

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 256  
3003751

BETWEEN            DANIEL HANCOCK  
                                 Applicant  
  
A N D                IVAN GASU BRYANT  
                                 First Respondent  
  
A N D                ELIAS HARLEY GASU  
                                 LIMITED  
                                 Second Respondent

Member of Authority:    Nicola Craig  
  
Representatives:        Anna Hansen, Advocate for Applicant  
                                 No appearance by or for Respondents  
  
Investigation Meeting:    22 June 2017 at Auckland  
  
Date of Determination:    28 August 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Daniel Hancock was employed by Ivan Gasu Bryant personally.**
- B. Mr Hancock was unjustifiably dismissed by Mr Gasu Bryant. Within 14 days of the date of this determination Mr Gasu Bryant is to pay Mr Hancock:**
- (i) \$1040.00 gross in lost wages; and**
  - (ii) \$5,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Mr Gasu Bryant is to pay Mr Hancock the following sums within 14 days of the date of this determination:**
- (i) \$1,137.50 gross in unpaid wages;**

- (ii) **\$800.00 gross for statutory holidays;**
- (iii) **\$1001.00 gross as holiday pay;**
- (iv) **Interest on those three sums at the prescribed rate of 5% from 17 January 2017 until the time of payment; and**
- (v) **\$71.56 for the filing fee.**

**D. Within 14 days of the date of this determination, Mr Gasu Bryant is ordered to pay a penalty of \$3,000.00 for failure to provide a written employment agreement to Mr Hancock, with 50% of the penalty be paid to Mr Hancock and 50% to the Crown.**

#### **Employment relationship problem**

[1] Daniel Hancock worked for about two and a half months at the end of 2016 and start of 2017 doing building work for either Mr Ivan Gasu Bryant (Mr Gasu Bryant), who sometimes refers to himself as Mr Gasu-Bryant, or Elias Harley Gasu Limited (the company). Mr Gasu Bryant is the sole director and shareholder of the company which was incorporated on 26 August 2016.

[2] Mr Hancock originally filed his claim solely against Mr Gasu Bryant and subsequently refiled against both Mr Gasu Bryant and the company.

[3] Mr Hancock claims that he was unjustifiably dismissed and that he is owed wages and other money. He also claims that he was not provided with a written individual employment agreement in breach of s 63A of the Employment Relations Act 2000 (the Act) and seeks a penalty for that breach. The claims are made firstly against Mr Gasu Bryant personally as the employer and, in the alternative, against the company as the employer.

[4] At the time when Mr Gasu Bryant was the only respondent, the statement of problem was served on Mr Gasu Bryant at his residential address, as that address is recorded in relation to Mr Gasu Bryant's directorship of the company at the Companies Office. On 3 March 2017 the statement of problem was also emailed to Mr Gasu Bryant at the email address which Mr Hancock was given for Mr Gasu

Bryant during his employment. Mr Hancock's representative had also had email exchanges with Mr Gasu Bryant at the same email address, which were filed with the Authority.

[5] Mr Gasu Bryant telephoned the Authority to complain about receiving Mr Hancock's application. The Authority Officer requested a response by email and then received an email in reply to the Authority's earlier email to Mr Gasu Bryant. That email states that the writer (not named) did not "*know this guy*" (presumably Mr Hancock) and "*never has employed anyone*".

[6] Once the company had also been named as a respondent, the amended statement of problem was sent to Mr Gasu Bryant at the same residential address as the earlier statement of problem was sent to. It was also served on the company at the same address as that is also the company's registered office.

[7] No statement in reply has been received from either of the respondents.

### **Non-appearance of the respondents**

[8] The notice for the investigation meeting was served on Mr Gasu Bryant at his place of residence and was signed for. That notice was also served on the company at the company's registered office, which is at the same address.

[9] An investigation meeting was held on 22 June 2017. There was no appearance for the respondents.

[10] The Authority Officer attempted to contact the respondents by telephone to ascertain their whereabouts but was unable to make contact with them.

[11] Clause 12 of Schedule 2 of the Act sets out the Authority's power to proceed if any party fails to attend. It provides that without good cause being shown for the non-attendance, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.

