there is insufficient evidence before me to make any reduction in amount I have determined as payable as a penalty.
- (f) Globalisation of the penalty is appropriate because there has been one continuous action of non-payment of wages and holiday leave that has given rise to this matter.

[22] I have also given consideration as to who should receive payment of the penalty. I have determined Mr Savaj has suffered primarily from the breaches and should receive 50 percent.

Orders

[23] Therefore the following orders are now made:

- C. Metro Foods NZ Limited is ordered to pay Jignesh Savaj within 14 days of this determination, \$36,853.74 in wage arrears and holiday pay.
- D. Metro Foods NZ Limited is also ordered to pay within 14 days of this determination a penalty of \$20,000 into the Employment Relations Authority bank account with 50 percent then being paid out to Mr Savaj.

TG Tetitaha
Member of the Employment Relations Authority