

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 224
5420313

BETWEEN CRAIG HAMILTON
Applicant

A N D AFROZ KUTTI
Respondent

Member of Authority: James Crichton

Representatives: Louise Darroch, Counsel for the Applicant
Respondent in person

Investigation Meeting: 28 April 2014 at Auckland

Date of Determination: 9 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hamilton) alleges that he was unjustifiably disadvantaged and unjustifiably dismissed during his employment by the respondent (Mr Kutti).

[2] Mr Hamilton was employed by Mr Kutti as a barber. The employment commenced in March 2012 and ended in April 2013. Mr Hamilton had been referred to Mr Kutti's business by a Work & Income New Zealand (WINZ) work broker.

[3] Mr Hamilton told the Authority that he had been out of work for a period of time and was pleased to get employment.

[4] It seems to be common ground that there was an interview between the two protagonists as a consequence of which Mr Kutti told Mr Hamilton that the latter could undertake a trial the following day. Mr Hamilton was told to attend at 10am, told that he would be paid \$13.50 per hour, and told that he would receive a minimum of 30 hours' work per week over five days.

[5] Mr Hamilton says that those five days were Wednesday through to Sunday starting at 10am and concluding at 6pm with no provision for proper breaks. He also maintains that he was in sole charge of the barbershop for much of the time that he was working. It is common ground that there was no written employment agreement provided.

[6] Of particular concern to Mr Hamilton was the fact that he was never paid his wages in the ordinary way on pay day, which was a Monday. Mr Hamilton told me that his expectation was that he would be paid by direct credit on Monday night and to that end, he is adamant that he provided Mr Kutti with IRD and bank account details. This is disputed by Mr Kutti whose evidence is that part of the reason that he paid Mr Hamilton on a day-by-day basis was because he did not have the information sufficient to pay by direct credit.

[7] Whatever the explanation, it is common ground that Mr Hamilton was effectively paid each night before he went home and he would sign an informal wage book each night to evidence receipt of the money paid to him. While the method of delivery was odd, Mr Hamilton accepted that, generally, he was paid what he was entitled to.

[8] There is, however, a dispute between the parties as to the nature of the employment. Mr Hamilton alleges that Mr Kutti told him that the employment was casual and therefore he did not get sick pay, holiday pay or any other employment benefits and that because he was casual, there was no need for a written employment agreement.

[9] Conversely, Mr Kutti told me that he had prepared a casual employment agreement, showed it to Mr Hamilton but the latter said that he would have to take it to his lawyer to discuss it and he did not have the money to do that. Accordingly, the matter was never taken any further.

[10] Mr Kutti also placed great emphasis on the fact that when Mr Hamilton commenced in the employment, Mr Kutti was not provided with Mr Hamilton's curriculum vitae and had he been, he would have had a better appreciation of Mr Hamilton's background and skills.

[11] But that allegation is rejected by Mr Hamilton who said that WINZ had his curriculum vitae (as was a requirement of all unemployed people seeking work), and that WINZ had provided a copy of the curriculum vitae to Mr Kutti .

[12] Mr Hamilton has no recollection of being furnished with a draft employment agreement, as Mr Kutti alleged, but he did remember seeing “*a few things handwritten on a piece of paper which he asked me to read and agree to*”, but that Mr Hamilton refused because he thought some of the requirements were unreasonable.

[13] At the end of the first week of the employment, Mr Hamilton found that there was no money in his bank account and he asked Mr Kutti for his wages. Mr Hamilton’s evidence is that Mr Kutti told him that if he wished to be paid on pay day (which was Monday) he would have to open the shop on Monday and work Mondays, on commission. Prior to this, it is common ground that the shop was closed on Mondays and Tuesdays.

[14] This commission arrangement was another bone of contention between the parties. So far as Mr Hamilton was concerned, when he worked on Mondays on commission, the arrangement was that 50% of the takings belonged to him and 50% belonged to Mr Kutti. That much seems to be agreed but Mr Kutti seemed to suggest that the shared commission arrangement took Mr Hamilton out of an employment relationship and meant he was a contractor for that day’s work anyway. Certainly Mr Hamilton’s evidence was that his expectation was that the money the he earned on successive Mondays and later Tuesdays as well, notwithstanding it was on a different basis from the money he earned in the rest of the week from Mr Kutti , was nonetheless still money earned in an employment relationship and therefore the responsibility of Mr Kutti to deal with the incidence of tax.

