

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 253
3074492

BETWEEN

WENLI WEI
Applicant

AND

SUNLIGHT JMB FUTURE
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in Person
David Fleming, counsel for the Respondent
Investigation Meeting: 16 June 2020
Submissions and/or further evidence: 16 June 2020 from the Applicant and from the Respondent
Determination: 25 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Wenli Wei, claims that he is owed monies in respect of arrears of wages and holiday pay.

[2] Mr Wei also claimed that he was not provided with a written employment agreement and claims penalties for the non-provision of a written employment agreement and in respect of the arrears of wages and holiday pay.

[3] Sunlight claims that Mr Wei is not owed any wages or holiday pay and that he is not entitled to claim any penalties.

Issues

[4] The issues requiring investigation are whether or not Mr Wei is owed:

- wage arrears and/or holiday pay by Sunlight.

- monies in respect of rest and meal breaks
- for Sunlight's failure to pay him at the minimum wage rate, and
- Can claim any penalties.

Brief Background

[5] Sunlight is a retail food business, operating a takeaway shop called 'Country Roast'..

[1] Mr Wei was employed on two occasions by Sunlight, the first period of employment was in 2017, and the second period of employment was in 2018, which ended on 24 September 2018. He was paid in cash on each occasion.

[2] Following the conclusion of the employment there was an exchange of WeChat messages related to Mr Wei's final pay and tax status. Sunlight submit that during those exchanges there was no suggestion made by Mr Wei that he was not paid correctly.

[3] Mr Wei filed a Statement of Problem with the Authority on 11 September 2019 claiming he was owed the amounts of \$18,900.00 in respect of unpaid wages and \$10,920.00 in respect of unpaid holiday pay entitlement.

[4] Mr Wei is seeking to recover unpaid wages in relation to two periods of employment with Sunlight, the first in 2017 and the second period of employment in 2018.

[5] Mr Wei said that whilst he worked at Sunlight he was paid \$8.00 per hour in cash and claimed that he had worked for a continuous period from 31 October 2017 until 30 November 2018, working a total of 35 hours per week.

[6] Mr Wei, when questioned at the Investigation Meeting, had no documentary evidence in support of this claim, he had not kept a written record himself but said that Sunlight had withheld a copy of the record of his working hours which he had signed.

[7] Mr Wei said that at the time he was first employed at Sunlight he had given his driving licence and IRD number to Mr Harry Bei, Director and joint shareholder.

[8] Mr Bei denied that Mr Wei had given him his IRD number. He said that when he employed Mr Wei in 2017 he had asked him for his IRD number and his bank details. Mr Wei had promised to provide them, but did not do so subsequently.

[14] Mr Bei said that Mr Wei had insisted on being paid in cash and stated that he wanted to receive \$15.00 per hour net in cash.

[9] Mr Bei said he had employed Mr Wei because although Mr Wei created difficulties for Sunlight in respect of tax, Mr Wei had previous experience in cutting roast meat, and he could speak understandable English to the customers.

[10] Ms Mi Zhang, Manager of Country Roast, said that she was responsible for the daily operation of the Country Roast business and for staff management, including the payment of wages.

[11] Ms Zhang said she also had asked Mr Wei for his bank account details and IRD number but he had not provided them to her. Ms Zhang said that Mr Wei was paid \$15.00 net per hour in cash, and she reserved monies in respect of the tax payment for Mr Wei.

[12] Ms Zhang said she used a notebook to details the hours each staff member worked. In the case of Mr Wei, Ms Zhang said she had kept a notebook record, but not in as much detail as the other employees because he worked the same hours each week.

[1] This information was provided to the Country Roast accountant who calculated the tax deductions and provided a payslip for each employee showing their net pay and the tax paid. No information had been provided to the accountant in respect of Mr Wei 's earnings because Sunlight had been waiting to receive his IRD number.

[13] Ms Zhang wrote the net payment in each notebook, next to the record of hours worked for that week and asked the employees to sign the book. All the employees apart from Mr Wei were paid by credit transfer into their bank accounts.

[14] Ms Zhang said she recorded the details of payment made to Mr Wei in a notebook, but Mr Wei refused to sign it.

[15] Mr Bei said he had contacted Mr Wei in 2018 because he needed his experience and language abilities in Country Roast whilst he was overseas. After some negotiation about the hours to be worked it was agreed that Mr Wei would work from 4.00 to 10.00 p.m. and at Mr Wei's insistence he was paid in cash, at the increased rate of \$16.00 per hour.

[16] Ms Zhang said Mr Wei's first period of employment came to an end after she had questioned him about an incident in which the Country Roast fridge was switched off, he had become angry and left

[24] After Mr Wei's employment ended, he and Ms Zhang exchanged text messages . The text message sent by Ms Zhang dated 25 September 2018 states:

You yourself were unwilling to sign an employment contract. Harry asked you to provide the IRD number. You haven't provided to us even till now. Now you can come back to work, but you must provide the IRD number. As for the taxes before, we have already deducted and put them in the account, waiting for your IRD number.