[12] No good cause was shown for the respondents' failure to attend. I therefore continued to hear this matter. I heard evidence from Mr Hancock in person and also, by telephone, from the foreman Mr Hancock worked under.

## **The issues**

[13] The issues for investigation and determination by the Authority are:

- (a) The identity of Mr Hancock's employer;
- (b) Whether Mr Hancock was unjustifiably dismissed from his employment, and if so, what remedies (if any) he should receive;
- (c) Whether Mr Hancock has outstanding wages, statutory holidays and annual leave owing to him by his employer; and
- (d) Whether there was a failure to provide an employment agreement in a breach of s 63A of the Act and, if so, should a penalty be awarded and, if so, to whom?

## **Mr Hancock's appointment**

[14] Mr Hancock initially learned about the possibility of work through a friend who had seen an item on Trade Me about building work being available. The name of the Trade Me advertiser was Danny. Mr Hancock's friend passed on Danny's phone number to Mr Hancock. There appears to have been no indication on the Trade Me listing of company involvement. Mr Hancock later learned that Daniel is Mr Gasu Bryant's middle name. Mr Hancock was told by his friend that the advertisement indicated that there were a couple of years' worth of work and a lot of hours.

[15] Mr Hancock phoned the number provided and spoke to someone who he subsequently discovered was Mr Gasu Bryant. Mr Gasu Bryant said that he was looking for people for jobs, including ones in Ponsonby and Millwater.

[16] The next day Mr Hancock went to Millwater, a new development between Silverdale and Orewa. Mr Gasu Bryant introduced Mr Hancock to the foreman of the site where a house was being built. Mr Hancock worked the day there and the foreman then phoned Mr Gasu Bryant regarding the prospect of employing Mr Hancock.

[17] On 7 November 2016 Mr Hancock received a call from Mr Gasu Bryant. During that call, Mr Gasu Bryant offered Mr Hancock employment at \$25 per hour

doing building work. Mr Hancock says that there was no reference during that call to the employer being anyone other than Mr Gasu Bryant himself. After the call, Mr Hancock says that his father asked him who the job was with and he was also curious himself so he sent a text message to Mr Gasu Bryant asking the name of his company. Mr Gasu Bryant responded:

Elias Harley Gasu Limited  
Ehg constructors like us on Facebook ... E H G Constructors

[18] Mr Hancock later discovered that Mr Gasu Bryant's young son's name is Elias Harley Gasu.

### **Training agreement**

[19] Mr Hancock was not provided with a letter of appointment or an employment agreement. However, subsequently a BCITO<sup>1</sup> representative came and met with the foreman and Mr Hancock on a building site on 19 December 2016. The foreman signed a BCITO training agreement on behalf of the employer. Mr Hancock also signed that agreement. At that stage, the "*employer or contracting principal*" section of the form was left blank.

[20] Later, Mr Hancock received a letter from BCITO enclosing a copy of the training agreement which was registered. Someone, both Mr Hancock and the foreman believe it to be Mr Gasu Bryant, had filled out the "*employer or contracting principal*" section on the form. It described the "*organisation/company*" as "*EHG Constructors*" and the "*employer name*" as "*Ivan Gasu Bryant*".

### **Other references to the possible employer**

[21] The foreman gave Mr Hancock one of Mr Gasu Bryant's business cards which did not refer to Elias Harley Gasu or to a company. It was headed "*EHG Constructors*" and Mr Gasu Bryant was described as the manager. The foreman was aware of a company being involved and thought that it employed people but was not aware of written employment agreements.

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<sup>1</sup> Building and Construction Industry Training Organisation

[22] There is no company on the Companies Register with the name “*EHG Constructors*” in any of the variations of EHG<sup>2</sup>.

[23] Mr Hancock’s bank statements show that he received some payments from “*Elias Harley Gasu Li*”. The remainder of the description, if any, is not apparent but is likely to be Limited. Other payments were referred to as being from “*Elias Harley*”.

[24] Mr Hancock also provided emails which he had received from Mr Gasu Bryant. There had been some difficulties with his emails feeding back his hours of work getting through to Mr Gasu Bryant. As a result Mr Gasu Bryant sent an email through to Mr Hancock’s personal email address. The subject read “*Test ... ehg constructors Ltd*”. The nominated sender name in the email address, is a name which is usually a female name, and is not someone Mr Hancock has any knowledge of. However, the email is signed by “*Associate Professor Ivan Gasu-Bryant director EHG Constructors Ltd*”. There is no registered company called EHG Constructors Ltd or the like.

