

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

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Amir Roufail,

Petitioner,

Docket Nos.: LB-21-0406-0409

v.

Office of the Attorney General,  
Fair Labor Division,

Respondent.

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**Appearance for Petitioner:**

Amir Roufail, *pro se*  
Northbridge House of Pizza  
2225 Providence Road  
Northbridge, MA 01534

**Appearance for Respondent:**

Anita V. Maietta, Esq.  
Assistant Attorney General  
Office of the Attorney General  
Fair Labor Division  
105 William Street, First Floor  
New Bedford, MA 02740

**Administrative Magistrate:**

John G. Wheatley

**SUMMARY OF DECISION**

The four citations issued by the Office of the Attorney General, Fair Labor Division, are affirmed. The citation for failure to pay the minimum wage is affirmed because two of the petitioner's employees were paid less than the state minimum wage for substantial non-tipped work performed inside the petitioner's restaurant. Based on the conflicting evidence presented,

and the petitioner's internally inconsistent payroll records, the Fair Labor Division did not err in calculating the amount of restitution due to those employees. The civil penalties assessed under each of the citations are also affirmed, because the violations for which the penalties were assessed were established by the evidence, and the Fair Labor Division considered appropriate and relevant factors in setting the value of the penalties.

### DECISION

The petitioner, Amir Roufail, appealed four citations issued by the Fair Labor Division of the Attorney General's Office alleging that the petitioner had failed to pay two of his employees the minimum wage, had failed to provide them with paystubs or other documentation detailing their wages and payroll deductions, had failed to establish a policy for his employees to accrue earned sick leave, and had failed to maintain true and accurate payroll records. The citations ordered the petitioner to make restitution to the affected employees, in the amounts of \$3,651.75 and \$1,990.33, and to pay civil penalties totaling \$2,300.00.

I held an evidentiary hearing on March 23 and April 11, 2022, using the Webex videoconferencing platform, which was recorded. I admitted into evidence the parties' documents marked as Exhibits 1-18.<sup>1</sup> The Fair Labor Division called its investigator, Eduina Butts, and one of the affected employees, Danielle Perreault, to testify at the hearing. Mr. Roufail testified on his own behalf.<sup>2</sup> The parties elected not to file closing briefs, and the administrative record closed at the end of the hearing.

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<sup>1</sup> I have excluded the petitioner's proposed Exhibits 19-23, which consisted of video surveillance that allegedly showed misconduct by one of the employees involved in this case. This is not a wrongful termination case, and an employee's alleged misconduct is irrelevant to the issue of whether the employee was paid the minimum wage permitted under Massachusetts law.

<sup>2</sup> Although I found Mr. Roufail to be a credible witness, generally, the inconsistencies in his payroll reports and lack of supporting documentation made his payroll records unreliable.

**FINDINGS OF FACT**

Based on the testimony at the hearing, my assessment of witness credibility, and the documents admitted into evidence, I make the following findings of fact:

1. Amir Roufail is the sole proprietor of Northbridge House of Pizza. (Ex. 2.)
2. In 2017, Mr. Roufail hired Danielle Perreault as a delivery driver for Northbridge House of Pizza. When she was hired, Mr. Roufail explained to Ms. Perreault that she would be paid an hourly rate less than the minimum wage because she would also receive tips for doing deliveries. (Perreault Testimony.)
3. When she was hired, Mr. Roufail did not provide Ms. Perreault a notice regarding earned sick leave law and did not advise her regarding her right to earned sick leave. (Perreault Testimony.)
4. Ms. Perreault was employed full-time, working 37 hours per week on average. (Perreault Testimony; Butts Testimony.)
5. During her employment, Ms. Perreault was the only full-time employee at the restaurant. (Perreault Testimony.)
6. When she was not out delivering food, Ms. Perreault worked inside the restaurant. Her duties included taking customer orders, answering the telephone, preparing food orders, weighing meat, packaging orders for delivery, processing customer payments, cleaning the dining area, sweeping and mopping, cleaning dishes, and assembling pizza boxes. (Perreault Testimony.)
7. In addition, on days that Ms. Perreault opened the restaurant for business, she would turn on the lights, pizza oven, and food warmer, and then begin the “prep. work” for food orders, such as making salads and cutting toppings for pizzas. (Perreault Testimony.)

