

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 113
3002112

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	GSTECH LIMITED First Respondent
AND	GHANSHYAM SHARMA Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Claire English, Counsel for Applicant
Paul McBride and Frances Lear, Counsel for Respondents

Investigation Meeting: 4 and 5 July 2017 at Wellington

Submissions Received: 5 July 2017 from the Applicant and from the Respondents

Determination: 17 November 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment (the Labour Inspector) claims GSTech Limited (GSTL) and Ghanshyam Sharma sought and received payments from their former employee, Pardeep Kumar. The Labour Inspector says these payments constituted premiums in respect of Mr Kumar's employment in breach of s.12A of the Wages Protection Act 1983 (WPA). The Labour Inspector seeks recovery of the premiums, totalling \$30,200. She also seeks the imposition of a penalty against Mr Sharma for breaches of s.12A.

[2] Other claims made by the Labour Inspector are that the first and second respondents failed to:

- (a) pay Mr Kumar the minimum wage in breach of s.6 of the Minimum Wage Act 1983 (MWA);
- (b) pay Mr Kumar annual holiday pay as required by s.23 of the Holidays Act 2003 (HA);
- (c) maintain wage and time records for Mr Kumar, in breach of s.130 of the Employment Relations Act 2000 (the Act);
- (d) provide Mr Kumar with public holidays or make appropriate payment for work done on public holidays in breach of ss.46, 49, 50, 55, 56 and 60 of the HA; and
- (e) keep holiday and leave records in breach of s.81 of the HA.

[3] The Labour Inspector seeks payment of arrears of wages and/or holiday pay for Mr Kumar in respect of each of these claims. She seeks the imposition of penalties on both GSTL and Mr Sharma for their multiple breaches.

[4] The respondents say GSTL employed Mr Kumar and Mr Sharma did not at any stage employ him personally. They deny that either respondent sought or received premiums from Mr Kumar in respect of his employment and they assert he was paid all sums to which he was entitled under the employment agreement and in law.

[5] They also say Mr Kumar was seeking to acquire a franchise of another business, Select Cleaning, and sought the assistance of GSTL with that. The respondents say that such payments as were made were in relation to Mr Kumar acquiring that franchise.

Relevant facts

[6] The applicant is a Labour Inspector designated under s.223(1) of the Act. The first respondent is a registered and incorporated company whose sole director and shareholder is the second respondent, Mr Sharma.

[7] Mr Kumar came to New Zealand on a student visa in 2011. He obtained a diploma in information and communications technology from the Eastern Institute of Technology in Hawke's Bay, graduating in 2012. He relocated to Wellington in April 2013 and worked for one employer for approximately four months before obtaining a position as an ICT customer support officer in a marketing company. He took up that position in August 2013 and resigned from it to take up employment with GSTL as an IT technician, commencing on 23 September 2015. He was employed by GSTL until tendering his resignation on 8 March 2016.

[8] Before commencing his employment Mr Kumar signed two written individual employment agreements with GSTL, the first on 25 August 2015 and the second on 14 September 2015. Mr Sharma also signed each of the IEAs as the director of GSTL. The terms of the two agreements differed in their hourly rate and hours of work. The 25 August employment agreement (IEA) provided an hourly rate of \$17 for a minimum of 35 hours per week, while the second IEA provided for \$19 for a minimum of 40 hours per week.

[9] The increased hourly rate and minimum hours of work were as a result of advice from Immigration New Zealand (INZ) on 10 September 2015. In a letter identifying factors that could negatively impact on Mr Kumar's application for a work visa INZ noted that he had been offered an annual salary of \$30,940¹ whereas its information was that computer support technicians earned between \$41,000 and \$56,000 per annum.

[10] After he terminated his employment with GSTL, Mr Kumar approached the Labour Inspectorate claiming he had paid premiums to his employer, totalling \$30,200, both before his employment commenced and during its term. Mr Kumar also claimed that approximately two or three weeks after the commencement of his employment as an IT technician Mr Sharma informed him he would need to do some cleaning work and that, if he refused to do it, his visa would be cancelled and he would be deported.

[11] Mr Kumar told the Labour Inspector he undertook the cleaning role from October 2015 to March 2016, in addition to continuing to undertake his IT technician work for GSTL. He told her he was, from December 2015 to February 2016,

¹ based on \$17 per hour for 35 hours per week over 52 weeks.

undertaking another role on Mr Sharma's instructions. This was a sales role for a separate company, trading as Connecting, for which he claims he received no remuneration.

[12] The Labour Inspector has calculated the outstanding wages Mr Kumar is owed, from information supplied by him regarding the hours he worked on the cleaning roles and the sales roles. The Labour Inspector based her calculations on the minimum wage applicable at the time, which was \$14.75 per hour.

[13] There is no dispute that Mr Kumar was paid a salary for 40 hours a week at \$19 per hour throughout his employment, or that he received holiday pay at the end of that employment in respect of his IT technician's duties with GSTL.

