

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 591
3240159

BETWEEN OFA TONGA
Applicant

AND AWARD LIVING LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Kylie Hudson and Andrea de Stadler, counsel for the applicant
No appearance for the respondent

Investigation Meeting: 27 June 2024 by audio-visual link

Submissions Received: 5 July 2024 from the applicant
Nothing received from the respondent

Determination: 4 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ofa Tonga had an unfortunate start to his working life in New Zealand. He came from Tonga and worked from April to June 2023 on a building project at a hospital in Auckland but was not paid for most of that work.

[2] Mr Tonga was introduced to that job by his brother in law Viliami Tafuna, who has recently been involved in his own Authority matter with Award Living Limited (Award Living).¹ Award Living provides labour for construction projects.

¹ *Viliami Tafuna v Award Living Ltd* [2024] NZERA 252.

[3] Mr Tonga is seeking his outstanding wages from Award Living.

[4] Award Living did not attend the Authority's investigation meeting but indicated earlier that it accepted money was owing to Mr Tonga.

The issues

[5] The issues for investigation are:

- (a) Was Mr Tonga employed by Award Living?
- (b) If so, does Award Living owe Mr Tonga any arrears of wages and if so, how much?
- (c) Is Mr Tonga able to pursue a personal grievance that he was disadvantaged by unjustifiable actions of Award Living in not paying his wages?
- (d) If Mr Tonga is able to pursue his personal grievance, was he disadvantaged by unjustifiable actions of Award Living?
- (e) If a personal grievance is established, what remedies (if any) should Mr Tonga receive including lost wages or benefits and compensation under s 123(1)(c) of the Employment Relations Act 2000 (the Act)?
- (f) Should either party be required to contribute to the other's costs?

The Authority's investigation

[6] Initially, representing himself and seemingly with little clear understanding about who his employer was, Mr Tonga lodged documents in the Authority identifying two individuals as respondents. He appears to have seen these two (directors) as connected with two companies. He shortly afterwards lodged the following:

- (a) a statement of problem which identified a company I refer to as Company C as the respondent. The problem sought to be resolved refers to seeking payment for five weeks' work done for Company C and Award Living. Mr Tonga refers to being given an employment agreement by Company C under an accredited work visa; and
- (b) at the same time, an application for joining a controlling third party to a personal grievance. This named Award Living as the respondent (employer) and Company C as the controlling third party.

[7] Those documents were sent out to the respondent companies. Ross Ogotau made contact with the Authority using an Award Living email address. In Mr Tafuna's determination it is recorded that he understood Mr Ogotau was the (sole) director of Award Living, effectively using another name from that in the Companies Office register.² Mr Tonga could not add much to that description.

[8] Mr Ogotau emailed the Authority that he deeply regretted the situation and the stress caused by it. Mr Ogotau indicated he was committed to finding a suitable resolution to the outstanding matters concerning Mr Tonga, involving a repayment plan.

[9] A statement in reply with attached statement from Mr Ogotau was lodged. This is taken as being solely from Award Living as Company C did not respond to a question from the Authority about whether the statement in reply was also provided on behalf of Company C.

[10] The Authority received no contact on behalf of Company C in this proceeding.

[11] Mr Tonga and Award Living were willing to continue previous dealings with the Early Resolution Service of the Ministry of Business, Innovation and Employment.

[12] Later Mr Tonga advised the Authority that he had reached agreement with Company C but matters had not been resolved with Award Living. The Authority directed Mr Tonga and Award Living to mediation but that was not successful.

[13] Mr Tonga subsequently obtained representation.

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

[15] The amended statement of problem on which Mr Tonga proceeded named solely Award Living as respondent, identifying it as his employer.

[16] An investigation meeting was held by audio-visual link on 27 June 2024. Notice of the investigation meeting was sent to Award Living using the email address Mr Ogotau communicated from. I am also satisfied that Award Living was properly served with that notice at its registered office. No one appeared at the investigation meeting

² Above at n1, at [9].

for Award Living. A call was made to Mr Ogotau but he could not be reached, with a message left advising that the investigation meeting was continuing.

[17] Mr Tonga provided a written witness statement and his oral evidence was heard under affirmation at the investigation meeting. The Authority was assisted by an interpreter of the Tongan language. At the conclusion of the meeting the Authority set a timetable for submissions and directed that the settlement agreement with Company C be provided as well.

[18] 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 Tonga's appointment

[19] In 2023 Mr Tonga was looking for work. He is from Tonga and speaks very little English.

[20] Mr Tafuna introduced Mr Tonga to Mr Ogotau.

[21] Mr Ogotau's communications to the Authority set out some of the circumstances. Reference is made to seeking to assist through a friend's construction company which was accredited. I take this to refer to being an accredited employer for immigration purposes. Award Living was not an accredited employer.

[22] Mr Tonga told the Authority at the investigation meeting that Mr Ogotau had not mentioned which company was to be the employer but said he could help with Mr Tonga's work visa. Mr Ogotau referred Mr Tonga to an agent, seemingly an immigration advisor.

[23] The agent gave Mr Tonga an employment agreement with Company C which identifies his position as construction worker. On its face the agreement was signed by the then sole director of Company C. Mr Tonga was told the employment agreement was related to the work visa.

[24] Mr Tonga is not aware of the signatory of the employment agreement having any involvement in him getting a job. He thought he was going to work with Mr Ogotau.

[25] Mr Tonga had no contact with the Company C director who signed the agreement – they did not meet and never talked or messaged.

