

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 42
5416921

BETWEEN SANJAY KUMAR
 Applicant

A N D ROTORPLAST INDUSTRIES
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Narendra Kumar for Applicant
 John Coyle, Advocate for Respondent

Investigation meeting: 16 December 2013 at Auckland

Submissions Received: 20 December 2013 and 13 January 2014 from Applicant
 21 December 2013 from Respondent

Date of Determination: 05 February 2014

DETERMINATION OF THE AUTHORITY

- A. Mr Sanjay Kumar was not constructively dismissed by Rotorplast Industries Limited (Rotorplast).**

- B. Rotorplast is ordered to pay Mr Kumar unpaid wages and holiday pay totalling \$3,966.40 gross within 14 days of the date of this determination.**

- D. There is no order as to costs.**

Employment relationship problem

[1] The respondent company, Rotorplast Industries Limited (Rotorplast) operates a business in the motor industry including the collection of old car tyres from various workshops, for which service it is paid a fee.

[2] Mr Sanjay Kumar worked for Rotorplast for almost two months in June and July 2012. Mr Kumar says he resigned with immediate effect on 3 August, following the receipt of an abusive email from the director of Rotorplast, Mr Jagjeet Singh accusing him, among other things, of stealing. Mr Kumar says his resignation amounted to a constructive dismissal which in the circumstances was unjustified. Mr Kumar also says he is owed wages, holiday pay and costs for damage to his vehicle sustained while performing duties for Rotorplast.

[3] Rotorplast denies Mr Kumar was constructively dismissed. Rotorplast says Mr Kumar obtained another job and was as a result unable to continue to work fulltime for Rotorplast. Rotorplast states that Mr Kumar's actions in accepting employment with another company and no longer being available to comply with the terms of his employment with it, amounted to a repudiation by him of his employment agreement with it.

[4] Rotorplast denies that wages or monies for damage to Mr Kumar's vehicle are owed by it. Rotorplast does accept there is an amount of holiday pay owing which it withheld because it says Mr Kumar owes it money for not giving notice of resignation as required by his employment agreement.

Issues

[5] The following issues arise:

- (a) Was Mr Kumar constructively dismissed by Rotorplast?
- (b) If so, was the constructive dismissal unjustified in all the circumstances?
- (c) If Mr Kumar was constructively dismissed and it was unjustified what remedies should be paid to him?

- (d) Is Mr Kumar owed outstanding wages, holiday pay and monies for damage to his vehicle by Rotorplast?

First Issue

Was Mr Kumar constructively dismissed by Rotorplast?

[6] Mr Kumar obtained a job at Rotorplast through a connection his father, Mr Narendra Kumar had with its director, Mr Jagjeet Singh. Mr Kumar began working for Rotorplast on 4 June which was Queen's Birthday public holiday. Mr Kumar told Mr Singh that he was a motor vehicle mechanic and an automotive vehicle inspector (Vehicle Inspector) and that he wished to find a job as a Vehicle Inspector so that his licence did not expire. Mr Singh understood the situation and agreed to employ Mr Kumar.

[7] Mr Kumar was not provided with an employment agreement when he commenced at Rotorplast, this was provided to him subsequently. Mr Kumar and Mr Singh both signed an employment agreement dated 18 June 2012. Mr Kumar says he signed the last page of the employment agreement on 27 June 2012, but dated the employment agreement the 18th June because of Mr Singh's immigration requirements.

[8] There is no dispute that Mr Kumar did sign the employment agreement, albeit after he had commenced employment with Rotorplast on 4 June. The relevant provisions of the employment agreement included:

- Commencement date on 13 June 2012;
- The position was a fulltime position of normally 40 hours per week between Monday and Sunday and normal hours of work were Monday to Friday;
- Hourly rate of \$20 gross;

[9] Clause 21 of the employment agreement set out Mr Kumar's personal details. Mr Kumar handwrote his bank account number and contact details in the spaces provided and signed the employment agreement.

[10] Clause 22 of the employment agreement states:

INDEPENDENT ADVICE

*I, **SANJAY KUMAR**, declare that prior to my signing this agreement I have been forwarded a copy of this by the Employer and advised of my right to take independent advice with regard to the terms and conditions contained within this agreement, and that I have been allowed a reasonable time and opportunity of three working days to take such independent advice. I confirm that I (**tick only one of the following boxes**):*

[] have taken independent advice and I am satisfied with the terms and conditions of this Employment Agreement, and the Company's Work Rules and disciplinary systems.

[] have been given the opportunity and a reasonable time to take independent advice on the terms and conditions of this Agreement, however I have declined this right and/or decided not to do so.

[11] Mr Kumar ticked the second box.

