

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 252
3260799

BETWEEN VILIAMI TAFUNA
Applicant
AND AWARD LIVING LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Ruby Brooking for the applicant
No appearance for the respondent
Investigation Meeting: 1 May 2024 by audio-visual link
Submissions Received: At the investigation meeting from the applicant
Nothing received from the respondent
Determination: 2 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] From January to June 2023 Viliami Tafuna worked as a carpenter for Award Living Limited (Award Living or the company). Award Living provides labour on construction projects.

[2] Mr Tafuna claims difficulties with Award Living not paying for some of his work and not forwarding to the Inland Revenue Department (IRD) PAYE deducted from his wages. Award Living's position is largely unknown as it has chosen not to participate in this proceeding.

The issues

[3] The issues for investigation are:

- (a) Does Award Living owe Mr Tafuna arrears of wages?
- (b) Was Mr Tafuna disadvantaged by unjustifiable actions of Award Living in not paying his wages and not forwarding deductions for PAYE to the IRD?
- (c) If a personal grievance is established, what remedies (if any) should Mr Tafuna receive including lost wages or benefits and compensation under s 123(1)(c) of the Employment Relations Act 2000 (the Act)?
- (d) Should either party be required to contribute to the other's costs?

The Authority's investigation

[4] Award Living was served with the statement of problem at its registered office. That document was also emailed to an address provided by Mr Tafuna for the company's director and shareholder known as Ross Ogotau. No statement in reply was received.

[5] A case management conference was arranged with an invitation sent to the company although only Mr Tafuna's representative attended. It was agreed at the conference that the investigation meeting would be held by audio-visual link.

[6] The investigation meeting was held by audio-visual link on 1 May 2024. Notice of the investigation meeting was sent to Award Living and I am satisfied that it was properly served with that notice at its registered office. No one for the company appeared at the investigation meeting. A call was made to Mr Ogotau, but he could not be reached, with a message left advising that the investigation meeting was continuing.

[7] Mr Tafuna's evidence was heard under affirmation at the investigation meeting. The Authority was assisted by an interpreter of the Tongan language. Mr Tafuna was represented by his wife Ruby Brooking.

[8] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

Mr Tafuna's appointment

[9] Mr Tafuna dealt with Mr Ogotau, whom he identifies also being known as Cassius Soni Aleki Togatamai, the sole director and shareholder of Award Living.

[10] The company did not provide Mr Tafuna with an employment agreement as it should have. The Authority has however received evidence of:

- Bank statements showing Award Living making multiple payments into Mr Tafuna's account
- Records of work hours Award Living provided to the company it contracted with to provide the labour of Mr Tafuna and others
- Text messages between Mr Ogotau and Ms Brooking
- Parts of a conversation between Mr Ogotau and Ms Brooking

[11] I am satisfied that Mr Tafuna was employed by Award Living.

[12] Mr Ogotau offered Mr Tafuna \$35 gross an hour to work for the company. They agreed the company would deduct PAYE from Mr Tafuna's wages and forward it to the IRD.

Unpaid wages

[13] Award Living paid Mr Tafuna for most of his work but failed to pay for the following:

- 56 hours worked between 27 February and 4 March 2023
- 40 hours worked between 24 and 28 April 2023
- 9 hours worked on 6 June 2023

[14] These hours are confirmed on the records of work hours sheets. On the information before the Authority, Award Living does not dispute some wages were unpaid.

[15] Award Living owes Mr Tafuna for 105 hours of work at \$35 an hour which he was not paid for. The company is to pay Mr Tafuna \$3,675 gross as arrears of wages.

Unjustified action grievances

[16] From at least 30 May 2023 Ms Brooking on her husband's behalf pursued Mr Ogotau by a variety of methods to ensure that Award Living paid PAYE to the IRD. She texted and spoke to him. A 25 June 2023 voice recording indicates Mr Ogotau was aware of the concerns and payment would be arranged once calculations were made. When this problem was still not resolved Ms Brooking messaged him again in mid-July 2023. By that time, she was also raising the outstanding pay issue. These messages clearly indicate that Mr Tafuna had concerns about Award Living's actions regarding tax and pay. The substance of those concerns were identified as was what he wanted to happen to remedy them.¹ Personal grievances were raised within 90 days of Mr Tafuna becoming aware of these issues.²

[17] Later a formal grievance letter was sent, dated 7 September 2023, specifying unjustifiable action grievances regarding non-payment of wages and failure to forward tax to the IRD.

[18] Award Living owes Mr Tafuna wages. Also, there seems no defence for it deducting money for tax from Mr Tafuna and not forwarding it to the IRD. The voice recording suggests payment would be made once the amount/s were calculated but that was not to be.

[19] On the evidence before the Authority, Award Living acted unjustifiably in not paying Mr Tafuna his wages promptly during his work time and not forwarding PAYE to the IRD. Mr Tafuna was disadvantaged as he was without money which he was entitled to and eventually paid the IRD directly himself after many months had passed without payment from the company.

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].

² The Act, s 114.

Grievance remedies

[20] Mr Tafuna seeks repayment of the money deducted by Award Living for PAYE. Had he not already paid IRD for the tax owing, it would have been appropriate to order Award Living to pay the deducted amount to the IRD. However, as Mr Tafuna has undertaken his tax obligations directly, Award Living should pay him the money it deducted. This could be seen as lost wages or other money owing under s 123(1)(b) of the Act or a lost benefit under s 123(1)(c)(ii). The company is to pay Mr Tafuna \$4,432.15, without deduction.

[21] Mr Tafuna seeks compensation for humiliation, loss of dignity and injury to feelings. Although there are two grievance aspects, the pay and the tax, their impact on Mr Tafuna is intertwined and one award of compensation is appropriate. Mr Tafuna describes a very dark period, being without his full wage entitlement and having to consider where to get money to pay the IRD. There were family tensions with it being a real struggle to pay rent and food. Although compensation is directed at Mr Tafuna's suffering, seeing the impacts on his family was distressing for him.

[22] Mr Tafuna isolated himself. He was also frustrated. He saw his hope of finding better processes in place in New Zealand, a foreign country when he arrived a few years ago, as thwarted.

[23] Having considered other cases, compensation of \$5,000 without deduction under s 123(1)(c)(i) of the Act is appropriate. There is no contributing conduct by Mr Tafuna.

Costs

[24] Mr Tafuna has been successful before the Authority. No representation fees were incurred. However, he is entitled to be paid for the Authority's filing fee of \$71.55.

Orders

[25] Award Living Limited is to pay Viliami Tafuna the following sums within 21 days of the date of this determination:

- \$3,675 gross as arrears of wages;
- For his personal grievances, \$4,432.15 (without deduction) for the PAYE deduction and \$5,000 (without deduction) as compensation under s123(1)(c)(i) of the Act; and
- \$71.55 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority