

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kamal Dholakia (Applicant)  
**AND** Global Peace New Zealand (Respondent)  
**REPRESENTATIVES** In person, for Applicant  
Paul Rajan, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 21 November 2006  
**FURTHER INFORMATION RECEIVED** 21 November and 5 December 2006  
**DATE OF DETERMINATION** 8 December 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Kamal Dholakia seeks to recover wages and holiday pay he says were due and owing when his employment with Global Peace New Zealand Trust ended on 10 February 2006. Mr Dholakia says that his employment with the Trust ended by way of unjustified dismissal and he seeks remedies in relation to that claim.

[2] Paul Rajan is the executive director of the Trust. He employed Mr Dholakia and conducted all the Trust's dealings with him. Mr Rajan says Mr Dholakia was paid correctly and in accordance with the terms of his employment agreement, that holiday pay has been withheld until this employment relationship problem is resolved and that Mr Dholakia's employment came to an end by way of mutual agreement.

[3] The parties did not attend mediation prior to the investigation meeting. This was because the date scheduled for that purpose was vacated due to Mr Rajan's ill health, attempts to reschedule the mediation were unsuccessful and Mr Dholakia sought have his employment relationship problem dealt with by the Authority. In these circumstances it is appropriate that the Authority move to determine this employment relationship problem without the parties attending mediation.

[4] Mr Rajan confirmed to me that he was well enough to participate in the investigation meeting.

[5] Due to difficulties the Authority experienced setting down a date for the investigation meeting by consent Mr Dholakia was directed to personally serve the notice of investigation meeting on the Trust and to provide proof of service at the investigation meeting. Mr Dholakia provided a disc which I understand is a video recording of him serving the required documents on Mr Rajan. Mr Rajan raised a concern at the investigation meeting that he had been videoed without his consent. I advised Mr Rajan that the Authority had not directed Mr Dholakia to record service in that manner and that I would destroy the disc. I record that I have done so.

[6] Following the conclusion of the investigation meeting on 21 November Mr Dholakia filed a

witness statement. I have not reconvened the investigation meeting to deal with this document because the matters covered in the witness statement were canvassed in the investigation meeting and Mr Rajan has been given an opportunity to provide a response, which he has.

### **Wage arrears**

[7] Mr Dholakia met Mr Rajan in November 2005 when he was selling American Express credit cards door to door in the Trust's locale. Mr Rajan offered him a position fundraising for the Trust and selling advertising in its publication "Global Peace Messenger". Mr Dholakia accepted the position and the parties entered a written employment agreement on 8 December 2005. I find that Mr Dholakia's employment with the Trust commenced on 8 December 2005; he attended training, for which he was paid, on 8 and 9 December and was paid for another 36 hours work performed in December.

[8] The employment agreement provided that Mr Dholakia was a full time employee and that he would have to complete a minimum of 40 hours work per week. The agreement also provided for a salary of \$32,500 per annum to be paid fortnightly.

#### **(i) hourly rate**

[9] Mr Dholakia says he was not paid at the agreed rate for the agreed number of hours per week. Mr Rajan says the agreed rate was different to that provided in the employment agreement and that Mr Dholakia was paid for all the hours he worked at the varied rate.

[10] In relation to the rate of pay, Mr Rajan says he and Mr Dholakia entered an oral variation to the salary provision to the agreement. He says Mr Dholakia told him he needed the written employment agreement to state that he received a salary of \$32,000 for immigration purposes and to satisfy his family, but that he would agree to a rate of \$12 per hour plus commission. Mr Rajan said that it was on this basis that he paid Mr Dholakia. Mr Rajan said these variations were not recorded in writing. Mr Dholakia denied that he entered any such variations to the written terms of the employment agreement.

[11] I am not satisfied that the oral variations Mr Rajan described were entered between the parties. It is not credible that Mr Rajan would agree, on behalf of the Trust, to enter a document with the intention of misrepresenting Mr Dholakia's terms of employment for immigration or family purposes; Mr Rajan and Mr Dholakia had known each other for about a week when the employment agreement was entered and Mr Rajan was not able to tell me how a \$32,000 salary would satisfy Mr Dholakia's immigration or family purposes. Further, Mr Dholakia was not paid at the rate of \$12 per hour plus commission. The Trust's pay records show Mr Dholakia was paid at the rate of \$12.74 per hour, with no calculation for commission. This difference casts further doubt on Mr Rajan's claim that the parties' agreed to vary the terms of the written employment agreement.

**[12] I find that Mr Dholakia's salary rate is that set out in the written employment agreement, \$32,500 per annum. The wages he has been paid should be recalculated from \$12.74 gross per hour to \$15.625 gross per hour.**

#### **(ii) 8 – 20 December 2005**

[13] Mr Dholakia was paid for 156 hours at \$12.74 per hour during the period of his employment with the Trust. The Trust has provided pay records and timesheets to support these payments. It says Mr Dholakia was paid for the hours he worked. Orders regarding the correct hourly rate are above.

[14] Mr Dholakia says that he should be paid for 296 hours from 8 December 2005 until 10 February 2006 when his employment ended<sup>1</sup>. Other than public holidays and payment for 5

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<sup>1</sup> Letter Kamal Dholakia to Paul Rajan 23 March 2006

January Mr Dholakia makes no claim for that period. Mr Dholakia appears to accept that the Trust could direct him to take unpaid leave over the Christmas shut down from 21 December until 8 January 2006. In relation to the period between 8 December and 20 December Mr Dholakia says he was entitled to payment for 72 hours work. The difference is 8 hours i.e., one working day. Mr Dholakia was not required to keep a timesheet during this period. He says he worked these hours and it appears the Trust accepts this, but for one day, the reason for which is unclear. The pay records show he has been paid for 64 hours work during this period but do not provide a no break down of the days worked or the number of hours worked each day. I have no reason to doubt Mr Dholakia performed the work during this period which he says he did.

**[15] Mr Dholakia is entitled to be paid for eight hours at the rate of \$15.625 gross per hour and I so order.**

**(iii) Public holidays**

[16] For the purposes of determining a usual working day and calculating how many hours Mr Dholakia should be paid for a public holiday i.e., his relevant daily pay<sup>2</sup>, the starting point is the parties' employment agreement. The employment agreement provides for a forty hour week but does not specify what days of the week Mr Dholakia would be required to work. The only other document provided in evidence which indicates the parties' intention in relation to this issue are the timesheets provided by the Trust to Mr Dholakia. These provide for a Monday to Friday week. I take from them that the Trust expected Mr Dholakia to complete his forty hours within that span of days which results in an eight hour day.

[17] Mr Dholakia has not been paid for public holidays which fell during his employment with the Trust on days which would otherwise be working days. Those public holidays were 25, 26 December 2005, 1, 2 and 30 January and 6 February 2006.

**[18] Mr Dholakia is entitled to be paid for the six public holidays which fell between and including 25 December 2005 to 6 February 2006 at the rate of \$15.625 gross per hour for 8 hours each day<sup>3</sup>.**

**(iv) 5 January 2006**

[19] Mr Dholakia says he telephoned and left voice and text messages for Mr Rajan to confirm his return date in the very early New Year and received a call from a Trust volunteer on 3 January passing on a message from Mr Rajan that the return to work date was 5 January. Mr Dholakia had not yet been paid and he was, understandably, anxious to discuss this with Mr Rajan. Mr Dholakia attended work on 5 January 2006 and was told to go home and return on 9 January 2006. Mr Dholakia seeks payment for 5 January 2006.

[20] Mr Rajan says the return to work date was 9 January. He says he did not tell Mr Dholakia to attend work on 5 January and that the Trust is not obliged to pay him for that day.