[15] During the investigation meeting, I raised the apparent inaccuracy in the earnings declared to the Inland Revenue Department by Mr Kutti concerning Mr Hamilton’s employment. Prior to preparing this determination, I have received a statement from Mr Kutti ’s accountant which appears to confirm that no tax was declared in relation to the commission earnings on Mondays and Tuesdays but also claims to have made adequate provision for tax on the balance of Mr Hamilton’s earnings. I am not satisfied that is the position at all, even allowing for the deduction of the moneys earned on the commission basis.

[16] The employment relationship continued in this rather unsatisfactory and disjointed way and on the evidence I heard from both parties, there was reasonably regular disputation between them on a range of matters. Mr Kutti for instance complained about Mr Hamilton “*smoking all the time*” and smelling of cigarette smoke which Mr Kutti said promoted complaints from his clients. Mr Kutti also complained about Mr Hamilton drying his hands on the towel to be used for hair cutting. Mr Kutti tried to deal with the smell of cigarette smoke, he says, by buying Mr Hamilton aftershave.

[17] Mr Kutti also complained about Mr Hamilton taking too many breaks and smoking outside in the street where the smoke wafted into the neighbouring business and promoted complaints from that business. Mr Kutti denied Mr Hamilton’s claim that there were no proper breaks; his evidence was that a 30 minute lunch break was provided and there were two 10-15 minute breaks as well per day but that Mr Hamilton was taking far more time than was provided.

[18] There was also argument about whether Mr Hamilton attended work late, whether he was constantly arguing with acquaintances, whether friends came in to bludge cigarettes from Mr Hamilton, whether Mr Hamilton purchased cigarettes for a teenager in the adjoining dairy, whether Mr Hamilton brought marijuana into the lunch room and whether Mr Hamilton was dealing in drugs as well.

[19] For the avoidance of doubt, Mr Hamilton disputes each and every one of Mr Kutti’s allegations and in particular vehemently denies bringing drugs onto the workplace, dealing in drugs, being late for work, arguing with acquaintances and taking too many breaks.

[20] Moreover, Mr Hamilton alleged that he was forced to work when he was sick, once with influenza and once when he had a broken bone in his foot and that he was denied bereavement leave. Both claims are vehemently denied by Mr Kutti who said that bereavement leave was always available and that in relation to working when he should have been on sick leave, Mr Kutti said that Mr Hamilton chose to work despite the fact that he was unwell.

[21] Mr Hamilton also maintained that he was subjected to racist and sexual harassment, that Mr Kutti would say things like “*I hate white people*” and that

Mr Kutti would make fun of him for being a gay man and that Mr Kutti would make fun of the fact that Mr Hamilton was not a person of faith.

[22] On Saturday, 20 April 2013, matters finally came to a head. Mr Hamilton asked Mr Kutti for his pay. Mr Kutti allegedly threw \$100 at Mr Hamilton and told him that he was sacked. Mr Kutti agrees that he said something to the effect that Mr Hamilton was to take his money and “*fuck off*”. Not surprisingly, Mr Hamilton took the money and fled; his evidence is that Mr Kutti was unpredictable, had a bad temper, and he was concerned that he had a machete in the shop for protection.

[23] It is common ground that there had been altercations of this sort between the two protagonists previously and on each occasion in the past, the relationship had been restored, if only because Mr Hamilton was fearful that if he lost his job, he would not be able to obtain the unemployment benefit again.

[24] When the employment relationship concluded, Mr Hamilton says that there was significant money owing to him in wages and holiday pay.

Issues

[25] Mr Hamilton claims unjustified dismissal and disadvantage as a consequence of suffering unjustified actions of the employer. He also seeks unpaid wages.

[26] It will be convenient if the Authority considers each of those matters in turn.

Was Mr Hamilton unjustifiably dismissed?

[27] I am satisfied on the evidence I heard that Mr Hamilton was unjustifiably dismissed from his employment by Mr Kutti . I reach this conclusion because the weight of evidence from both of the principal protagonists is that the employment concluded at around 5pm on Saturday, 20 April 2013 when Mr Hamilton simply asked Mr Kutti for his pay, Mr Kutti provided \$100 (Mr Hamilton says that Mr Kutti threw the money at him although that is denied), and then by common consent, Mr Kutti said to Mr Hamilton words to the effect “*take your money and fuck off*”. Mr Hamilton is adamant that Mr Kutti also told him that he was “*sacked*” or “*fired*” but Mr Kutti denies those additional statements.