[26] It was Mr Ogotau who gave Mr Tonga instructions about the work and occasionally went to the work site. Mr Tonga's first day of work was 17 April 2023.

[27] There was a timesheet which Mr Tonga's immediate on-site supervisor filled out. It was headed "Award Living" and listed a few workers' names, including Mr Tonga and Mr Tafuna.

[28] Mr Tonga was paid twice in cash by Mr Ogotau, for two of his seven weeks of work despite requesting payment into his bank account. He seeks wages for the remaining five weeks of employment as well as bringing a disadvantage personal grievance about non-payment of wages.

Impact of the settlement agreement

[29] The settlement agreement with Company C is signed by the director who signed Mr Tonga's employment agreement.

[30] Company C and Mr Tonga agreed to settle all matters between them for a payment under s 123(1)(c)(i) of the Act. That provision concerns compensation for humiliation, loss of dignity and injury to feelings. There is no payment of wages in the settlement agreement and it refers to the parties confirming they have not agreed to forego minimum entitlements for example, money entitlements under the Minimum Wages Act 1983.

[31] There is some awkwardness here. One of the original respondent parties has reached agreement with Mr Tonga, the other one has not. What impact does that have on Mr Tonga's claims?

[32] For the following reasons I conclude that Mr Tonga's wages claim is not captured by the settlement agreement. On its face there is no reference to wages. The sole payment is made for compensation for non-economic loss. Recognising that there is some flexibility in how parties describe their payments in mediated settlements, there is however also the confirmation by the parties that they have not agreed to forego minimum entitlements. Mr Tonga told the Authority that the payment was not for wages and he has not been paid for the wages he initially claimed.

[33] The grievance initially brought to the Authority appears to be the same as that which is pursued now regarding Award Living.

[34] It is possible in controlling third party situations for grievance remedies to be ordered to be paid by the controlling third party and/or the employer.³ There is little information about the basis on which this settlement agreement was reached. Company C was not a party to the matter at the time of the investigation meeting. There is also the complication of the statement of problem seemingly identifying Company C as the employer but the application to join a controlling third party identifying company C as the controlling third party with Award Living as the employer.

[35] Submissions for Mr Tonga suggested that the settlement agreement with Company C related to an employment relationship with that company which was different to the employment relationship with Award Living. It is difficult though to ascertain that clearly from the material in front of the Authority.

[36] I am in a position to make a finding about the identity of Mr Tonga's employer when he worked on the hospital project and whether wages are owing, and do so below. However, I cannot safely conclude that the personal grievance claim can still be pursued by Mr Tonga.

Identity of Mr Tonga's employer

[37] The Authority's role is to determine the real nature of the relationship between the parties, taking into account all relevant matters.⁴ The fact that Mr Tonga was given a written employment agreement with Company C does not determine that Company C was his employer at the crucial time.⁵

[38] The following factors are relevant:

- The employment agreement with Company C
- Mr Tonga never having met or spoken to the director of Company C who signed that employment agreement

³ The Act, s 123A,

⁴ The Act, s 6(2) and (3)(a).

⁵ The Act, s 6(3)(b).

- Mr Tonga's dealings were with Mr Ogotau, including arrangements about when to start work
- The records of work hours provided to the higher level contractor about the work of Mr Tonga and others referred to Award Living, not to Company C
- The wages which Mr Tonga was paid were received in cash from Mr Ogotau.
- Mr Ogotau's communications from an Award Living email address with the Authority acknowledge a relationship with Mr Tonga.

[39] Having examined the material available, I am satisfied that for the time he was undertaking work on the hospital project Mr Tonga was employed by Award Living.

Unpaid wages

[40] Mr Ogotau paid Mr Tonga cash for his first two weeks' work. The employment agreement with Company C has Mr Tonga on \$29.66 gross per hour. That appears to have been the rate he received when paid cash by Mr Ogotau.

[41] The hours claimed by Mr Tonga are confirmed on the records of work hours sheets. On the information before the Authority, Award Living does not dispute some wages were unpaid. Mr Tonga's representatives have calculated a grossed up total amount he should have been paid and adjusted for the amount he received in cash. Account is also taken of s 132 of the Act, as except for the records of work hours sheets, no wages and time records from Award Living are before the Authority.

[42] In conclusion, Award Living owes Mr Tonga for 274.25 hours of work at \$29.66 an hour which he was not paid for.

[43] The company owes and is to pay Mr Tonga \$8,134.25 gross as arrears of wages.

[44] In addition Mr Tonga is owed holiday pay on both the wages outstanding and the cash amount he received. At the rate of 8% his holiday pay entitlement amounts to \$650.74 gross.

[45] Award Living must also pay interest on the sums outstanding, which should have been paid some time ago now.⁶ Interest is to be paid from 14 June 2023, being a week after Mr Tonga's last day of work. It is to be calculated as per the Ministry of Justice's civil debt calculator.⁷

Orders

[46] Award Living Limited is to pay Ofa Tonga within 21 days of the date of this determination:

- (a) \$8,134.25 gross arrears of wages;
- (b) \$871.54 gross for holiday pay; and
- (c) Interest on those sums from 14 June 2023 until the date of payment.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Tonga may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Award Living then has 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

Nicola Craig
Member of the Employment Relations Authority

⁶ The Act, Sch 2, cl 11.

⁷ <https://www.justice.govt.nz/finances/civil-debt-interest-calculator>