[12] Clause 23 of the employment agreement states:

DECLARATION & ACCEPTANCE OF EMPLOYMENT

*I **SANJAY KUMAR** declare that I have read and understand the terms and conditions of employment as detailed in the Employment Agreement and accept them fully. ...*

I also understand that any job application forms that I have filled out will become part of the Agreement. I agree that I will comply with the Company's Occupational Health And Safety Regulations as detailed in the Occupational Health and Safety Handbook, and the Company's operating policies and procedures as detailed in the Operations Manual. I also declare that I have read and fully understand the Company's Work Rules and Disciplinary System and how they will be applied and the penalties for a breach of any of the Rules, and accept this Agreement of employment commencing on: 13th June 2012 ("the commencement date").

[13] Mr Kumar took advice from an employment consultant, signed and dated the employment agreement as did Mr Singh.

[14] Mr Kumar said he commenced employment with Rotorplast on 4 June and from 4-10 June undertook a number of personal type jobs for Mr Singh. Mr Singh says that from 4-10 June Mr Kumar was employed by him personally to attend to various jobs and that is why Rotorplast did not have wage and time records for Mr Kumar for that week.

[15] Mr Kumar was paid by Rotorplast for 40 hours work for the week of 4 June at the rate of \$20 gross per hour.

[16] It is my finding that Mr Kumar commenced employment with Rotorplast on 4 June even though his written employment agreement stated it commenced on 13 June and it was not signed until later in June.

[17] After starting with Rotorplast, Mr Kumar began looking for other jobs as a Vehicle Inspector so that he could retain his licence.

[18] On 22 July, Mr Kumar saw a position on the SEEK website for a vehicle testing inspector at the Waitakere Vehicle Testing Station (VTS). The position had been placed by Madison Force Limited (Force), a recruitment agency.

[19] Mr Kumar responded to the advertisement and attended an interview on 25 July at the offices of the Waitakere VTS in Laidlaw Business Park, West Tamaki. On 25 July 2012 Mr Kumar and a representative from Force signed an Individual (On Hire Staff New Zealand) Agreement. This agreement sets out the nature of the arrangement between the parties as follows:

[20] Clause 3.2

The Terms and Conditions of employment contained in this Agreement will come into force at the commencement date of the assignment and will continue until termination of the assignment unless sooner terminated in accordance with clause 6. I understand that Force has genuine reasons based on reasonable grounds for specifying that my employment will end in this way. The nature of my employment is that Force employs me to work on individual Assignments for Clients in accordance with the clients' requirements. My employment will therefore terminate on the earlier of:

- a. The date notified to me and the Confirmation of On Hire Job Brief; or*
- b. When the client terminates the assignment in accordance with clause 6 of this Agreement.*

[21] The agreement has a number of standard terms and conditions including provision for annual holidays, public holidays, sick leave, bereavement leave, health and safety, and resolution of employment relationship problems.

[22] Clause 29 contains a declaration as follows: *"I have read and fully understood the above terms and conditions and agree to be bound by them on each*

and every assignment I undertake on behalf of Force.” Mr Kumar signed the declaration.

[23] Mr Kumar’s hours of works as a Vehicle Inspector at the Waitakere VTS varied, but he agreed to be available from Thursday to Sunday each week.

[24] Mr Singh was in Fiji at the time that Mr Kumar was interviewed for and accepted the Vehicle Inspector position. Mr Kumar says that when Mr Singh returned from Fiji, he met with him on 1 August to discuss his new position. Mr Kumar says that he and Mr Singh agreed that he could work for Rotorplast from Monday to Wednesday each week as usual, collecting car tyres and that he would be available to work at the Waitakere VTS the rest of the week.

[25] Mr Kumar says he confirmed this discussion with Mr Singh in an email sent to him at 11.20pm on 1 August. The email stated:

As per our conversation earlier regarding my WOF authority expiration I wont be able to work with your company from Thursday to Sunday.

As discussed I can work Monday to Wednesday when available.

Thank you very much for giving me that opportunity.

Sanjay Kumar

[26] Mr Kumar worked at the Waitakere VTS on 2 and 3 August. Mr Singh denies ever agreeing to such a change in the working employment relationship with Mr Kumar and says he needed somebody fulltime in Mr Kumar’s position. Mr Singh became angry when he received Mr Kumar’s email and the following day, 2 August, sent an email to Mr Kumar accusing him of “*stealing and lying while employed by Rotorplast Industries*” and also seeking information about the job interviews attended by Mr Kumar during work hours.

[27] It is not disputed that Mr Kumar obtained a position as a vehicle testing inspector and signed an employment agreement with Force on 25 July 2012 when Mr Singh was in Fiji on business. Mr Kumar then notified Mr Singh on 1 August that he was not able to work for Rotorplast from Thursday to Sunday. I do not accept that Mr Singh agreed to a change in Mr Kumar’s terms and conditions of employment which would enable him to work for both Rotorplast and for the Waitakere VTS.

