

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 650
3051092

BETWEEN SHAKEEL GILL
Applicant

AND NAVIN SHARMA
Respondent

Member of Authority: Nicola Craig

Representatives: David Prisk, advocate for the Applicant
Muhammad Khan, agent for the Respondent

Investigation Meeting: On the papers

Submissions received: 12 April, 31 May and 2 September 2019 from the
Applicant
29 May 2019 from the Respondent

Date of determination: 11 November 2019

SECOND DETERMINATION OF THE AUTHORITY

- A. Under s 142Y of the Employment Relations Act 2000, Navin Sharma is ordered to pay Shakeel Gill the following sums within 21 days of the date of this determination:**
- (a) **\$5,712.64 gross in arrears of wages;**
 - (b) **\$1,000.00 gross as commission;**
 - (c) **\$557.28 gross for public holiday pay;**
 - (d) **\$1,152.00 gross for alternative holidays; and**
 - (e) **\$2,604.97 gross for holiday pay.**

B. Mr Sharma is ordered to pay Mr Gill \$800.00 as a contribution to his costs and \$71.56 for the filing fee, within 21 days of the date of this determination.

Employment relationship problem

[1] The Authority issued a determination upholding several claims by Shakeel Gill against his former employer, South Auckland Vehicle Imports Limited (now in liquidation) (SAVI or the company), which I will refer to as the 2018 determination.¹ In the 2018 determination SAVI was ordered to pay sums as personal grievance remedies and arrears, as well as a penalty.

[2] Following that determination being issued, SAVI was put into liquidation and Mr Gill did not receive payment. He then brought a claim against Navin Sharma, the sole director of SAVI.

[3] At a case management conference the parties agreed that this matter could be decided on the papers.

[4] In the first determination involving Mr Sharma personally I found that he was a person involved in breaches of employment standards regarding Mr Gill.² Leave was granted for Mr Gill to bring a recovery claim against Mr Sharma under s 142Y of the Employment Relations Act 2000 (the Act).

[5] Submissions and documents received on behalf of Mr Gill prior to that first determination included material relevant to the first determination against Mr Sharma and to the current one. After that first determination a timetable was set for the filing of any further evidence and submissions by the parties. Mr Gill's representative indicated that there was nothing further to add. Nothing further was heard on behalf of Mr Sharma. I take into account what is in the statement in reply and amended statement in reply, as well as what was said by Mr Sharma at the case management conference.

[6] This determination includes findings and orders but does not record all the evidence and submissions received, as permitted by s 174E of the Act.

¹ *Shakeel Gill v South Auckland Vehicle Imports Limited* [2018] NZERA Auckland 108

² *Shakeel Gill v Navin Sharma* [2019] NZERA 510

Issues

[7] The issues for determination are:

- (a) Is SAVI unable to pay the arrears in wages and other money owing to Mr Gill under the 2018 determination, amounting to a breach of employment standards?
- (b) If so, are there restrictions on the sums which may be claimed against Mr Sharma under Part 9A of the Act (which contains ss 142W and 142Y)?
- (c) Does Mr Sharma have any defence against an order under s 142Y of the Act being made against him?
- (d) In conclusion, should an order under s 142Y of the Act be made requiring Mr Sharma to pay Mr Gill wages or other money owing?

Is SAVI unable to pay?

[8] In March 2019 Mr Gill's representative filed a creditor's claim with SAVI's liquidator for the sum of \$17,340.49. The claim was classified as being that of an unsecured creditor. This is a matter which may be reconsidered as it appears, without receiving submissions on this issue, that some of the sums awarded in the 2018 determination against SAVI may be preferential under Schedule 7 of the Companies Act 1993. This seems particularly to concern holiday pay.

[9] The liquidator confirmed in writing that the company did not have the financial means to pay the order of the Authority to Mr Gill.