[21] That Mr Dholakia received a message from a volunteer about the return to work date has not been challenged. Mr Dholakia made reasonable efforts to confirm his return to work date and he was entitled to rely on the information provided by a Trust representative. **Mr Dholakia is entitled to 8 hours pay at the rate of \$15.625 for 5 January 2006 and I so order.**

**(v) 9 January – 10 February 2006**

[22] Mr Dholakia returned to work on 9 January 2006. He was required to keep and submit to the Trust a timesheet of hours worked. Those timesheets have been made available to the Authority. There is no dispute that Mr Dholakia has been paid for the hours he worked and

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<sup>2</sup> Section 49 Holidays Act 2003

<sup>3</sup> Refer clause 6 relevant employment agreement and Section 48 Holidays Act 2003

recorded on the timesheet. He claims the difference between those hours and the 40 hours pay per week he says are guaranteed under the terms of the employment agreement.

[23] The timesheets record that Mr Dholakia did not work 40 hours per week between 9 January and 10 February when his employment ended. He says he was demotivated by the delays in his pay and the dispute about his rate of pay. There is no dispute that the work was available for Mr Dholakia to perform.

[24] The hours of work clause of the employment agreement provides:

The normal hours of work are at the discretion of the employee however the Trust requires the completion of a minimum of 40 hours work per week.

[25] Mr Dholakia did not complete 40 hours work per week. The work was available. There is no basis for an award of payment for hours not worked.

#### **(vi) Holiday pay entitlement**

[26] Mr Dholakia has not received his holiday pay entitlement from the Trust. No penalty was sought against the Trust for failing to pay the holiday pay entitlement when it was due and owing nor has interest calculated on that sum been sought. That these further sanctions have not been sought should not be mistaken by the Trust as acceptance that withholding the payment on the basis provided was lawful.

**[27] Mr Dholakia's holiday pay is due and owing and should be paid forthwith recalculated to include in his gross earnings, taking into account the above orders for hourly rate, hours worked and outstanding payment for public holidays, and I so order.**

#### **Unjustified dismissal**

[28] Mr Dholakia says he was unjustifiably dismissed. He says Mr Rajan told him on 10 February not to come to work again because he was not able to pay him. Mr Dholakia says he was not given notice and received no training to improve.

[29] Mr Rajan says he and Mr Dholakia reached an agreement on 10 February that Mr Dholakia's employment should end. He relies on an email exchange between himself and Mr Dholakia where he describes the employment relationship as "*end[ing] mutually...*" and Mr Dholakia relies:

"Dear Brother

Thank you for the opportunity given to associate and learn from you. It indeed was a short period, but unfortunate the time was not in our favour.

I definitely intend to support the cause of Global Peace and am sure that the organisation will bring smiles to a lot of needy ones. God Bless!

Just to bring to your kind attention that I have received the pay for two weeks, i.e. 16<sup>th</sup> Jan'06 to 20<sup>th</sup> Jan'06 and 23<sup>rd</sup> Jan'06. The pay for the week 31<sup>st</sup> Jan'06 to 04<sup>th</sup> Feb'06 (Monday holiday but worked on Saturday, sheet provided to you) and 7<sup>th</sup> Feb'06 to 10<sup>th</sup> Feb'06 are balance.

Although my contract states 4 weeks notice period from either side, we have parted ways on mutual understanding and faith. I would really appreciate you release my salary for the above two weeks at the earliest as it will be full and final payment from your end.

..."

[30] Mr Dholakia says this email does not accurately describe the circumstances under which his employment with the Trust ended. He said he wrote the email because he believed it was necessary to secure payment of salary which he had not yet received.

[31] While I accept that Mr Dholakia would be anxious to take steps to secure payment of

outstanding wages I do not accept that to do so it was reasonable or necessary to misstate the circumstances in which he left the Trust. Based on the statements in these emails that Mr Dholakia's employment ended by mutual agreement I find that it is more likely than not that the employment ended in the manner described by Mr Dholakia and Mr Rajan in their emails, i.e., by agreement on 10 February 2006. Mr Dholakia was not unjustifiably dismissed.

### **Costs**

[32] Mr Dholakia is entitled to be reimbursed the \$70 filing fee incurred in lodging his application with the Authority.

**[33] Global Peace and Justice Trust is ordered to pay Mr Dholakia \$70 to reimburse the filing fee.**

Marija Urlich  
Member of Employment Relations Authority