### **Identity of the employer**

[25] Mr Hancock considers that Mr Gasu Bryant personally was his employer.

[26] As neither of the respondents filed a statement in reply or attended the investigation meeting, their perspective on the identity of the employer is largely unknown. The email to the Authority referred to above denied knowing Mr Hancock or being an employer. However, this was from an email address which had been used to communicate with Mr Hancock when he was employed.

[27] There are references in various documents suggesting the employer was either Mr Gasu Bryant himself, Elias Harley Gasu Limited, or a person or organisation trading as EHG Constructors.

[28] In *McDonald v Ontrack Infrastructure Ltd*<sup>3</sup>, the Full Court confirmed that s 6 of the Act, regarding the meaning of employee, is not limited to determining issues of

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<sup>2</sup> Upper or lower case, spaces etc

<sup>3</sup> *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 32 at [52]

status<sup>4</sup>, but may also be referred to in circumstances where the identity of the employer is in issue.

[29] The Facebook listing, under an abbreviation of Mr Gasu Bryant's middle name, would suggest that he was the employer personally.

[30] I am satisfied that Mr Hancock was not informed during the conversation when he entered into an oral employment agreement that Mr Gasu Bryant was the agent for a company or that Elias Harley Gasu Limited was to be his employer. However, shortly thereafter Mr Hancock was informed of the name of the second respondent and also "*EHG Constructors*".

[31] There is no letter of appointment or employment agreement indicating the name of the employer.

[32] It appears probable that someone, likely Mr Gasu Bryant, had recorded the second respondent's name as the payer of Mr Hancock's wages.

[33] The use of the "*EHG Constructors Limited*" name when there is no such company, adds to the confusion.

[34] Mr Hancock says that PAYE was not being paid to the Inland Revenue Department so he has no tax records regarding the identity of the employer.

[35] Under s.3 of the Industry Training and Apprenticeships Act 1992, apprenticeship training agreements are part of the employment agreement between the employee and the employer concerned.

[36] I regard as particularly significant the entries made by Mr Gasu Bryant on the training agreement referring to himself as the employer. There is no reference in that agreement to Elias Harley Gasu Limited.

[37] I am satisfied on the balance of the evidence that Mr Gasu Bryant personally was Mr Hancock's employer.

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<sup>4</sup> Whether a person is a contractor or an employee

## Dismissal

[38] Mr Hancock had been having difficulties during his employment with Mr Gasu Bryant about payment of wages. A new foreman, who was described as Mr Gasu Bryant's business partner, became involved in the building work, after the foreman who signed the training agreement with Mr Hancock left. The new foreman told Mr Hancock not to come in to work the next day, 16 January 2017. Mr Hancock texted Mr Gasu Bryant in the morning to say he was not at work that day but that he would be in the following day. He also texted saying that the foreman had told him not to come in.

[39] Mr Gasu Bryant then telephoned Mr Hancock and became aggressive and abusive towards him, including calling him "*fucking useless*". Mr Gasu Bryant said that he "*sacked all of you right now*". Mr Gasu Bryant said that he was shutting his business down because the work was not progressing to the site manager's satisfaction and he did not have enough other work. He told Mr Hancock to look for another job. Mr Gasu Bryant did not subsequently attempt to follow up regarding whether Mr Hancock was coming into work again.

[40] Subsequent attempts by Mr Hancock and then his representative to follow up with Mr Gasu Bryant by text and email regarding outstanding entitlements degenerated, with Mr Gasu Bryant becoming abusive.

[41] I am satisfied that Mr Gasu Bryant dismissed Mr Hancock during the telephone conversation on 16 January 2017.

[42] I am required to consider whether that dismissal was unjustified in the sense of whether the employer acted in a way that a fair and reasonable employer could have done in all the circumstances<sup>5</sup>.

[43] The dismissal was undertaken over the telephone with no prior warning to Mr Hancock that his employment was in jeopardy.