8. Ms. Perreault did not receive paystubs for the wages she was paid. (Perreault Testimony.)
9. Ms. Perreault was laid off after she got into a non-work-related automobile accident on February 13, 2021. (Perreault Testimony; Ex. 9.)
10. Dylan Thompson was employed as a delivery driver at Northbridge House of Pizza between January 11, 2020, and January 13, 2021. (Ex. 8.)
11. Like Ms. Perreault, Mr. Thompson also worked inside the restaurant when not performing deliveries, including sweeping and mopping the floors, cleaning the dining area, doing dishes, cashing out customers, and kitchen work such as grilling and cooking food. (Perreault Testimony; Butts Testimony; Ex. 8.)
12. Ms. Perreault and Mr. Thompson spent approximately 50-70% of their worktime working inside the restaurant, and the remaining 30-50% of their time delivering food.<sup>3</sup> (Perreault Testimony; Ex. 8; Butts Testimony.)
13. Customers ordering food inside the restaurant were invited to leave tips in a jar on the restaurant's counter. Ms. Perreault and Mr. Thompson did not receive any of those tips. (Perreault Testimony; Roufail Testimony.)
14. Ms. Perreault and Mr. Thompson retained all the tips they received from customers for making deliveries, without any deductions taken by Mr. Roufail.<sup>4</sup> (Roufail Testimony.)
15. Ms. Perreault was paid \$10.00 per hour during the years 2020 and 2021. (Perreault Testimony; Exs. 5, 11A, 11B, 12A, 12B.)

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<sup>3</sup> Ms. Perreault testified that she spent 65-70% of her time working inside the restaurant doing non-tipped work. (Perreault Testimony.) Mr. Thompson reported that he "spent more time working in the restaurant" than delivering food. (Ex. 8.) Mr. Roufail testified that the employees spent 30-40% of their time working in the restaurant but had reported to Ms. Butts that they spent about half of their time in the restaurant. (Roufail Testimony; Butts Testimony.)

<sup>4</sup> I credit Mr. Roufail's testimony on this point over any contrary testimony by Ms. Perreault.

16. In January 2021, the Office of the Attorney General received a nonpayment of wages complaint from Ms. Perreault, alleging that she received less than the minimum wage for her time performing non-tipped work inside the restaurant. (Butts Testimony.)
17. Eduina Butts was assigned to investigate Ms. Perreault's complaint. (Butts Testimony.)
18. Ms. Perreault informed Ms. Butts that Mr. Thompson also worked as a delivery driver at the restaurant. Ms. Butts contacted Mr. Thompson, who confirmed that he worked at the restaurant from January 2020 to January 2021. (Butts Testimony.)
19. On February 11, 2021, Ms. Butts issued a demand for documents from Mr. Roufail, including payroll records, timekeeping records, and documents concerning earned sick leave policies. (Ex. 1; Butts Testimony.)
20. During the relevant period, Northbridge House of Pizza did not have an earned sick time policy. (Ex. 2; Roufail Testimony.)
21. Mr. Roufail responded to the payroll demand by submitting an Excel spreadsheet and Quicken Books payroll history reports for Danielle Perreault, but he did not submit any payroll records for Mr. Thompson. (Ex. 5; Butts Testimony.)
22. The payroll documents for Ms. Perreault did not show the amount of any tips she received. The records also substantially underreported her hours worked, indicating only 16-17 hours per week.<sup>5</sup> (Ex. 5.)
23. Ms. Butts called Mr. Roufail to request additional payroll documentation, including records for Mr. Thompson. (Butts Testimony.)

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<sup>5</sup> The revised Excel spreadsheet and payroll history reports that Mr. Roufail submitted into evidence at the hearing reflect a substantially greater number of weekly hours for Ms. Perreault and include amounts for tips she received each day. (Exs. 11A, 11B, 12A, 12B.) These records therefore contradict the payroll records he previously submitted to Ms. Butts.