[10] The most recent liquidator's report on the Companies Office website is the six monthly report dated 24 September 2019. The contents of that report are very similar to the previous report of 10 December 2018. The 2019 report identifies that thus far the liquidator has received no money. The only assets identified were vehicles which were subject to finance and had been repossessed by a finance company prior to liquidation. Preferential claims at that point totalled just over \$350,000, with unsecured creditors totalling almost \$340,000. Any prospect of a distribution was dependent on the quantum of the recovery of an overdrawn shareholders' current account and any possible voidable transactions pursued, which had not been decided on at that point.

[11] Under the 2018 determination against SAVI the money awarded was due to be paid to Mr Gill in April 2018. It has not been paid.

[12] I am satisfied that SAVI is unable to pay the money due under the 2018 determination.

Can all aspects of Mr Gill's claims be covered by an order under s 142Y?

[13] The 2018 determination orders payment by SAVI of:

- (a) lost wages and compensation as remedies for Mr Gill's personal grievances;
- (b) arrears of wages, including commission; and
- (c) public holiday pay, pay for alternative holidays and (annual leave) holiday pay.

[14] Mr Gill has now restricted his claim to money which would have been earned from 1 April 2016 onwards, in light of ss 142W and 142Y of the Act coming into force at that date.³ I have deducted the figure of \$1,369.60 gross due for work prior to 1 April 2016⁴ from the arrears of wages total of \$7,082.24⁵, leaving a total of \$5,712.64 gross.

[15] There is a question about whether all the remaining sums come within the description of employment standards as used in ss 142W and 142Y. Employment standards are defined as the:

- (a) requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130 of the Act;
- (b) provisions of the Equal Pay Act 1972;
- (c) minimum entitlements and payment for those under the Holidays Act 2003;
- (d) requirements of sections 81 and 82 of the Holidays Act;
- (e) minimum entitlements under the Minimum Wage Act 1983; or
- (f) provisions of the Wages Protection Act 1983.⁶

[16] I do not accept that an award of lost wages as a remedy for a dismissal grievance comes within the definition of employment standards and thus no order can be made for it under s 142Y.

[17] The arrears of wages, including commission, come within payments required to be made under the Wages Protection Act⁷ and thus may be subject to an order under s 142Y of the Act.

³ Employment Relations Amendment Act 2016, s 2

⁴ *Shakeel Gill v South Auckland Vehicle Imports Ltd* [2018] NZERA Auckland 108 at [110]

⁵ Above n 4 at [124]

⁶ Employment Relations Act, s 5

⁷ Wages Protection Act 1983, s 2 (definition of wages) and section 5 (payment of wages without deduction).

[18] The awards to Mr Gill regarding holiday pay for annual leave, public holidays and alternative holidays are all payments for the minimum entitlements under the Holidays Act. They may be the subject of a s 142Y order.

Does Mr Sharma have a defence?

[19] For Mr Gill it is submitted that Mr Sharma knowingly committed the breaches and was not relying on anyone else's information in committing those breaches.

[20] No evidence or submissions have been provided suggesting that Mr Sharma has a defence under ss 142ZC and 142ZD of the Act to a claim against him. No defence has been established.

Should an order be made?

[21] I conclude that an order should be made against Mr Sharma. I order Navin Sharma to pay Shakeel Gill the following sums within 21 days of the date of this determination:

- (f) \$5,712.64 gross in arrears of wages;
- (g) \$1,000.00 gross as commission;
- (h) \$557.28 gross for public holiday pay;
- (i) \$1,152.00 gross for alternative holidays; and
- (j) \$2,604.97 gross for holiday pay.

Costs

[22] This matter was dealt with on the papers. However, Mr Gill's representative was required to attend a case management conference by telephone, file submissions and documents, as well as have contact with the Authority on a number of occasions due largely to the extensions of time sought by and for Mr Sharma.⁸

[23] I order Navin Sharma to pay Shakeel Gill the sum of \$800.00 within 21 days as a contribution to Mr Gill's costs, along with \$71.56 for the Authority's filing fee.

Nicola Craig

Member of the Employment Relations Authority

⁸ See [2019] NZERA 510 at [6] – [9]