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<sup>5</sup> Section 103A(2) of the Act

[44] Without Mr Gasu Bryant being present at the investigation meeting or having filed a statement in reply, I cannot be satisfied that this was a genuine redundancy. In any event, the process used was minimal and unfair to Mr Hancock. Mr Hancock was not consulted about a possible redundancy. I find that Mr Gasu Bryant did not treat Mr Hancock as a fair and reasonable employer could have done and that Mr Hancock was therefore unjustifiably dismissed.

### **Personal grievance remedies**

[45] I now consider what remedies Mr Hancock should be awarded.

#### *Lost wages*

[46] Mr Hancock had earlier been in discussions with another potential employer, as a result of payment problems in employment with Mr Gasu Bryant. He was able to obtain other employment the day after his dismissal, although on a lesser rate of pay than with Mr Gasu Bryant. The difference amounts to \$80 gross per week.

[47] I order Mr Gasu Bryant to pay Mr Hancock \$1,040.00 gross in lost wages being three months (13 weeks) of the \$80.00 per week difference between the two rates of pay. This sum is to be paid within 14 days of the date of this determination.

[48] I have considered whether Mr Hancock contributed to his dismissal but find that he did not.

#### *Compensation for hurt and humiliation*

[49] Mr Hancock also claims compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings which he suffered as a result of his dismissal. He says that he found being dismissed pretty scary. This was a job at a higher pay rate than his previous jobs and he was hopeful that it would continue for some time. He understood from the Facebook listing that there was plenty of work.

[50] Mr Hancock had a sense of everything crashing down when Mr Gasu Bryant told him to find another job. The sudden announcement over the telephone to Mr Hancock of his redundancy, without any previous discussion or consultation, was a shock for him.

[51] I order Mr Gasu Bryant to pay Mr Hancock the sum of \$5,000.00 in compensation under s 123(1)(c)(i) of the Act. This sum is to be paid within 14 days of the date of this determination.

### **Unpaid wages and holiday pay**

[52] Mr Hancock claims that he was not paid for hours worked towards the end of his employment with Mr Gasu Bryant, or for statutory holidays and annual holidays.

[53] Regarding unpaid wages, I am satisfied that Mr Gasu Bryant owes Mr Hancock unpaid wages for 45.5 hours worked which at \$25 per hour amounts to \$1,137.50.

[54] I order that within 14 days of the date of this determination Mr Gasu Bryant pays to Mr Hancock \$1,137.50 gross.

[55] Regarding statutory holidays, Mr Hancock claims for Christmas and Boxing Days 2016 and New Year's Day and 2 January 2017, when he had the day off as a public holiday on what would ordinarily have been a working day. He claims at his usual rate of \$200.00 per day. I am satisfied that Mr Hancock should be paid for those four days and order Mr Gasu Bryant to pay Mr Hancock the sum of \$800.00 in statutory holiday pay within 14 days of the date of this determination.

[56] Mr Hancock also claims payment for annual leave. During his employment for Mr Gasu Bryant he was not paid any holiday pay and 8% of his total earnings is \$1,001.00. I order that within 14 days of the date of this determination, Mr Gasu Bryant pays Mr Hancock the sum of \$1,001.00 gross as holiday pay.

[57] I am also satisfied that, as Mr Hancock has been deprived of the wages and leave payments which he should have been paid in January 2017, interest should be paid on the sums outstanding. I order that interest at the prescribed rate of 5% per annum be paid from 17 January 2017 when the amounts should have been paid, until the time of payment.

## **Lack of written employment agreement**

[58] Mr Hancock claims that his former employer should pay a penalty for not providing him with a written employment agreement, and that that penalty should be paid to him.

[59] Mr Hancock was not provided with a written employment agreement in breach of s 63A of the Act. He says that Mr Gasu Bryant told him that when Mr Hancock had been there for six months he would write him up a contract. There was no explanation for the six month period.

[60] I am satisfied that this is a situation where a penalty should be imposed. No explanation has been provided for the failure to provide an employment agreement.

[61] The Authority may impose a penalty for non-compliance<sup>6</sup>. Following the decision of the Full Bench of the Employment Court in *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd (Preet)*<sup>7</sup>, I now work through the four step test outlined there to assess the appropriate penalty.

