

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 589
3055472

BETWEEN SONIA DUHAN
Applicant

AND RAJ INFOTECH NZ LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Teresa Brown, advocate for Applicant
Rajasekar Chellappa, agent for Respondent

Investigation Meeting: 10 July 2019 in Tauranga and 15 July 2019 by telephone

Submissions received: 15 July 2019 from both parties

Date of determination: 15 October 2019

DETERMINATION OF THE AUTHORITY

- A. Sonia Duhan was unjustifiably dismissed by Raj Infotech NZ Limited (Raj Infotech).**
- B. Raj Infotech is to pay Sonia Duhan the following remedies for her grievance within 28 days of the date of this determination:**
- (a) \$12,844.00 gross as lost wages; and**
 - (b) \$9,000 as compensation for humiliation, loss of dignity and injury to feelings.**

- C. Raj Infotech is to pay Sonia Duhan within 28 days of the date of this determination:**
- (a) \$1,266.65 net as arrears of wages;**
 - (b) \$1,235.52 gross as holiday pay; and**
 - (c) Interest on those figures from 10 February 2018 to the date of payment.**
- D. Raj Infotech breached the Holidays Act 2003 by failing to pay Sonia Duhan holiday pay. Within 28 days of the date of this determination Raj Infotech is to pay a penalty of \$1,000 to the Employment Relations Authority for payment into the Crown account.**
- E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment Relationship Problem

[1] Sonia Duhan (who I refer to by her preferred name Ms Sonia) worked as an ICT Support Technician for Raj Infotech NZ Limited (Raj Infotech or the company).

[2] Raj Infotech was set up to develop orchard management mobile applications. Rajasekar Chellappa is a director of the company. I refer to him by his preferred name of Mr Rajasekar. He was also a director and shareholder of a business operating in the kiwifruit industry.

[3] Ms Sonia claims that she was unjustifiably dismissed and the company breached her employment agreement and the Holidays Act 2003. Raj Infotech disputes those claims.

[4] An investigation meeting was held in Tauranga on 10 July 2019. Due to flight cancellations, Ms Sonia's representative was unable to attend the investigation meeting in person but the parties agreed to continue with the representative participating by telephone. I heard evidence from Ms Sonia and Mr Rajasekar. I then sought further documents. Submissions were heard by telephone on 15 July 2019.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded everything received from the parties but have stated findings, expressed conclusions and specified resulting orders.

Issues

[6] The issues for investigation are:

- (a) Was Ms Sonia unjustifiably dismissed by Raj Infotech?
- (b) If so, what remedies (if any) should she receive?
- (c) Did Raj Infotech breach Ms Sonia's employment agreement by failing to pay her wages, and if so, how much does it owe her?
- (d) Did Raj Infotech breach the Holidays Act by failing to pay Ms Sonia holiday pay?
- (e) If so, how much does the company owe Ms Sonia for holiday pay and should it be penalised?

[7] A claim regarding public holidays was withdrawn.

Evidence and credibility

[8] There were some difficulties with the evidence in this matter. Aspects of the documentation did not fit easily with either witness's evidence. In addition, Ms Sonia and Mr Rajasekar disagreed on some points. Generally I found Ms Sonia's evidence more credible, being more internally consistent and more plausible.

Employment arrangement

[9] Mr Rajasekar described setting up the business to develop applications (apps) plus at the same time help support vulnerable people who were in tight situations and find them jobs. He used his other income to establish Raj Infotech.

[10] The IT Support Technician position was advertised. A mutual acquaintance brought Ms Sonia to Mr Rajasekar's attention.

[11] The parties signed an employment agreement on 20 August 2017. Ms Sonia was to assist with an app to be launched on 6 January 2018.

[12] There was some dispute about Ms Sonia's start date. However, during the investigation meeting the parties were in agreement that she was initially paid by Raj Infotech for about three weeks before her visa expired on 27 September 2017. She applied for another

visa and did not work in the meantime. Once Ms Sonia got her visa in October 2017 she contacted Mr Rajasekar and they agreed she would start working again on 6 November 2017.

Ms Sonia's work

[13] A question arose as to whether Ms Sonia had really been undertaking substantial work for the company. It was agreed that she was to be involved with getting orchard management data from the field for use in the app.