[28] In any event, the short point is that, by common consent, there was at the outset an ordinary machinery engagement around pay, which for no apparent reason degenerated into what I think I must conclude as a “*sending away*”.

[29] Why Mr Kutti should have got so angry at this point is difficult to discern; he certainly was unable to assist me on the point during my investigation but it is common ground that he did become very angry. All he could remember was that Mr Hamilton had sworn at him. Mr Hamilton acknowledged that he swore at Mr Kutti from time to time but he had no recollection of swearing on this occasion.

[30] Factually, there can be no question that Mr Kutti sent Mr Hamilton away, in the context of an intemperate exchange which, on the evidence I heard, was entirely unjustified, and which, on Mr Hamilton’s evidence, led to him being genuinely fearful of remaining in Mr Kutti’s presence.

[31] Indeed, I am satisfied that the reason that Mr Hamilton departed the workplace as quickly as he did was that he was genuinely frightened of Mr Kutti and that also is why he failed to take any steps to engage with Mr Kutti again, after the dismissal.

[32] Nor is there any evidence that Mr Kutti took any proper steps to re-engage with Mr Hamilton, had he (Mr Kutti) intended that the relationship should continue. Mr Kutti did tell me that he contacted WINZ and told them that Mr Hamilton’s job was still available but Mr Kutti made no direct approach to Mr Hamilton himself.

[33] And in any event, even the approach to WINZ, which was reported by WINZ to Mr Hamilton, could only have been efficacious in restarting the relationship if Mr Hamilton could have been satisfied that he was not in any danger in returning to the workplace.

[34] In that regard, I repeat my conclusion that Mr Hamilton was genuinely frightened about Mr Kutti’s angry outburst, particularly as it seemed out of proportion to any initiation by Mr Hamilton. All the latter did was sought to be paid for the work that he had actually done, and in the context of a relationship which Mr Hamilton describes as an abusive one anyway, it is difficult to conclude that Mr Hamilton was somehow at fault by not being willing to re-engage with Mr Kutti, especially when there had been no direct communication between Mr Kutti and Mr Hamilton.

[35] Mr Kutti told me that he had both performance and disciplinary concerns about Mr Hamilton and I have already referred to these matters earlier in this determination. But even if all of these matters were proved against Mr Hamilton (and that is not the case), there is no evidence that any of them were even referred to by Mr Kutti during the final conversation between the two men. Indeed there is no evidence at all to support a conclusion that these matters were the basis of the termination of the employment.

[36] Indeed, Mr Kutti's position seems to me to be characterised by wanting to have it both ways. On the one hand he says he had performance and disciplinary concerns about Mr Hamilton and on the other he claims to have wanted the employment relationship to continue and that is why he contacted WINZ to indicate that Mr Hamilton's job was still available.

[37] Moreover, I accept the submission made for Mr Hamilton that there is no evidence that Mr Kutti ever conducted a proper disciplinary or performance inquiry into any of his concerns relating to Mr Hamilton. I was told that there were regular general meetings between Mr Kutti and the staff members, but there was nothing to suggest that Mr Kutti had conducted any proper disciplinary or performance process specifically directed at Mr Hamilton.

[38] Furthermore, the termination of the employment must be seen in the context of the employment relationship as a whole. Looked at in that way, the final dismissal of Mr Hamilton was one of many dismissals, the only difference being that on all the previous occasions when Mr Kutti had dismissed Mr Hamilton, Mr Kutti had contacted Mr Hamilton within a day or so and asked him to come back. As I am satisfied this did not happen on the final occasion, I think it proper to draw the conclusion that Mr Kutti intended to end the relationship, for whatever reason, and given that ending was abrupt and precipitate, done in the heat of the moment without Mr Hamilton having any opportunity whatever to respond, get advice or even reflect on what had happened to him, the dismissal process was callous and unfeeling and resulted in significant emotional harm to Mr Hamilton.

[39] I am satisfied then that Mr Hamilton has suffered a personal grievance by reason of having been unjustifiably dismissed from his employment by Mr Kutti.