[28] It is my finding that Mr Kumar's conduct in accepting employment as a Vehicle Inspector at the Waitakere VTS and in informing Mr Singh that he was not available from Thursday to Sunday to work for Rotorplast constituted conduct which can only be regarded as repudiating his employment agreement with Rotorplast.

[29] Mr Kumar's employment agreement with Rotorplast was clear that he would be required to work from Monday to Sunday, normally Monday to Friday for 40 hours a week. By not making himself available to work for Rotorplast from Thursday to Sunday he was rejecting his employment agreement with Rotorplast.

[30] Mr Kumar says after receiving Mr Singh's email of 2 August, he took advice from his employment consultant and decided to resign because Mr Singh was accusing him of stealing.

[31] It is my finding that Mr Kumar obtained a position as a Vehicle Inspector at the Waitakere VTS so as not to lose his license and that this was always his intention. Mr Kumar began working at the Waitakere VTS on 2 August, only having notified Mr Singh of his intention to do so the day before. The terms and conditions of employment for Mr Kumar's position with Waitakere VTS were not compatible with those for Rotorplast. After repudiating his employment agreement with Rotorplast, Mr Kumar resigned and claimed he had been constructively dismissed because of Mr Singh's "derogatory" email to him. I do not accept Mr Kumar was constructively dismissed, he had already started work for a new employer. The answer to the First Issue is "No".

[32] Given my finding that Mr Kumar was not constructively dismissed, I am not required to investigate issues 2 and 3. Mr Kumar does not have an employment relationship problem and accordingly is not entitled to remedies.

Issue four

Is Mr Kumar owed outstanding wages, holiday pay and monies for damage to his motor vehicle by Rotorplast?

[33] Mr Kumar claims he regularly worked overtime for Rotorplast since he commenced employment with it on 4 June and kept records of the times he worked over and above the normal 40 hour period. Mr Kumar claims a total of \$4650 in unpaid wages plus holiday pay.

[34] Mr Singh says Mr Kumar was not required to work overtime and never obtained his consent to do so.

[35] Mr Kumar did not make a claim for “overtime” during his employment by Rotorplast. Mr Singh says for the period of time Mr Kumar was employed, he was paid \$20 per hour for 40 hours per week and this appears to be supported by the cheques produced by Rotorplast. Rotorplast accepts it owes holiday pay.

[36] I do not accept that overtime can be claimed by Mr Kumar in the absence of any agreement with Rotorplast. There was no such agreement, written or otherwise and no provision in Mr Kumar’s employment agreement for the payment of overtime. No overtime as claimed by Mr Kumar is payable by Rotorplast.

[37] Mr Kumar also seeks reimbursement for damage to his car sustained while undertaking work for Rotorplast. I find there was not an agreement, written or otherwise with Mr Singh for Mr Kumar to use his vehicle and to be reimbursed by Rotorplast for any damages sustained.

[38] I have found Mr Kumar is not entitled to claim overtime. However, Mr Kumar is entitled to claim payment for weeks in which he worked 40 hours and for which he claims not to have been paid by Rotorplast as follows;

- Mr Kumar claims he worked but was not paid by Rotorplast for the weeks of 4-10 June and 18- 24 June. Mr Kumar claims wages of 40 hours a week at the rate of \$20 gross an hour for those two weeks, a total of \$1,600 gross.
- Payment of an 8 hour day in lieu for working on the Queen’s Birthday public holiday on 4 June 2012 totalling \$160 gross.
- For the week of 25 June to 1 July, Mr Kumar claims he was short paid 16 hours of work at the rate of \$20 gross an hour totalling \$320 gross.
- For the week of 23 July to 29 July Mr Kumar claims he worked but was not paid. Mr Kumar claims a total of \$800 gross for 40 hours a week.

- Mr Kumar claims wages of \$520 gross for working 26 hours work from 30 July to 1 August when he notified Mr Singh he had a position at the Waitakere VTS.
- These amounts total \$3,400 gross. Mr Kumar also seeks payment of holiday pay. This amount is calculated at the rate of 8% on the total gross amounts Mr Kumar should have been paid but was not paid by Rotorplast. Mr Kumar should have been paid a total of \$7080 gross being 8 weeks of work at 40 hours a week at \$20 an hour, a final 26 hour week totalling \$520, and \$160 being a day in lieu for Queen's Birthday. I calculate holiday pay of \$566.40 is owed, (8% on \$7,080).

[39] I find Mr Kumar is owed a total of \$3,966.40 , being \$3,400 gross in wages owed but not paid (as above) and holiday pay of \$566.40. I order Rotorplast to pay Mr Kumar the sum of \$3,966.40 gross within 14 days of the date of this determination.

Costs

[40] No order of costs will be made. Each party is to bear their own costs.

Anna Fitzgibbon
Member of the Employment Relations Authority