24. On June 28, 2021, Mr. Roufail submitted substantially identical payroll records, which did not include any records for Mr. Thompson and did not indicate any tips received by Ms. Perreault. (Exs. 3, 5; Butts Testimony.)
25. Ms. Butts requested copies of paystubs for Ms. Perreault and Mr. Thompson. Mr. Roufail responded that he did not have any, and that he did not issue paystubs to his employees. (Butts Testimony; see also Ex. 1.)
26. The payroll reports provided by Mr. Roufail do not reflect the actual times that the employees logged in and out of the cash register system at the start and end of their workdays. Rather, Mr. Roufail reported that he rounded the in-and-out times when he transferred the times from the cash register system to Quicken Books. (Butts Testimony.)
27. Mr. Roufail did not produce the employee's actual in-and-out times from the cash register system. (Butts Testimony.)
28. On July 15, 2021, Mr. Thompson provided Ms. Butts a spreadsheet of his hours worked and tips earned during his employment at Northbridge House of Pizza. His spreadsheet indicated that he was paid \$8.00 per hour through December 6, 2020, and then \$9.00 per hour from December 7, 2020, through the end of his employment.<sup>6</sup> (Ex. 8.)

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<sup>6</sup> The revised payroll records that Mr. Roufail submitted at the hearing are consistent with Mr. Thompson's spreadsheet of wages and tips in material respects. Mr. Roufail's records, however, include the wages and tips paid to Mr. Thompson for the weeks of March 23, May 25, June 15, June 22, August 3, August 31, September 14, September 21, and September 28, 2020 which were omitted from Mr. Thompson's spreadsheet. I note that there is less than \$1.00 difference in the tip amount reported by Mr. Thompson and those reflected in Mr. Roufail's records for the same weeks. With respect to his hourly rate, Mr. Roufail's records indicate an increase from \$8.00 to \$9.00 per hour effective November 30, 2020, as opposed to December 7, 2020. Setting aside the week of November 30, 2020, the wages reflected in Mr. Roufail's records total \$2.00 less than those in Mr. Thompson's spreadsheet during those same weeks. (Exs. 8, 13A, 13B, 14A, 14B.)

29. To determine whether the employees were underpaid, Ms. Butts separated their hours worked into time spent delivering food and time spent working inside the restaurant. Based on the information received from Mr. Roufail and the employees, she calculated the hours that the employees worked inside the restaurant at 60% of the total hours worked. She then applied the employees' hourly rate to those hours to determine the wages attributable to work performed inside the restaurant. Lastly, she calculated the difference between those wages and the wages the employee would have earned at the prevailing minimum wage (for non-tipped work) to determine the amount of wages owed to such employee each week. Based on these calculations, Ms. Butts determined that \$3,651.75 was owed to Ms. Perreault (for the period between October 7, 2019, and February 7, 2021), and \$1,990.33 was owed to Mr. Thompson. (Ex. 6; Butts Testimony.)
30. Both Ms. Perreault and Mr. Thompson regularly received gratuities in excess of \$20.00 per month and are therefore considered "tipped employees" as defined in 454 Code Mass. Regs. § 27.02. During the period at issue, Ms. Perreault received an average of approximately \$250.00 per week in gratuities, and Mr. Thompson received an average of approximately \$130.00 per week. (Exs. 8, 11A, 11B, 12A, 12B, 13A, 13B, 14A, 14B.)
31. With respect to the time spent delivering food, Ms. Butts accepted that the employees' wages earned, plus the tips they received, were greater than the amount they would have received if paid the minimum wage. (Butts Testimony.)
32. On October 14, 2021, The Fair Labor Division issued four citations to Mr. Roufail based on Ms. Butts's investigation and recommendations. The first citation (#21-01-60053-001) was for restitution to Ms. Perreault for \$3,651.75 and to Mr. Thompson for \$1,990.33, plus a civil penalty of \$1,000.00, for the failure to pay the state minimum wage during the period of

October 7, 2019, to February 7, 2021. The remaining citations were for civil penalties as follows: (1) a penalty of \$300.00 based on the failure to permit employees to earn and use sick time (#21-01-60053-002); (2) a penalty of \$500.00 for failure to furnish paystubs to his employees (#21-01-60053-003); and (3) a penalty of \$500.00 for failure to keep true and accurate payroll records (#21-01-60053-004). The Fair Labor Division indicated that each of these violations were done “without specific intent” by Mr. Roufail. (Ex. 7; Butts Testimony.)

33. In determining the amount of these penalties, Ms. Butts considered the maximum penalty allowable (\$7,500.00 per violation), the number of employees affected, and the absence of any evidence of intent to violate employment law. (Butts Testimony.)