Is Mr Hamilton owed wages?

[40] Before I address that issue, I need to make some introductory observations about the paucity of the appropriate records of the employment.

[41] I turn first to the employment agreement, or more accurately the lack of one. Mr Hamilton's evidence (which I prefer) is that there was no written employment agreement. He says he was shown some handwritten clauses on rough pieces of paper which Mr Kutti wanted him to sign and that he refused to sign the purported agreement on the footing that he did not agree with all of its provisions. He also indicated that he was unable to afford a lawyer to review the agreement and until he was able to do that, he was not prepared to commit himself.

[42] At the investigation meeting, Mr Kutti produced two documents, the first a casual individual employment agreement which was in the name of another employee but which Mr Kutti assured me was in similar terms to the one he gave to Mr Hamilton. That is as may be, but the short point is that there is no signed employment agreement between these parties. Mr Hamilton's evidence is that if he was shown one, he never signed it, and I did not understand Mr Kutti to maintain that Mr Hamilton had signed the agreement either. In any event, there is no signed agreement before the Authority.

[43] In addition to that issue, there is also another agreement between the parties relating to Mr Hamilton's commission work on Mondays and Tuesdays. I have been provided with a copy of that agreement duly signed by both parties. It provides broadly for a 50/50 commission basis for Mr Hamilton's work on Mondays and Tuesdays, specifies the hours that he works on those days and concludes with a commitment that he will "*not breach my written agreement*". The commission document is undated but it appears to have been executed in March of 2012, perhaps soon after the employment commenced.

[44] In summary then, I conclude that Mr Kutti did not comply with New Zealand employment law in respect of the provision of a written employment agreement for Mr Hamilton. There is no more than an implication there was a casual individual employment agreement in place between Mr Kutti and Mr Hamilton which presumably will be in similar terms to the example which the Authority has been shown. But the Authority has not been provided with a signed agreement between

these parties and the Authority prefers Mr Hamilton's evidence that he refused to sign the agreement because he did not agree with some of its provisions.

[45] That leaves the very curious document which purports to deal with the commission situation. Again, although that document is signed and plainly does exist, it is completely inadequate in dealing with the arrangements between the parties for the commission payment structure and amongst other things does not make clear whether the parties intended that this be an employment relationship or a contractual relationship. To make the same point in a different way, there is no reference in the agreement to the incidence of tax and the obligations that both parties have to ensure that tax on income is paid.

[46] I turn now to the wage and time records. It would be difficult to imagine a greater mess. There are some apparently straightforward payslips available for some of the employment and some pages from a time and pay book for part of Mr Hamilton's employment.

[47] But the difficulty is that the physical way in which Mr Hamilton was paid for the work that he did was so haphazard as to make it almost impossible to marry the purported wage and time record (selected dates only) with the running record of payments made to Mr Hamilton by Mr Kutti .

[48] That running record was kept in an exercise book and that was provided to the Authority. I arranged for my long suffering support officer to physically copy each page and I have used my best endeavours to understand how payment was made.

[49] By way of a general observation, I accept Mr Hamilton's evidence that he was paid in drips and drabs. For instance, in a handwritten entry which I am satisfied is written in Mr Kutti's writing, for 26 April 2012 there is the legend "*paid Craig \$20 wages*" and beside that is Mr Hamilton's signature. Then there are the words "*balance \$20*", whatever that means.

[50] The exercise books that I have just referred to contains numerous such examples throughout their pages. On each occasion where a payment was made to Mr Hamilton, he appears to have dutifully signed for receipt of the money. The amounts Mr Hamilton received by this process were uniformly small. Most of the entries in this exercise book seem to be for amounts between \$20 and \$40.

[51] I conclude two things from this material. The first is that Mr Hamilton's evidence that he was paid a little bit each day rather than a weekly wage as the law requires is amply made out. Second, I conclude that the wage and time records of the employer do not comply with New Zealand law and that, in effect, it is almost impossible to discern what hours Mr Hamilton worked although I can with slightly better certainty identify what he was paid. This is because the exercise book that I referred to may be a complete record of the payments made.