[14] A letter from the company to Ms Sonia's representative referred to Ms Sonia not being much interested in learning IT work and her productive contribution to the company being:

... only that she typed and printed 11 pages of documents while she got \$11,000/ in wages. Company couldn't afford to pay her \$1040/week for contributing nothing ...

[15] However, at the investigation meeting Mr Rajasekar gave more positive evidence including indicating that Ms Sonia did her best. The company also filed on my direction some weekly status reports submitted by Ms Sonia and signed off by Mr Rajasekar. These did not cover the whole period of employment. Although not very detailed, the reports provide some support for Ms Sonia undertaking more work than described in that letter.

[16] Both parties suggest that the other raised the possibility of Ms Sonia undertaking kiwifruit picking work however, there was no evidence that she did work for Mr Rajasekar's kiwifruit company.

[17] The project Ms Sonia worked on, did not launch when expected, possibly because one of the other workers had a visa problem.

Finishing work

[18] The parties do not agree about the circumstances of Ms Sonia finishing work with Raj Infotech.

[19] Ms Sonia says that on 9 February 2018 Mr Rajasekar told her that the company could no longer provide her with IT work but that she could pick kiwifruit in a fruit picking business he owned. Ms Sonia objected that she could not work in the kiwifruit company under her visa. He replied that he would wind the company up, to which Ms Sonia said she

would look for other work but wanted to keep the role open while she did that. She did not complete anymore work for Raj Infotech.

[20] Raj Infotech claims that Ms Sonia actually finished work on 10 January 2018 when she said she was going to India for an indefinite period. Mr Rajasekar says he was later told by others that Ms Sonia had not gone to India. He was funding her pay and says he would have kept paying Ms Sonia if he had more money.

[21] I now look at the available documents. Payslips show the company paying Ms Sonia after 10 January, for two standard weeks of 40 hours.¹ Then the last payslip provided to the Authority shows pay for 24 hours, received for the period ending 4 February 2018. It includes payment for one day at time and a half, presumably for Anniversary Day. This suggests Ms Sonia was working at this time.

[22] On about 26 February 2019 Ms Sonia asked Mr Rajasekar for what she described as a reference letter. The letter he provided implies that Ms Sonia was still working for the company as at 28 February 2018.

[23] Mr Rajasekar's email to Immigration New Zealand of 30 April 2018 states that Ms Sonia went on indefinite leave from work on 10 January 2018 and that he stopped paying her on 9 February 2019. He concludes that she no longer works for the company from 8 February 2018.

[24] Raj Infotech's letter to the Authority of 16 March 2019, attaching the statement in reply, specified that Ms Sonia worked until 10 January 2018 when she was advised that she no longer worked for the company. Reference is made to termination for serious misconduct.

[25] By contrast the statement in reply referred to Ms Sonia leaving for India at that time on indefinite leave with her then being seen working elsewhere and so Raj Infotech stopped paying her on 8 February 2018.

Understanding

[26] At some point there appears to have been an understanding developed that the completion of work would be described as the start of an extended period of unpaid leave. This gave Ms Sonia a base from which to find other work or to see her family overseas.

¹ 14 and 28 January 2018

[27] Both Ms Sonia and Mr Rajasekar agree that the company sought a letter from Ms Sonia. She says the company wanted protection against possible claims against it and she felt pressured to sign it. Despite a direction from the Authority, neither party provided the letter. The letter is said to indicate that Ms Sonia had gone off on a period of extended leave.

[28] Ms Sonia places this discussion as occurring in early March 2018. Mr Rajasekar says the discussion happened on her last day of work, which he identified in his oral evidence 10 January 2019. I prefer Ms Sonia's evidence on this point.

[29] In mid-April 2018 Mr Rajasekar told Ms Sonia that he was going to notify Immigration New Zealand of her absence from work. He did so later in the month, noting however, that Ms Sonia no longer worked for the company from 8 February 2018. Ms Sonia appears to have also notified Immigration New Zealand in April that her work had finished.

[30] Ms Sonia subsequently applied for a variation of visa conditions but this was unsuccessful. For reasons which were not altogether apparent she has not obtained another work visa as yet.