34. On October 20, 2021, Mr. Roufail timely appealed each of the citations.

#### DISCUSSION

The Commonwealth’s minimum fair wages law requires employers to pay their employees the prevailing minimum wage (currently \$15.00 per hour). G. L. c. 151, § 1. During the period at issue, the minimum hourly wage was \$12.00 in 2019, \$12.75 in 2020, and \$13.50 in 2021. St. 2018, c. 121, §§ 17, 18, 19.

The Attorney General is empowered to seek restitution on behalf of employees whose employers violate the minimum wage law. G. L. c. 149, §§ 2, 3, 150. An employer challenging a citation or order of the Office of the Attorney General has the burden of proving “by a preponderance of the evidence that the citation or order was erroneously issued.” G. L. c. 149, § 27C(b)(4). See *Garcia v. Office of Attorney Gen., Fair Labor Div.*, No. LB-21-0034-0036, at 20 (DALA Dec. 16, 2021) (employer’s burden to show error in the amount of restitution ordered).



Minimum Wage Exception for Tipped Employees

General Laws c. 151, § 7, provides an exception to the minimum wage in the case of a “tipped employee,” i.e., an employee who regularly receives more than \$20.00 per month in tips. See also 454 Code Mass. Regs. § 27.02 (defining “tipped employee”). This exception permits employers to pay tipped employees an hourly “service rate” as low as \$6.75 (the current minimum service rate),<sup>7</sup> so long as the tips received by the employee are sufficient to make up the difference between the employee’s wages paid at the service rate and the amount that would be payable under the state minimum wage. G. L. c. 151, § 7. In other words, the “sum of the service rate and the tips received by the employee must equal or exceed the basic minimum wage” provided under G. L. c. 151, § 1. 454 Code Mass. Regs. § 27.03(2)(b).

To be eligible for this exception, however, certain conditions must be met. First, the employer must inform the employee that he or she will be compensated in the manner provided under G. L. c. 151, § 7, rather than receiving a wage equal to or greater than the minimum wage. In addition, all tips received by the employee must either be retained by the employee or distributed to the employee through a tip-pooling arrangement. G. L. c. 151, § 7; 454 Code Mass. Regs. § 27.03(2)(b). If these conditions are not met, the employer must pay the tipped employee at least the state minimum wage. 454 Code Mass. Regs. § 27.03(2)(b).

It is undisputed that Ms. Perreault and Mr. Thompson were paid wages at an hourly rate that was above the applicable minimum service rate under G. L. c. 151, § 7, but below the applicable minimum wage under G. L. c. 151, § 1. Ms. Perreault acknowledged that Mr. Roufail informed her of the compensation structure upon being hired, and the Attorney General does not

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<sup>7</sup> During the period in question, the minimum service rate was \$4.35 in 2019, \$4.95 in 2020, and \$5.55 in 2021. St. 2018, c. 121, §§ 22, 23, 24.

contend that there was insufficient notice to either employee regarding the manner of compensation. Ms. Perreault and Mr. Thompson retained the tips they received from delivering food, which totaled well above the \$20.00 per month necessary for them to be classified as “tipped employees.”

In addition to delivering food, however, these employees performed substantial work inside the restaurant that covered nearly all aspects of food service to patrons both inside the restaurant and those ordering food for delivery. The tasks they performed inside the restaurant included taking customer orders, preparing the food, processing customer payments, packaging food for delivery, cleaning, opening the restaurant for business, and closing the restaurant at the end of the business day. They did not, however, receive any of the tips left by non-delivery customers, i.e., those ordering food inside the restaurant (either dining in or taking out).

Under the unique circumstances of this case, it was reasonable for the Fair Labor Division to apportion the employees’ time between their time spent doing deliveries, for which they received tips, and their time spent working inside the restaurant, for which they did not receive any gratuities. Mr. Roufail did not prove that the employees’ duties were limited to those of a delivery driver, or that they otherwise were not entitled to any of the tips left by customers at the restaurant counter. Ms. Butts attributed 60% of their time to work inside the restaurant, and 40% to doing deliveries, which again was a reasonable estimate based on the information provided by both the employer and the employees.