[52] Next, in terms of documentation, I turn to a third issue which is the incidence of tax. As I indicated to the parties during the investigation meeting, and as I have already alluded to in this determination, the amount of tax paid by Mr Kutti in respect of Mr Hamilton's work does not marry to the amount of money actually earned by Mr Hamilton (or perhaps more accurately, the amount of money that ought to have been earned by Mr Hamilton) during the employment. I have been provided with the evidence of what has been filed by Mr Kutti's accountant with the Inland Revenue Department and I am not satisfied that that adequately accounts for the moneys earned by Mr Hamilton during the employment.

[53] I conclude that Mr Kutti's record keeping does not comply with s.130 of the Employment Relations Act 2000 (the Act) or s.81 of the Holidays Act. The information I have been provided with does not establish with any certainty the hours that Mr Hamilton worked, the wages that were paid to him, the way in which those wages were calculated, the entitlements Mr Hamilton had to holiday pay, sick pay, bereavement leave and so on.

[54] Because in a case of this kind, there is likely to be an issue about whether Mr Hamilton has an entitlement to wage and analogous payments that he ought to have received during the employment, I need to determine whether the status of the employment was properly a casual engagement or not. Despite Mr Kutti's enthusiasm for convincing me that it was a casual engagement, I am not persuaded. Applying the test in *Jinkinson v. Oceania Gold (NZ) Ltd* [2009] ERNZ 225 I am satisfied that this was an employment relationship where at the end of each work period, Mr Hamilton had a reasonable expectation of continued work for the next work period and that in the periods between work being performed by Mr Hamilton for Mr Kutti, the parties had *mutual obligations*, the one to the other and treated each other as if the

relationship was one of continuing employment rather than one of a succession of discrete engagements.

[55] This conclusion is formed by the evidence of the regular pattern of work performed by Mr Hamilton, and the absence of any evidence that he was summoned to the workplace to work different hours from the ones that had previously been determined between the parties by agreement.

[56] In submissions for Mr Hamilton, counsel refers to Mr Hamilton as a permanent full time employee. That may be arguable; it is commonly said that work habitually performed beyond 30 hours a week justifies the nomenclature of a full time engagement. Nothing turns on whether Mr Hamilton is a full time employee or a part time employee; the distinction is between a permanent employee, which Mr Hamilton was, and a casual employee, which Mr Kutti maintained was the nature of the employment but which I am satisfied simply does not meet the case.

[57] Having determined that Mr Hamilton is not a casual employee but a permanent employee, it follows that he is entitled to the usual benefits of a permanent employee, namely sick leave, bereavement leave, annual leave and holiday pay on annual leave together with statutory holiday pay. Mr Hamilton received none of these payments, so far as I can discern.

[58] Worse than that, Mr Hamilton was entitled to be paid at the minimum wage and that appears to be what the parties agreed to but, on the face of it, the evidence suggests that he was not paid the minimum wage for all hours worked. This is particularly the case in respect of the so-called commission arrangement which, for the avoidance of doubt, I am satisfied was a kind of employment and not a contractual role as Mr Kutti seemed to want me to understand. Because the parties had agreed simply to a 50/50 split for the two days that Mr Hamilton was to work on commission, it follows that if the payments to the business for each hour worked by Mr Hamilton on commission was less than twice the minimum hourly rate, then Mr Kutti had an obligation to top that deficit up and there is no evidence that he did that.

[59] Moreover, the sketchy evidence on payments to Mr Hamilton for work on public holidays and time in lieu suggest that he was not correctly paid for that class of work either.

[60] Even more seriously, Mr Hamilton was told at the beginning of his engagement that he was a casual employee and in consequence, his holiday pay was paid with the hourly rate. But that is not what happened. Generally, Mr Hamilton was paid the minimum hourly rate but there is no evidence that that amount was augmented by the 8% that would be necessary to add holiday pay to the entitlement. It seems that even Mr Kutti accepts that holiday pay is due and owing although that matter has not been addressed. Again, I am satisfied that Mr Hamilton is entitled to arrears of holiday pay.

[61] Bereavement leave and sick leave are in the same category. As a permanent employee, Mr Hamilton is entitled to both bereavement leave and sick leave. Orders will need to be made by me in respect of both those heads as well.

Has Mr Hamilton suffered an unjustified disadvantage?