Is Mr Wei owed monies in respect of wage arrears and unpaid holiday entitlement?

Arrears of wages

[17] Mr Wei claims that he is owed holiday pay for the period he was employed and that he was not paid for public holidays.

[18] Mr Wei was unable to provide any documentary evidence in support of his claims, and his evidence was that Sunlight had the signed record of the hours he had worked.

[19] Sunlight provided a copy of the notebook entries in respect of Mr Wei, and also provided copies of the notebooks for other employees which had been signed, and payslips for those employees.

[20] The notebook records provided by Sunlight show that Mr Wei was paid \$300 net per week for the period 6 March 2017 to 18 August 2017, that is 24 weeks, and \$480.00 net per week in respect of the period 21 May 2018 to 30 August 2018, 15 weeks.

[21] The notebooks kept by Sunlight are not compliant with the statutory requirement to keep wage and time records in the form set out in s 130 of the Employment Relations Act 2000 (the Act).

[22] Section 132 of the Act states that if an employer failed to keep such records in the required format and that the failure prejudiced the employee's ability to bring an accurate claim for arrears of wages, the Authority may accept the employee's claims in respect of the wages actually paid and hours, days and time worked

[23] The Authority therefore has a discretion to accept the employee's claims in such a situation. However in exercising that discretion the Authority may have regard to the basis of evidence presented by the applicant and the credibility of the basis of the claim.

[24] In this case, Mr Wei was unable to provide any documentary evidence of the hours he worked for Sunlight, nor could he recall any precise details. By contrast Sunlight supplied records which showed that Mr Wei worked 20 hours per week at \$15.00 per hour net for 24 weeks, and 30 hours at \$16.00 per hour for 15 weeks.

[33] Sunlight further provided text messages (as translated) which showed that in 2017 Mr Wei worked 20 hours and was paid \$300.00 net per week, and that in 2018 the terms of re-employment were as negotiated.

[25] In addition Sunlight provided copies of records and payslips kept for other employees which showed that they were paid minimum entitlements as supported by the notebook evidence and statutory deductions were properly made. There is no plausible reason offered by Mr Wei explaining why other employees of Sunlight would be paid correctly and Mr Wei would be the sole exception.

[26] The text messages also support Mr Bei and Ms Zhang's evidence that Mr Wei did not supply his IRD number despite requests from Sunlight which meant his payments were net of tax.

[27] I find the evidence of Sunlight to be more credible than that of Mr Wei.

[28] I determine that there are no arrears of wages due to Mr Wei from Sunlight.

Unpaid holiday pay

(i) Annual holiday pay

[29] Mr Wei claims that he is owed holiday pay in respect of the periods he worked at Sunlight.

[30] Mr Wei worked less than 12 months in both 2017 and 2018 therefore he was entitled to be paid holiday pay at the rate of 8% of his gross earnings less any holiday taken based upon his ordinary weekly pay at the time of leaving in accordance with s 24 of the Holidays Act 2003.

[31] Section 27 (1)(b) of the Holidays Act 2003 (the HA) states that in circumstances in which the employee's employment has come to an end, s27(2) applies. This states:

If subsection (1)(b) applies, the employer must pay the annual holiday pay in the pay that relates to the employee's final period of employment..

[32] During the Investigation Meeting a copy of a cheque in the sum of \$1,152.00 was provided by Sunlight, which was dated 6 November 2019 and made payable to Mr Wei. Sunlight's evidence was that the cheque represented the net payment due to Mr Wei as holiday pay for the two periods in which he worked at Sunlight during 2017 and 2018.

[42] Mr Wei confirmed he had received this cheque.

[43] Sunlight did not pay Mr Wei's outstanding holiday pay until 6 November 2018 and I find it was therefore not compliant with s27 of the HA.

[1] This cheque represents a sum of money calculated as the net pay owing to Mr Wei for holiday entitlement. However Mr Wei should have been paid a gross amount and he would have been responsible for paying the tax due on that to the IRD.

[2] I determine that the difference between the net amount received and the calculated gross amount of holiday pay is owed to Mr Wei for the periods he worked during 2017 and 2018 and he is required to remit that amount to the IRD.

(ii) Public holiday pay

[3] Mr Wei claimed he was not paid for public holidays to be worked.

[4] Ms Zhang's evidence was that Mr Wei did not work on any public holidays although he was paid for them.

[5] Mr Wei did not dispute this evidence during the Investigation Meeting.

[6] I determine that Mr Wei is not owed any monies in respect of public holidays worked and not paid.

Is Mr Wei owed monies in respect of unpaid rest and meal breaks?

[7] Mr Wei claimed during the Investigation Meeting that he had not been paid for rest and meal breaks. Mr Wei had no evidence to support this claim.