Dismissal

[31] The understanding regarding unpaid leave does not reflect the reality of the situation. I find that Ms Sonia was dismissed on 9 February 2018 when Mr Rajasekar sent her away, telling her Raj Infotech would not provide work to her anymore. It also stopped paying her.

Reasons for dismissal

[32] There were several explanations provided by Raj Infotech for Ms Sonia's departure from the company.

[33] The company's letter to the Authority attaching the statement in reply indicated the reason for termination was serious misconduct. Reference was made to the clause on the employment agreement specifying that serious misconduct could occur for dishonesty and actions which seriously damage the employer's reputation. No further details were provided in the letter. At the investigation meeting Mr Rajasekar initially said that misconduct definitely was not the reason for dismissal although then reversed this position somewhat.

[34] At some points productivity or performance was mentioned as outlined above. However, at the investigation meeting Mr Rajasekar indicated that Ms Sonia did her best. His oral evidence was primarily that he was no longer able to keep funding her role when the company was not making any money. Effectively, that her position was redundant. Other than Mr Rajasekar the company currently has no one working for it.

[35] At the investigation meeting Mr Rajasekar also suggested that he was operating on the basis of the trial period in Ms Sonia's agreement, although I note that by January 2018 the 90 day period had concluded, if taken from her initial start in August 2017. There is also no reference in the documentation to the company using a trial period to dismiss Ms Sonia.

[36] In conclusion Raj Infotech provided multiple reasons for dismissal in different documents at different times, as well as in Mr Rajasekar's oral evidence. This makes it difficult to determine on what basis the decision to dismiss was really made. These are not the actions of a fair and reasonable employer.

[37] In addition, there appears to have been no investigation, disciplinary meetings or warnings. There was some evidence of discussion about the company not being able to afford to keep Ms Sonia on, although this was not sufficient to satisfy the requirement for consultation in redundancy situations. There was no proper process.

[38] I conclude Raj Infotech did not act as a fair and reasonable employer could have done and Ms Sonia's dismissal was unjustified.

Remedies

Lost wages

[39] The claim made for Ms Sonia is for 13 weeks' lost wages, at a rate of \$847.78 per week. That appears to be a net rate, based on the highest earnings Ms Sonia enjoyed when she was paid for 40 hours' work a week for some of November and December 2017.

[40] Both before and after that period Raj Infotech paid Ms Sonia for 38 hours of work a week. There is no arrears of wages claim in that regard. The employment agreement provides for 38 hours' work a week. I therefore base the lost wages award on 38 hours per week at \$26.00 per hour, proving in a weekly total of \$988. Thirteen weeks at that rate is \$12,844.00

[41] In terms of mitigation of her loss, there was some evidence of Ms Sonia applying for other work. She was offered one role but there were difficulties with her visa.

[42] I have considered whether Ms Sonia can be said to have contributed to the situation giving rise to her dismissal but given the changing bases which the company claimed lead to her employment finishing, I cannot be satisfied that her actions did contribute.

[43] I order Raj Infotech NZ Limited to pay Sonia Duhan \$12,844.00 gross as lost wages within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[44] Ms Sonia claims \$15,000 compensation. She refers to the financial pressure of being unable to pay her rent and having to borrow money from friends and family.

[45] Ms Sonia says she went to the doctor for stress and was put on some type of medicine. She suggests that she had medical conditions caused by the stress although there was no evidence provided from her doctor.

[46] Ms Sonia criticises Mr Rajasekar for what she sees as him cancelling her work visa, although he or the company was obliged to let Immigration New Zealand know that her employment had finished. Some of Ms Sonia's stress appears to have been caused by what seems to be an unusually long period of time to get a new visa.

[47] I accept that Ms Duhan found it stressful to lose her job and be without money, as well as embarrassing to have to borrow money. I order Raj Infotech NZ Limited to pay Sonia Duhan, within 28 days of the date of this determination, \$9,000 as compensation for humiliation, loss of dignity and injury to feelings.

Wage arrears

[48] Ms Sonia claims that she is owed wages for time worked. Prior to the investigation meeting Ms Sonia's representative made a solid effort to calculate both under and overpayments during the employment and specify an arrears amount. However, there was limited material to work with.

