

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 49  
3000139

BETWEEN TUI WESTRUPP  
Applicant

AND HELLYERS TRANSPORT  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Elizabeth Dalton, advocate for the Applicant  
Russell and Dorothy Hellyer, advocates for the  
Respondent

Investigation meeting: 30 March 2017

Determination: 3 April 2017

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**DETERMINATION OF THE AUTHORITY**

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**A. Within 28 days of the date of this determination Hellyers Transport Limited must pay Tui Westrupp:**

- (i) \$6,756.02 gross in unpaid wages and KiwSaver entitlements, and**
- (ii) Interest at 5% from 18 December 2016 until paid in full, and**
- (iii) \$71.56 reimbursement of the filing fee.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] Tui Westrupp was a driver for Hellyers Transport Limited from 14 November 2014 until 16 December 2016. He claims unpaid wages for incorrectly paid annual leave, sick leave, bereavement leave and for working on public holidays.

[2] Hellyers Transport Limited (the company) has had limited involvement in these proceedings. No statement in reply was received, despite an extension of time being granted. On 28 February 2017, Nigel Hellyer, a director of the company, took part in a teleconference at which he told me that the company was going into liquidation. I was aware, from the Companies Office website, that the company was not yet in liquidation. I directed him to provide evidence of the company's financial situation by 3 March 2017.

[3] He did not do so although he did instruct a law firm, which let the Authority know that it was representing the company in these proceedings.

[4] On 14 March 2017, still not having received any information from the company, I set a date for the investigation meeting, which I held in Dunedin on 30 March 2017.

[5] The company's law firm contacted the Authority a few days before the meeting, withdrawing from representing the company.

[6] The day before the investigation meeting, at 7.39pm, a Senior Employment Claims Adviser from Employsure Limited, emailed the Authority Officer, alerting me to the fact that it had been engaged by the company, and asking that Melodi James be able to attend the meeting by teleconference.

[7] I telephoned Ms James during the investigation meeting. Russell Hellyer, another director of the company, and Dorothy Hellyer attended the meeting in person. Ms Dalton and Mr Westrupp also attended the meeting.

[8] Mr and Mrs Hellyer advised me that the company was going into liquidation. If the company was in liquidation I could not continue these legal proceedings without the liquidator's permission. However, liquidation has not yet commenced. Therefore, I have continued to investigate and determine the claim.

[9] Unfortunately, neither Ms James nor Mr and Mrs Hellyer had seen Mr Westrupp's claim before the meeting. They did not bring any documentary evidence on the company's behalf. Nigel Hellyer did not inform the Authority that he did not intend to be present for the investigation meeting.

[10] Ms Dalton explained Mr Westrupp's claim. Mr Westrupp answered my questions. Mr and Mrs Hellyer were given an opportunity to ask questions and make any statements on the company's behalf.

### **The claims**

[11] I need to establish whether Mr Westrupp's claims are correct. His evidence is that he worked approximately 12 hours a day. There are a number of payslips and a page of calculations by the company's accountant that support that claim.

[12] Mr Westrupp claims the company owes him wages for the following reasons:

- It wrongly paid him for annual leave on a weekly basis and did not allow him to accumulate annual holidays as leave for the first eight months.
- It wrongly paid him for all leave (annual, sick and bereavement) and for working on public holidays as if he only worked 8 hour days (to 15 May 2016), when his actual earnings per day were higher. He should have been paid at the rate of his ordinary weekly pay or his average weekly earnings from the previous 12 months, whichever was the greater. That was not done.
- From 16 May 2016 he was paid for leave as if he worked variously 9.7 hours a day to 12.5 hours a day. He worked an average of 12 hours a day.
- On 29 May 2016, the company paid Mr Westrupp two payments over and above his weekly wages, of \$288.09 (back pay) and \$1,215 (cash up entitlement pay). However, instead Mr Westrupp claims he should have been credited with accrued annual leave. Only as at pay period 34 did annual leave begin to be accumulated, but it did not include the previous eight months of annual leave entitlement.

- It did not pay Mr Westrupp the correct amount of the employer's contribution to KiwiSaver because it underpaid him. Therefore, the company should pay 3% of the total wages it owes Mr Westrupp.
- The company should pay Mr Westrupp interest on the unpaid wages from the time he finished working for the company.

### **Determination**

[13] The company's failure to produce a full wages and time record, despite Ms Dalton's detailed requests made on 22 and 23 March 2017, prejudiced Mr Westrupp's accurate calculation of his wages. Therefore, according to s 132 of the Employment Relations Act 2000 (the Act) I can accept Mr Westrupp's claims in respect of the wages actually paid to him and the hours, days and time worked by him.

[14] During the first eight months of Mr Westrupp's employment no annual holiday leave was accrued. Instead, the company paid him 8% of his weekly earnings, towards his holiday pay. He did not take any annual leave during those eight months.

[15] Legally, the company was not able to pay him his annual holiday entitlement at 8% because he was not a casual employee and not employed on a fixed-term employment agreement. I understand that Nigel Hellyer may have been wrongly advised that he was entitled to pay Mr Westrupp at 8%, but he was not so entitled.

[16] Instead, Mr Westrupp should have been entitled to accrue annual leave, despite having wrongly been paid for it. In addition, the company was not entitled to pay Mr Westrupp for his annual leave by way of cashing up, as Mr Westrupp had not formally requested that some of his annual holiday entitlement be paid out.

[17] Ms Dalton's calculations show Mr Westrupp was underpaid for public holidays he did not work on. They also demonstrate that at the end of his employment he was not paid for all the annual leave that should have been accumulated.

[18] I also accept Ms Dalton's calculations in relation to sick leave, public holiday pay and bereavement leave and accept that these were similarly underpaid. I accept that the company owed Mr Westrupp \$3,985.24 as at the pay week ending 2 October

2016. The employer's KiwiSaver contribution on that at 3% comes to \$119.56. The amount of \$288.09 paid to Mr Westrupp in May 2015 needs to be deducted. The total owed to Mr Westrupp as at 2 October 2016 is \$3,816.71 gross.

[19] There is a further amount owed for annual leave entitlements that were not accrued in the first eight months of employment. That is \$2,853.70 gross. The employer's contribution of KiwiSaver on that at 3% is \$85.61, making \$2,939.31 gross.

### **Conclusion**

[20] The total the company owes to Mr Westrupp for underpaid entitlements and KiwiSaver is \$6,756.02 gross.

### **Interest**

[21] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.<sup>1</sup>

[22] From as early as April 2016, the company was aware that Mr Westrupp considered he had been unjustifiably disadvantaged by incorrectly being paid his annual leave in the first eight months of his employment and the leave not accumulating. Although the company paid him some amounts to attempt to settle the issue, it was never properly settled during his employment. I consider the company should pay Mr Westrupp interest of 5% on the total amount owed to him from the date he finished his employment until the date he is paid in full.

### **Costs**

[23] The company must reimburse Mr Westrupp the filing fee costs. If Ms Dalton intends to claim costs for representing Mr Westrupp she must do so within 7 days of the date of this determination. The company will then have a further 7 days in which to respond. I reserve my decision on costs.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>1</sup> Updated in 2011 by Judicature (Prescribed Rate of Interest) Order 2011.