[8] Mr Wei worked 4 hours per day in 2017 and 6 hours a day in 2018. He was therefore entitled to one 15 minute paid break in 2017 and a 15 minute paid break and an unpaid 30 minute lunch break in 2018.

[9] Mr Wei's evidence is that the employees at the Country Roast did not take their breaks at set times but between customers and at quiet times. Mr Wei was allowed to eat Sunlight provided food on his breaks and was paid for the breaks.

[10] I find no evidence that Mr Wei was unable to take rest and meal breaks although I accept these were not taken at set times. In addition there is no evidence that Mr Wei was not paid for the breaks taken.

[11] I determine that Mr Wei is not owed monies in respect of unpaid rest and meal breaks.

Was Mr Wei paid below the minimum wage rate?

[55] Mr Wei stated that he has been paid wages below the minimum wage rate, being paid \$8.00 cash per hour

[33] I have found that Mr Wei was paid \$15.00 net per hour in cash during 2017 and \$16.00 net per hour net in cash in 2018.

[34] During the period Mr Wei worked at Sunlight in 2017 the minimum wage rate was \$15.75 gross per hour and during the period he worked at Sunlight in 2018 the minimum wage rate was \$16.50 gross per hour. This means that his gross hourly rate in both 2017 would have been above the minimum wage rate.

[35] Sunlight is responsible for remitting the tax due on those net hourly payments to the IRD and its evidence is that it has retained monies to comply with that requirement once it receives an IRD number in respect of Mr Wei.

[36] I determine that Mr Wei was not paid below the minimum hourly rate in both 2017 and 2018.

Penalty claims

[37] During the Investigation Meeting Mr Wei stated that he wished to claim penalties in respect of his various wage arrears and holiday pay claims, and for the non-provision of a written employment agreement.

[38] I have determined that Mr Wei is not owed monies in respect of wage arrears, and rest and meal breaks.

[39] I have determined that Mr Wei is owed only the difference between the net and gross holiday pay, and that this difference is to be paid to the IRD. Mr Wei has already been paid the net pay for unpaid holiday pay.

[40] There are therefore no valid penalty actions in respect of those claims.

[41] In respect of the non-provision of a written employment agreement it is not disputed that Mr Wei was not provided with a written employment agreement. Sunlight claims that Mr Wei refused to sign one.

[65] Employers are expected to provide employees with a copy of the intended written employment agreement as set out in s 63 (2) of the Act and provide a written employment agreement in the form set out in s 65 of the Act. Failure to do so is punishable by the imposition of a penalty.¹

[66] Section 135 of the Act states that an action for the recovery of a penalty must be commenced within 12 months of:

- (a) The date on which the cause of action first became known to the person bringing the action; or
- (b) The date when the cause of action should reasonably have become known to the person bringing the action.

[67] Mr Wei had 12 months in which to commence his action for recovery of a penalty. It is therefore appropriate that I consider this timing issue because unless Mr Wei has brought his claim within the statutory time frame, he is time-barred and not entitled to remedies.

[68] Mr Wei must have brought his action for the recovery of a penalty either within 12 months of becoming aware of the cause of action, or within 12 months of reasonably becoming aware of the cause of action.

[69] In the text message exchange with Ms Zhang in September 2018 Mr Wei refers to the non-provision of an employment agreement: “Harry never mentioned anything as employment contract or IRD number. Had better wait for the government to resolve it.”

[70] I find that Mr Wei was reasonably aware of the cause of action, namely an employment agreement not having been provided to him, in September 2018.

[71] Mr Wei claimed a penalty in respect of this matter during the investigation Meeting held on 16 June 2020. This is more than 12 months after he was reasonably aware of this cause of action.

[72] I determine that Mr Wei is time-barred from bringing a claim for the non-provision of an employment agreement by Sunlight and consequently not entitled to any penalty.

Recommendation

[73] Sunlight has not kept compliant wage and time records in accordance with s 130 of the Act and is therefore acting in breach of the Act.

¹ S 133 Employment Relations Act 2000

[74] All employees must keep fully compliant wage and time records for all employees.

[12] I recommend that Sunlight take professional advice to ensure that in future it has wage and time records for its employees in the form required under the Act.

[13] No PAYE has been remitted to the IRD in respect of Mr Wei.

[14] I recommend that Mr Wei provides his IRD number to Sunlight as soon as possible in order that proper compliance can be made by both Mr Wei and Sunlight with the law of New Zealand regarding the payment of taxation.

[15] Mr Wei is further recommended to make payment of the gross amount payment on the holiday pay in a timely manner to the IRD as required.

[16] A copy of this determination will be sent to the IRD for its information.

Costs

[17] Costs are reserved. Should the parties seek costs, they are encouraged to try to resolve any issue of costs between themselves.

[18] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[19] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson
Member of the Employment Relations Authority**