

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 125
5458878

BETWEEN AUBREY TUUTA
 Applicant

A N D FERGUSON CIVIL
 INDUSTRIES LIMITED
 (In Receivership)
 Respondent

Member of Authority: David Appleton

Representatives: Mr Tuuta in person
 No participation by the Respondent

Investigation Meeting: Determined on the papers

Submissions Received: Further information received from Applicant on 31 July
 2014
 None received from Respondent

Date of Determination: 15 August 2014

DETERMINATION OF THE AUTHORITY

The respondent is to pay to the applicant outstanding wages and holiday pay in the sums set out in this determination, together with the lodgement fee disbursed by the applicant in bringing this claim.

Employment relationship problem

[1] Mr Tuuta seeks payment of holiday pay and wages which he states are outstanding after his employment was terminated by the respondent company on 7 March 2014. His son, Leigh Tuuta, has lodged a separate claim with the Authority which is subject to the determination recorded under file number 5458877.

[2] The respondent company went into receivership on 29 May 2014 and has lodged no statement in reply. The receiver, Murray Allott, has written to the Authority stating that, as receiver, he has no interest in and will be taking no part in any employment relationship disputes that may affect the company and which relate to matters arising prior to his appointment on 29 May 2014. Mr Allott also wrote to state that he had authorised Mackley Ferguson, the director of the company, to attend a case management conference on the company's behalf, which took place on 25 July 2014. Despite apparently being advised of the telephone conference by Mr Allott, Mr Ferguson was not available when the Authority telephoned him.

[3] A notice of direction was subsequently sent to the parties, including Mr Ferguson care of Mr Allott, and the respondent was given the opportunity to comment or provide any responses to the documentation that Mr Tuuta was directed to provide to the Authority.

[4] No communication has been received from the respondent company. Accordingly, this determination is based upon the documentation provided by Mr Tuuta.

Determination

[5] Section 131(1) of the Employment Relations Act 2000 provides as follows:

131 Arrears

(1) Where—

(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or

(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—

the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.

[6] Section 24 of the Holidays Act 2003 provides as follows;

24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen

(1) Subsection (2) applies if—

(a) the employment of an employee comes to an end; and

(b) the employee is entitled to annual holidays; and

(c) the employee has not taken annual holidays or has taken only some of them.

(2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—

(a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
(b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[7] Mr Tuuta claims that he is owed the sum of \$3,317.31, before deductions, together with unpaid holiday pay, which at his date of termination had accrued to a total of 240 hours. The Authority saw a copy of a pay slip printed on the headed notepaper of the respondent company and dated for the pay period ended 25 March 2014, which confirmed these figures. The Authority also saw copies of email communications between Mr Ferguson and Mr Tuuta regarding outstanding pay for him and his son, in which Mr Ferguson effectively acknowledged on two occasions that sums were outstanding.

[8] The Authority also saw copies of Mr Tuuta's bank statements which showed that the last payment received by the respondent company was on 4 March 2014. No further payments from the respondent company are shown on Mr Tuuta's bank statement.

[9] Accordingly, in the absence of any evidence from the respondent to the contrary, I accept the evidence of Mr Tuuta that he has not been paid his final wages in the sum of \$2,028.00 (before tax and deductions) or his final holiday pay amounting to 240 hours.

[10] Based upon the information that Mr Tuuta has provided, applying s 24(2) of the Holidays Act leads me to conclude that Mr Tuuta is owed the sum of \$13,269.24, before deductions, in unpaid holiday pay.

Orders

[11] I order the respondent company to make the following payments to Mr Tuuta:

- (i) Unpaid wages in the sum of \$3,317.31, before tax and other deductions; and
- (ii) Unpaid holiday pay in the sum of \$13,269.24, before tax and other deductions.

[12] These orders give rise to preferential claims in accordance with sub clauses 1(2)(a) and (b) of Schedule 7 of the Companies Act 1993 and, accordingly, a copy of this determination shall be sent to the receiver of the respondent company.

[13] I also order the respondent company to pay to Mr Tuuta the sum of \$71.56, being the fee incurred by him for lodging his claim in the Authority.

David Appleton
Member of the Employment Relations Authority