

ANDERSON

EMPLOYMENT LAW ADVOCACY

Refer to: **Lawrence Anderson**

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Thursday 12 December 2024

Employment Relations Authority c/- Chief Member Andrew Dallas

By Email: Complaints@ERA.govt.nz

OPEN LETTER COMPLAINT: Authority allowing counter-claims in Statements in Reply

1. I refer to the Authority's practice of allowing a Respondent (often the employer) being allowed to file a counter-claim against an Applicant (often the employee) in a Statement in Reply:
 - a. This is not legislatively allowed for.
 - b. There is no practice directions about this practice.
 - c. The party being allowed to file a counter-claim in this way does so on the back of using the filing fee of \$71.55 that the Applicant has already paid for.
 - d. The Applicant does not get a proper right of reply.¹
2. This practice that has developed allows an indulgence that is entirely against the principles of natural justice. Respondents (often employers) are getting a free lunch.
3. If parties go to any other Court or Tribunal, claims must be filed properly with the correct documentation. The Disputes Tribunal for example specifically has forms for counter-claims and will not entertain counter-claims being advanced by way of a reply from a Respondent.
4. Further, where parties are challenging a determination of the Authority to the Employment Court they must file their own claims. That being whether a Plaintiff wishes to challenge the determination (or file any other claim under Form 2). If a Defendant wishes to cross-challenge (Form 1) they must file themselves, or any other claim must be filed on its own (in the required form).
5. I contain here within annexed an extreme example of recent file number [REDACTED] Member [REDACTED] has allowed a counter-claim by way of the Respondent's

¹ Members have told me that a reply can be dealt with in Witness Statements. This is not a satisfactory reason.

Statement in Reply against the Applicant for **\$7,575.35** alleging overpayment of wages based on a simple spreadsheet with no legal substance to the “counter-claim”.

6. In the case of that I refer to, the employer has, and continues, to deliberately withhold wages and entitlements from the employee.
7. The Employer has not paid \$71.55 for its “counter-claim”.
8. The Employee’s case that was filed by the writer includes claims about:
 - a. The employer failing to provide rest and meal breaks.
 - b. Several unjustifiable action causing disadvantage personal grievance claims.
 - c. Unjustifiable dismissal.
 - d. Unlawfully withholding wages of \$1,890.
 - e. Further wages arrears.
 - f. Minimum wage breaches.
 - g. Holiday pay entitlements not being paid correctly with regard to Holidays Act.
 - h. Penalties for the various breaches.
9. When I complained to Member ██████████ about allowing the counter-claim to proceed by way of the Respondent’s Statement in Reply, Member ██████████ was entirely unable to refer me to any legal justification for allowing the entertaining a “counter-claim” in a Statement in Reply.
10. Member ██████████ further referred to this as being a practice that the Authority has “started doing, and that is how it is done... [just because]”. I did not get a satisfactory answer as to why this practice is continuing to happen.
11. Please advise what action will be taken by the Authority about this complaint.

Yours faithfully,



Lawrence Anderson

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

BETWEEN

██████████
Applicant

AND

████████████████████
First Respondent

AND

████████████████████
Second Respondent

Member of Authority: ██████████

Representatives: Lawrence Anderson, advocate for the Applicant
██████████, counsel for the Respondents

Date: 2 September 2024

DIRECTIONS OF THE AUTHORITY

[1] A case management conference (CMC) was held by telephone on 30 August 2024, with the following timetable directions made:

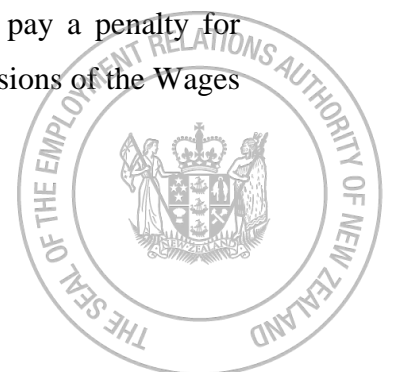
- Applicant's witness statements *To be lodged and served by 24 January 2025*
- Respondent's witness statements *To be lodged and served by 7 March 2025*
- Any witness statement in reply from the applicant (strictly if necessary) *To be lodged and served by 21 March 2025*
- Investigation meeting *From 10am on 7 and 8 May 2025*

Issues

[2] The issues identified for investigation and determination are:

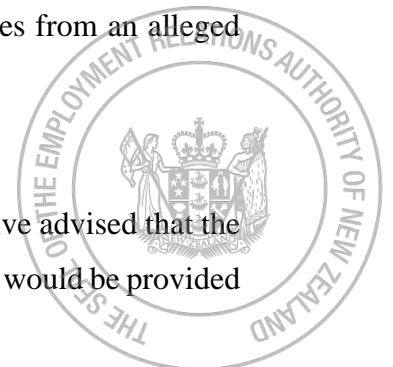


- (a) whether the applicant's employment, or one or more conditions of his employment, was affected to his disadvantage by the respondents' unjustified actions relating to:
- (i) failure to provide rest and meal breaks;
 - (ii) conducting a disciplinary meeting in a café, where members of the public were present.
 - (iii) failing to provide information regarding the disciplinary matter?
- (b) Whether the applicant was unjustifiably dismissed from his employment?
- (c) If the applicant establishes personal grievances, is he entitled to a consideration of remedies sought, including:
- (i) reimbursement of lost wages (quantification of which to be provided); and
 - (ii) compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (d) Should the Authority direct the first respondent to provide the applicant's full wages and time records together with his full holiday and leave records for the duration of his employment?
- (e) Should a penalty be ordered against the first respondent under s 130 of the Act, for the failure to provide the requested information?
- (f) Should a penalty be ordered against the second respondent, under s 134(2) of the Act, for aiding and abetting the first respondent's conduct in relation to the failure to provide the requested records?
- (g) Did the first respondent make an unlawful deduction from the applicant's wages in the sum of \$1,890.00 (gross), without lawful reason, and without the applicant's consent?
- (h) Should the Authority order the first respondent to pay a penalty for making an unlawful deduction in breach of the provisions of the Wages Protection Act 1983?



- (i) Should the Authority order the second respondent to pay a penalty under s 134(2) of the Act, for aiding and abetting the first respondent's breach of the Wages Protection Act in relation to the unlawful deduction?
- (j) Is the applicant owed wage arrears of \$526.00 (gross), together with holiday pay on this sum, for a period in 2021 when he was paid less than the minimum wage?
- (k) Should the first respondent be required to pay a penalty under s 10 of the Minimum Wage Act 1983, for failing to pay at least the applicable minimum wage?
- (l) Should the second respondent be ordered to pay a penalty under s 134(2) of the Act for aiding and abetting the first respondent's breach of the provisions of the Minimum Wage Act?
- (m) Is the applicant owed arrears of holiday pay, arising from the first respondent not including commission payments as part of 'gross earnings' for the purposes of calculating holiday pay, together with interest on any sum awarded?
- (n) Is the applicant owed arrears of wages under s 131 of the Act because the first respondent failed to provide the applicant with his full entitlements to unpaid meal breaks?
- (o) Should the first respondent be required to pay a penalty under s 69ZF of the Act for its failure to provide rest and meal breaks in accordance with the Act?
- (p) Should the second respondent be required to pay a penalty under s 134(2) of the Act for aiding and abetting the first respondent's breaches of the rest and meal breaks provisions of the Act?
- (q) Should any of the above penalties (if ordered) be paid to the applicant?
- (r) **Counterclaim:** should the applicant be required to repay to the first respondent, the sum of \$7,575.35 (gross) which arises from an alleged overpayment of wages, holiday pay, and sick leave?
- (s) Is any party entitled to an award of costs?

[3] During the course of the CMC, the respondents' representative advised that the wages and time record, and the holiday and leave record information would be provided



as soon as possible. Given this, no direction is made in relation to this at this stage. However, should he consider it necessary to progress such a direction, the applicant may notify the Authority.

Witnesses

[4] The applicant will give evidence, together with his partner [REDACTED].

[5] For the respondent, [REDACTED] will give evidence, together with [REDACTED], [REDACTED], and [REDACTED]. In addition, two expert witnesses will give evidence; an accountant, and the owner of another hairdressing salon.

[6] Written witness statements are required to be lodged and served as per the timetable above.

[7] It is agreed that a common bundle is required. The applicant has responsibility for preparing this. The common bundle is to be paginated and contain an index. The parties are to liaise about the contents of the common bundle, and are to have agreed on its index by **20 January 2025**.

[8] The common bundle is to be lodged and served (in soft copy form) together with the applicant's witness statements as timetabled above.

[9] Documents containing a language other than English must be accompanied by a translation.

[10] Unless agreed by the Authority in advance, witnesses are expected to attend the investigation meeting in person, and under oath or affirmation, answer questions about their evidence.

Investigation meeting

[11] The procedure for the investigation meeting will comprise:

- (a) Questions from the Authority Member to witnesses;
- (b) Any additional relevant and necessary questions to witnesses from the representatives; and
- (c) Submissions will be heard at the close of the meeting.



Further discussion and mediation

[12] During the CMC the parties both expressed a view that further mediation could be of some assistance, particularly in light of the fact that the respondents' representative has recently changed.

[13] Accordingly, a referral to further mediation is made, so that the parties may attend, and in good faith, attempt to resolve matters between them. A coordinator from the Employment Mediation Service of MBIE will make contact with the parties to arrange.

[14] The parties are expected to fully cooperate with the mediation coordinator.

[15] Attendance at mediation is voluntary. However, it is desirable that the further mediation should occur by **13 December 2024**. The above timetable dates have been set to allow mediation to take place prior to the parties being required to commence drafting their written evidence.

[16] If the matter is resolved at mediation, the application currently before the Authority may be withdrawn.

[17] The applicant is to notify the Authority of the outcome of mediation.

Potential liability for costs

[18] The Authority has power to award costs to a successful party under clause 15 of Schedule 2 of the Act, as a contribution to relevant costs incurred by that party.

[19] The Authority uses a "tariff" based approach.¹ The current tariff for a one day investigation meeting is \$4,500.00. For each day thereafter, the current tariff is \$3,500.00.

[REDACTED]

[REDACTED]

Member of the Employment Relations Authority

¹ Employment Relations Authority "Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi" <www.era.govt.nz>.