There was conflicting evidence regarding Ms. Perreault’s hourly rate during 2019. Ms. Perreault testified that she was paid \$8.00 per hour, until she received a raise to \$10.00 per hour approximately a year before the end of her employment. In a letter dated March 11, 2020, Mr. Roufail reported that Ms. Perreault was paid \$8.00 per hour. The payroll records he provided to

Ms. Butts conflicted with his letter and were inconsistent between reports: an Excel spreadsheet report of wages indicated that Ms. Perreault was paid wages of \$9.00 per hour through the end of 2019, but a Quicken Books earnings report indicated a rate of \$10.00 per hour during that time. The revised payroll records he submitted into evidence at the hearing reported wages of \$10.00 per hour throughout the period at issue.

Considering the conflicting reports and the series of internally inconsistent payroll records submitted by Mr. Roufail, I conclude that the Fair Labor Division's estimates for the employees' hours worked and rates of pay were reasonable. With respect to the employees' hourly rates, only a limited period appears to be in dispute: Ms. Perreault's hourly rate during the last three months of 2019, and Mr. Thompson's hourly rate during the week of November 30-December 6, 2020. Ms. Butts applied a rate of \$9.00 per hour for Ms. Perreault's wages during that time, which was consistent with Mr. Roufail's original Excel spreadsheet of wages and splits the difference between the alternatives of \$8.00 (supported by Ms. Perreault's testimony and Mr. Roufail's March 11, 2020, letter) and \$10.00 per hour (supported by Mr. Roufail's Quicken Books payroll report, as well as the revised payroll records that he offered into evidence at the hearing). Her reliance on Ms. Perreault's reported average weekly hours, and Mr. Thompson's spreadsheet of earnings, was also justified; there is no dispute that the payroll records she received from Mr. Roufail significantly understated Ms. Perreault's hours, and she did not receive any payroll records for Mr. Thompson. Although Mr. Roufail attempted to correct those deficiencies by submitting substantially revised payroll records at the hearing, the inconsistencies in his records and the lack of supporting documentation (e.g., paystubs, the employee's recorded

hours from the cash register system, etc.) make the accuracy of his revised records questionable.<sup>8</sup> In short, Mr. Roufail has not met his burden of proving that the amount of restitution set forth in the citation is erroneous.

#### Penalties Imposed

The Attorney General may assess civil penalties under G. L. c. 149, § 27C, for violation of Massachusetts labor laws. The maximum civil penalty that may be assessed a first-time violator of chapter 149 or chapter 151, who acted without specific intent, is \$7,500 for each violation. G. L. c. 149, § 27C(b)(2). In determining the amount of such civil penalty, the Attorney General must “take into consideration previous violations . . . by the employer, the intent by such employer to violate [chapter 149 or chapter 151], the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of the public contract or payroll involved.”<sup>9</sup> *Id.*

The Fair Labor Division was authorized to assess a civil penalty for each of the violations it cited. The cited violations included the failure to pay the state minimum wage, the failure to establish a policy for employees to accrue and use sick time as required by G. L. c. 149, § 148C, the failure to provide employees with paystubs or other suitable record of earnings and deductions as required by G. L. c. 149, § 148,<sup>10</sup> and failure to keep true and accurate payroll

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<sup>8</sup> Although I question the accuracy of his records, I do not find that Mr. Roufail had any intention to deceive or to knowingly submit inaccurate records.

<sup>9</sup> The Attorney General may also take into account other factors that it deems pertinent.

<sup>10</sup> General Laws c. 149, § 148, provides in pertinent part: “An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.”

records in accordance with G. L. c. 151, § 15. The evidence presented, and the facts set forth above, establish each of the violations for which Mr. Roufail was penalized.

In determining the amount of the penalties, Ms. Butts took into consideration appropriate and relevant statutory factors, in accordance with G. L. c. 149, § 27C(b)(2). The penalties assessed appear reasonable, and Mr. Roufail did not present evidence that would indicate that the penalties were unwarranted or were excessive. In short, the Fair Labor Division did not err in setting the value of the civil penalties assessed.

**CONCLUSION AND ORDER**

For the foregoing reasons, the citations issued by the Fair Labor Division—numbered 21-01-60053-001, 21-01-60053-002, 21-01-60053-003, and 21-01-60053-004—are affirmed. Mr. Roufail is hereby ordered to make restitution to Ms. Perreault in the amount of \$3,651.75 and to Mr. Thompson in the amount of \$1,990.33. Mr. Roufail is further ordered to pay the civil penalties assessed in these citations, which collectively total \$2,300.00.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ John G. Wheatley

John G. Wheatley  
Administrative Magistrate

JUN 06 2023