### *The breaches*

[62] Step 1 is to identify the nature and number of the breaches. Here a penalty is sought for a single breach of one section of the Act. There are other aspects of other legislation which could have been an issue but no penalties have been sought regarding those.

[63] The breach in this case concerned only Mr Hancock, although there was evidence that another employee was in the same situation. The maximum penalty for a breach of the Act by an individual is \$10,000<sup>8</sup>.

### *Severity*

[64] Step 2 of the *Preet* process involves the assessment of the severity of the breach, to establish a provisional starting point including aggravating and mitigating

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<sup>6</sup> Section 63A(3) of the Act

<sup>7</sup> *Borsboom (Labour Inspector) v Preet Pvt Ltd & Warrington Discount Tobacco Ltd (Preet)* [2016] NZEmpC 143

<sup>8</sup> Section 135(2)(a) of the Act

factors. I accept that the provision of written employment agreements is important. Mr Hancock has had to deal with the lack of clarity of the employer's identity and this as a consequence of not being given a written agreement.

[65] In terms of aggravating factors, I note that Mr Hancock is a young man and could to some extent be seen to be vulnerable in the sense of not having a great deal of experience of the law regarding employment.

[66] The failure to provide an employment agreement appears intentional on Mr Gasu Bryant's part. Mr Hancock says he requested one on occasions and Mr Gasu Bryant indicated that he would provide an agreement in six months. Mr Hancock says that he felt that his job was a little unsafe or insecure because of having to rely on a verbal agreement to employ him.

[67] Mr Hancock drew to my attention another Authority<sup>9</sup> case against Mr Gasu Bryant for failure to pay wages to a former employee. Although that case does not involve a claim for breach of s 63A of the Act, there was a question regarding the identity of the employee's employer and the absence of relevant documentation, apparently including no employment agreement.

[68] In terms of mitigating factors, the situation was of relatively short duration in that Mr Hancock was only employed by Mr Gasu Bryant for about two and a half months.

[69] In *Preet*, the Court found the Employment Relations Act breaches to be the least serious breaches, compared with those under the Minimum Wage Act 1983 and the Holidays Act 2003. The Court provisionally allocated \$10,000 for the Employment Relations Act breaches, being 50% of the maximum penalty for a company. I note that the breaches of the Act in that case also concerned wage and time records and the failure was part of an attempt to mislead or deceive employees and potentially the Labour Inspector, who might have sought to check the records.

[70] Considering all the matters outlined I set the provisional penalty at \$3,000.

### *Ability to pay*

[71] Step 3 of the *Preet* process requires consideration of the employer's means and ability to pay, which may result in a downwards adjustment. As Mr Gasu Bryant did not participate in the investigation meeting or file a statement in reply, I am not prepared to allow any downwards adjustment in this case.

### *Totality*

[72] Step 4 involves the proportionality or totality test, whether the provisional penalty after the first three steps is proportionate with the seriousness of the breach(es) and the harm occasioned by it/them. In the *Preet* decision, penalties were required to be proportionate to the amount of money unlawfully withheld<sup>10</sup>.

[73] Although no other penalties have been sought, there is evidence of Mr Gasu Bryant not paying wages which were due, statutory holiday pay and annual holiday pay.

[74] I do consider that there is a need for Mr Gasu Bryant to be given a deterrent against future breaches. I consider that a penalty of \$3,000 is at the appropriate level.

[75] Mr Hancock seeks to have any penalty paid to himself under s 136(2) of the Act. There is evidence of the lack of an agreement causing him uncertainty and difficulty and I consider that he should be given half the penalty.

[76] I order Mr Gasu Bryant to pay a penalty of \$3,000.00 within 14 days of the date of this determination. I order that 50% of the penalty be paid to Mr Hancock and 50% to the Crown.

### **Costs**

[77] Mr Hancock was represented by a family member and has not claimed any costs for that.

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<sup>9</sup> *John Martin v Ivan Bryant*, Employment Relations Authority, Christchurch, Member Crichton, CA159/10, 9/8/10

<sup>10</sup> *Preet* at [190]

[78] I order Mr Gasu Bryant to pay Mr Hancock the sum of \$71.56 within 14 days of the date of this determination.

Nicola Craig  
Member of the Employment Relations Authority