[62] The matters that I have just traversed concerning the inadequacy of record keeping by the employer and the absolute failure to pay statutory wage entitlements are, in my judgment, so egregious in the present case as to justify the conclusion that they represent unjustified actions of the employer. Whatever the size of an employer, they have an obligation to establish what is required of them and then set about fulfilling that obligation. Mr Kutti had an accounting adviser who he could turn to and clearly had an ongoing relationship with the local WINZ office. Both of those entities could have provided Mr Kutti with guidance if he had sought it. It is evident that Mr Hamilton suffered disadvantage as a consequence of the failure of his employer to meet its statutory obligations to pay him properly.

[63] That conclusion is reinforced many times over by the drip feed technique which Mr Kutti used to pay Mr Hamilton his ordinary wages during the employment. The effect of this process was to deprive Mr Hamilton of the benefits of his labours, make it difficult for him to meet his own obligations and leave him constantly at the beck and call of his employer. That is why such an arrangement is against the law. Mr Hamilton was entitled to be paid his weekly wage on payday free of deduction and on the evidence the Authority heard, that never happened. By s4 of the Wages Protection Act 1983, an employer is required to pay to his employee the entire amount of the wages then due, free of any deduction. Mr Hamilton satisfied me he was told payday was Monday and on that footing, I hold that Mr Hamilton was entitled to be paid his weekly wage free of deduction, on a Monday. The failure to do that, I am

satisfied, is an unjustified action of the employer, Mr Kutti, which caused Mr Hamilton disadvantage.

[64] Next, Mr Hamilton alleges that he was sexually and racially harassed by Mr Kutti. As a gay man, Mr Hamilton felt belittled by the observations which he says Mr Kutti made. Mr Kutti denied making those observations.

[65] Similarly, Mr Hamilton alleges that he was racially harassed because he would regularly be the only white person in the shop and Mr Kutti would make uncharitable observations about white people generally, it is said.

[66] Mr Hamilton also alleges that Mr Kutti made uncharitable observations about Mr Hamilton's religious beliefs. Mr Kutti is a person of faith and Mr Hamilton is not an observant member of any faith community.

[67] Mr Kutti denied either racially or sexually harassing Mr Hamilton and I prefer his evidence on that point.

[68] I am influenced to reach that conclusion first because of the quite significant body of evidence that Mr Kutti did his best to try to assist Mr Hamilton by occasionally buying him food to eat, paying for transport on one occasion, and buying Mr Hamilton gifts. Those matters were not denied by Mr Hamilton and I am satisfied that Mr Kutti did in fact do those things for Mr Hamilton.

[69] Second, the evidence for these harassment allegations comes first from Mr Hamilton's own testimony and second from a statement filed in his support by another individual who was employed at Mr Kutti's shop for a short period and who apparently observed some of the behaviour complained about. However, that other individual did not appear at the investigation meeting and it is difficult to judge what weight to put on that evidence as a consequence. That said, a signed witness statement was provided and it tends to confirm Mr Hamilton's complaints concerning the issues of religion and sexual orientation.

[70] While Mr Hamilton clearly felt he was harassed during the employment, and told others about that harassment (including medical advisers), the independent evidence to support those allegations is thin.

[71] While I think it evident that this was an unhappy employment relationship where the expectations of each party were, for whatever reason, not met by the other, I have not been able to conclude that there is evidence of harassment of any kind. I am sure that this was an uncomfortable period of employment for Mr Hamilton, but I attribute that rather to the totally unsatisfactory way in which he was treated by Mr Kutti concerning the normal incidents of employment, such as the entitlement to regular predictable payment of wages in a lump sum without deduction on the appointed day rather than any question about harassment.

[72] I am satisfied on the evidence that I heard that Mr Hamilton was disadvantaged by the series of unjustifiable actions of Mr Kutti, which I have enumerated in this section of the determination. In particular, I refer here to the woeful inadequacies in the payment of wages, the failure to keep proper records of the employment and in particular a wage and time record and a written employment agreement signed by both parties, the failure to understand the employment as being a permanent one rather than a casual one and therefore the failure to pay holiday pay, sick pay and pay for bereavement. Further and finally, Mr Kutti did not pay Mr Hamilton for the final week of the employment and he was not paid any notice period.

Determination

[73] I am satisfied on the evidence I heard that Mr Hamilton was unjustifiably dismissed from his employment and is accordingly entitled to the consideration of remedies for a personal grievance in that regard.