[49] A document headed Wages/Time Record was filed by the company on 12 July 2019 on my direction. However, it only sets out some hours and not wages. It also does not cover

the whole period of employment Raj Infotech accepts Ms Sonia worked. Additionally the weekly hours recorded do not fit the pattern of payments made. I found this record of little use.

[50] The payslips are of more assistance but again do not cover the whole period of employment.

[51] The claim mainly concerns periods in November 2017 and February 2018 when significantly less hours were paid than the hours specified in Ms Sonia's agreement.

[52] Raj Infotech claims that the four payments made after 10 January 2018 should cover any holiday pay and wages outstanding. However, I found that Ms Sonia worked until 9 February 2018 and so those payments were for wages for time worked.

[53] Due to the variable payments and absence of complete wage and time, or payslip, records, the claim is for a net figure. Relying on s 132 of the Act, I accept the arrears claim by Ms Sonia.

[54] Raj Infotech NZ Limited is ordered to pay Sonia Duhan arrears of wages of \$1,266.65 net within 28 days of the date of this determination.

Holiday pay

[55] Ms Sonia claims she did not take any paid holidays nor was she paid any holiday pay by Raj Infotech. I have rejected the company's argument that payments after 10 January 2018 cover amounts outstanding. This is reinforced by the fact that the payslips through January show Ms Sonia's annual leave entitlement continuing to rise.

[56] The claim is for \$1,235.52, being 8% of the gross salary earned during the period from August 2017 to February 2018. I accept that amount of holiday pay is owing and order Raj Infotech NZ Limited to pay Sonia Duhan \$1,235.52 gross holiday pay within 28 days of the date of this determination.

Penalty

[57] Ms Sonia seeks a penalty be imposed on Raj Infotech for non-payment of holiday pay, to go to the Crown.

[58] The company breached s 23 of the Holidays Act 2003 by failing to pay Ms Sonia holiday pay on the termination of her employment. I consider that the imposition of a penalty is appropriate.

[59] In considering the amount of penalty I have regard to s 133A of the Act as well as the Employment Court's approach in recent cases *Nicholson v Ford*² and *A Labour Inspector v Daleson Investment Ltd*³.

[60] The maximum penalty is \$20,000 against a company. There was only one breach.

[61] Holidays, and the payment for them if not used by the end of employment, are an important part of an employee's rights in New Zealand. Failure to pay is a serious matter. However, I take into account that Ms Sonia's employment was not that long. Given the period in 2017 when she was unable to work whilst awaiting a new visa, the amount outstanding is not particularly large.

[62] Ms Sonia was a migrant worker. However, she was paid at a rate substantially above the minimum wage and thus was not in quite the same situation as many migrant workers whose cases come before the Authority.

[63] Although the company indicated that money paid in January and February 2018 covered holiday pay, I have rejected that argument. I cannot say that the non-payment was inadvertent. However, it could be seen as negligent.

[64] Raj Infotech suggested that it had little work and thus few funds. On the evidence it now has no employees with only Mr Rajasekar undertaking work.

[65] Given that this lack of employees there is no need currently for deterrence for Raj Infotech, although Mr Rajasekar had connections with another business. It is also important that other employers are deterred from failing to pay holiday pay when their employees finish.

[66] Having regard to the evidence overall a penalty of \$1,000 is appropriate. I order Raj Infotech NZ Limited, within 28 days of the date of this determination, to pay a penalty of \$1,000 to the Employment Relations Authority for transfer into the Crown account.

² *Nicholson v Ford* [2018] NZEmpC 132.

³ *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

Interest

[67] Ms Sonia seeks interest on the wage arrears and holiday pay. I order interest to be paid, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, on the sums of \$1,266.65 net and \$1,235.52 gross from 10 February 2018 (the day after Ms Sonia's dismissal) until the date of payment.⁴

Costs

[68] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Sonia shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Raj Infotech shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[69] The parties can expect the Authority to use the notional daily tariff as the starting point, with possible adjustments upwards or downwards. The notional daily tariff for a one day investigation meeting is \$4,500.

Nicola Craig
Member of the Employment Relations Authority

⁴ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>