

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 11A/07
5041915

BETWEEN CHRISTOPHER BARRY
 Applicant

AND ANOOP INVESTMENTS LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Matt Young, Advocate for Applicant
 Sanjay Sharma, Counsel for Respondent

Investigation Meeting: 2 November 2006

Submissions received: 7 and 12 February, 1, 8 & 15 March 2007

Determination: 2 July 2007

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 18 January 2007 (AA11/07) I made the following factual findings and order in favour of the applicant:

“[23] Mr Singh and Mr Barry had an agreement that Mr Barry would be rostered work on Mondays and Saturdays (however, there was no agreement as to the number of hours Mr Barry would be rostered). Mr Singh did not get Mr Barry’s agreement to reduce his working days; he presented him with a roster and told him it would be implemented. This breached the terms of the employment agreement.”

“[24] Anoop Investments Limited is ordered to pay Mr Barry wage arrears for Saturdays and Mondays rostered off from August 2005 until his resignation effective 28 September 2006, to be paid at the average number of hours worked on Saturdays and Mondays from 27 September 2004 until 7 July 2005.””

[2] The parties have not been able to agree the calculation for the payment of Saturdays and Mondays. They have asked the Authority to assist them with this issue. I have received written submissions from the parties and convened a telephone conference where the representatives spoke to those submissions.

[3] In the same determination costs were reserved and the parties invited to attempt to resolve this issue themselves. They have not been able to and I have received memoranda setting out the parties' respective positions as to costs.

Mondays and Saturdays

[4] The finding of the Authority was that Mr Barry is entitled to be compensated for every Monday and Saturday that he would have been rostered on, but for the unlawful variation of the employment agreement by the respondent, at an average of the Monday and Saturday hours he was rostered in the period before the roster change.

[5] The sticking point between the parties in calculating the reimbursement payment is the divisor to be used to calculate the average hours worked on Mondays and Saturdays from September 2004, when Mr Barry started working for Anoop, and July 2005 when he was rostered off Mondays and Saturdays. Mr Barry says the divisor should be the number of days he was rostered on during the period of calculation. Anoop says the divisor should be the span of months over which the roster fell. The difference is significant, at least in respect of the Saturday hours worked by Mr Barry.

[6] I accept Anoop's divisor. The Authority's order is clear that the divisor is the total period over which the days were rostered. This fairly reflects the agreement between the parties that some hours would be rostered on Mondays and Saturdays but that the minimum number of hours was not guaranteed. Public holidays form part of this calculation.

[7] I record that holiday pay should be calculated on the sum outstanding.

Costs

[8] Mr Young submits that the costs to Mr Barry of the investigation exceed \$9000 (excluding GST), which represents about 36 hours work charged at the hourly rate of \$250.00. Disbursements total \$225.60.

[9] Mr Young submits that \$6000 would represent a fair contribution to costs reasonably incurred for the following reasons:

- (i) the matter was complicated because the first respondent failed to provide a written employment agreement, PAYE had not been properly calculated, the respondents' reluctance to attend mediation required the Authority to direct the parties, the filing of the Statement in Reply was delayed;
- (ii) the second and third respondents were not separately represented from the first respondent of whom they are directors;
- (iii) the constructive dismissal claim did not take a lot of hearing time and should be seen in the context of the wider wage arrears claim;
- (iv) no settlement offers were made;
- (v) the principles in *Da Cruz*¹ are applicable; and
- (vi) Mr Barry has limited resources, exacerbated by the respondents' conduct.

[10] Mr Khan submits:

- (i) Mr Barry made a number of claims, only one of which was successful;
- (ii) the respondents incurred substantial costs defending unmeritorious claims;
- (iii) the respondents participated fully in the investigation and mediation process; and
- (iv) they seek a fair contribution to costs incurred of \$7000.00.

[11] *Da Cruz* sets out the principles applicable to the Authority's exercise of its costs discretion. Mr Barry enjoyed a degree of success; it is usual that costs follow the event. However, a number of Mr Barry's allegations were not successful because they had an inadequate evidential base, which was apparent from the outset. The investigation meeting lasted less than a day and written closing were filed later.

[12] This is a situation where it is appropriate that an award of costs is made in Mr Barry's favour. Taking into account the applicable principles I set that award at \$2000; this award is based on a notional hourly rate appropriate for this matter of \$150 multiplied by the hearing time of six hours, plus six hours preparation time and a contribution to disbursements.

¹ *PBO Limited v Da Cruz (AC 2A/05)*

[13] Anoop Investments Limited is ordered pay Christopher Barry \$2000 as a reasonable contribution to costs reasonably incurred.

Marija Urlich

Member of the Employment Relations Authority