[74] I also conclude that Mr Hamilton is the victim of a series of unjustified actions by Mr Kutti which have caused him disadvantage in the workplace and those actions I refer to relate particularly to the woeful inadequacy in the payment of wages on a proper basis, the quantum of those wages, and the failure to pay those various wage entitlements such as holiday pay, statutory holiday pay and the like.

[75] I am required by s.124 of the Employment Relations Act 2000 to consider whether Mr Hamilton has contributed in any way to the circumstances giving rise to his grievance. I accept that the evidence is that Mr Kutti had various issues with Mr Hamilton's employment, but there is no evidence before me to suggest that Mr Kutti dealt with these in a proper fashion and also no evidence that they impacted

in any way, either on the dismissal or indeed on the disadvantage grievance. Applying *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82, I am satisfied Mr Hamilton's behaviour was neither causative nor blameworthy.

[76] While I am satisfied Mr Hamilton is entitled to compensation for the wrong done to him, I must take account of the size of the undertaking Mr Kutti operates in setting compensation for the two personal grievances proved. I conclude that compensation for the unjustified dismissal should be in the sum of \$ 3,500 and for the unjustified disadvantage should be in the sum of \$2,500.

[77] Moreover, Mr Hamilton is entitled to wages lost as a consequence of the unjustified dismissal. He was out of work for four weeks and on average, so far as I can discern it with the paucity of records, earned an average of \$400 gross per week. Mr Kutti is to pay to Mr Hamilton the sum of \$1600 gross for wages lost as a direct result of the dismissal. In addition, it is proper to compensate Mr Hamilton for the running loss in wages because his current role pays him for fewer hours than he had with Mr Kutti. I consider the proper course is to award Mr Hamilton the difference between the wages he receives now and the wages he would have received had he not been unjustifiably dismissed, for the balance of the 3 months remuneration referred to in s. 128 of the Employment Relations Act 2000, (the Act). That additional sum amounts to \$900 gross.

[78] Further, Mr Hamilton is entitled to be paid for his last week's work in full and to be paid a week's notice. Those sums aggregate to \$760 gross.

[79] Sick pay due and owing amounts to \$ 330 gross and a like amount is due and owing in respect to bereavement leave making a total under this paragraph of \$660 gross.

[80] Holiday pay is owed and in the absence of any other proper evidence on the point, I accept the submissions made for Mr Hamilton to the effect he is owed a total of \$3300 gross under this head.

[81] In respect to statutory holiday pay, counsel for Mr Hamilton has made a considerable effort to calculate the amount owing under this head. Because of the paucity of records, I can only estimate an entitlement and do that at the figure of \$1000 gross.

[82] The position is similar in terms of the shortfall in the payment for the commission work performed by Mr Hamilton where counsel's calculation suggests a figure but points up again the inadequacy of the records. I estimate an entitlement of \$2000 gross.

[83] I now direct that Mr Kutti is to pay to Mr Hamilton the sum of \$7000 net by way of compensation, and a further amount of \$9220 gross in wages due and owing. These sums are a significant impost for a small business and accordingly, I am prepared to hear from Mr Kutti on a time payment regime, and if he convinces me of that necessity, I shall direct payment by instalments, in terms of s. 123 of the Act.

[84] I sought a further engagement with the parties to discuss a payment regime and the arrangements for accounting to the Inland Revenue Department for the payment of tax. I am not satisfied that proper arrangements have been made for the payment of income tax or for the accounting of Kiwisaver contributions.

[85] Despite the usual efforts made to contact Mr Kutti by my support officer, he did not make himself available to participate in a telephone conference so that these matters could be explored appropriately. It follows that I have been unable to progress the inadequacy of provisioning for income tax or for agreeing a payment regime by instalments. Leave is reserved for Mr Kutti to approach the Authority on these matters, if he chooses to.

[86] In the meantime, the only steps I am able to take are to refer a copy of this determination to the Commissioner of Inland Revenue and in addition, to refer a copy of this determination to the relevant office of WINZ for their information.

[87] For the avoidance of doubt, I have stayed my hand on the question of penalties. If there can be some sign of good faith from Mr Kutti in making good on what is owing to Mr Hamilton, I am prepared to waive consideration of penalties, but leave is reserved for a further application to be made by Mr Hamilton, in the event of a lack of progress.

Costs

[88] Costs are reserved.

James Crichton
Member of the Employment Relations Authority