The Authority's investigation

[14] Evidence was given in person by five witnesses. The Labour Inspector, Mr Kumar and Mr Rana Pardhuman gave evidence for the applicant. Mr Sharma and Mr Kwong Man Lo gave evidence for the respondent.

[15] Additionally, two further witnesses for the applicant supplied written statements (one signed and dated, one not) but did not attend the investigation meeting. They provided no reason for their absences. I have not accorded any weight to their evidence as it was unable to be tested.

[16] Two further witnesses for the respondent supplied written statements by way of sworn affidavits. While unable to attend the investigation meeting in person because of work commitments, they notified their availability for questioning by telephone and supplied their contact details for that purpose. In the event, I did not find their evidence critical to my investigation and did not contact them.

[17] In accordance with s.174E of the Act I have not set out a record of all the evidence and submissions presented to the Authority but have set out the material facts and made findings on issues relevant to the determination of the applicant's claims. This determination has been issued outside the timeframe set out in s174C(3) of the Act by leave of the Chief of the Authority under s174C(4).

Issues

[18] The issues for determination are:

- (a) Whether GSTL and/or Mr Sharma breached s. 12A of the Wages Protection Act;
- (b) Whether GSTL and/or Mr Sharma failed to pay Mr Kumar the minimum wage in breach of s. 6 of the Minimum Wage Act 1983;
- (c) Whether GSTL and/or Mr Sharma failed to pay Mr Kumar annual holiday pay as required by s.23 of the Holidays Act 2003;
- (d) Whether GSTL and/or Mr Sharma failed to maintain wage and time records for Mr Kumar in breach of s.130 of the Employment Relations Act 2000;
- (e) Whether GSTL and/or Mr Sharma failed to provide Mr Kumar with public holidays or make appropriate payment for work carried out on public holidays in breach of ss 46, 49, 50, 55, 56 and 60 of the Holidays Act;
- (f) Whether GSTL and/or Mr Sharma failed to keep holiday and leave records in breach of s. 81 of the Holidays Act; and
- (g) Whether a penalty or penalties should be imposed on GSTL and/or Mr Sharma if one or more of the claimed breaches is established.

Were premiums sought and received in respect of Mr Kumar's employment?

[19] The Labour Inspector claims Mr Kumar was required to pay six premiums during 2015 and 2016 in respect of his employment. These comprised an initial payment of \$10,000 in August 2015, a payment of \$6,000 in September, another \$10,000 payment in November, \$1500 in December, \$2,000 in January 2016 and a final payment of \$700 in February that year.

[20] I am not persuaded by the evidence provided by the Labour Inspector and Mr Kumar that these claims are made out. I will set out below why I have reached that conclusion, which entails describing the events leading up to Mr Kumar's employment.

[21] Mr Kumar had been working for a marketing company for approximately two years when, in July 2015, his friend Rana Pardhuman told him about an IT job with GSTL. He applied for the position and, following a telephone interview, was invited to a face to face interview with Mr Sharma. There was some inconsistency between

Mr Kumar's written and oral evidence on the dates these interviews took place. However, I find his written evidence of having a telephone interview in late July 2015 and a face to face interview on 4 August 2015 most likely to be accurate.

[22] Mr Kumar said Mr Sharma offered him the position of IT technician on the day they met for the face to face interview. He had told Mr Kumar he would need to resign from his current employment and said he would assist with Mr Kumar's application for a new visa. Mr Kumar said it was at that interview that Mr Sharma had first asked him for money, in the sum of \$10,000 (the first premium).

[23] In his written evidence he said Mr Sharma had told him the money was for assistance with his visa application. In oral evidence Mr Kumar said Mr Sharma had told him he needed the \$10,000 to start his business, but that he would get the money back. He said he had paid the money in two instalments of \$5,000. The first payment, which was from his savings, was made on 10 August. He had borrowed \$5,000 from a friend for the second payment of \$5,000, which was made on 16 August 2015. The payments were not made directly to Mr Sharma or GSTL but by way of electronic transfer to Mr Pardhuman's account.

[24] Mr Pardhuman confirmed he had received two payments of \$5,000 each on 10 and 17 August 2015, and provided bank statements with entries showing this. He told the Authority he did not ask Mr Kumar for an explanation of the deposited money and that Mr Kumar told him Mr Sharma would contact him about it. Mr Pardhuman's bank statements indicate he transferred \$5,000 to Mr Sharma's business account on 11 and 21 August 2015, with the transaction being described on the statement as "*Ghanshyam Help gstech business.*"

[25] It was Mr Pardhuman's evidence that he did this on instruction from Mr Sharma, who had told him how the transaction type and details were to be described. Mr Pardhuman said under cross examination that at one point Mr Sharma had given him \$10,000 in cash and asked him to deposit it in his business account. He also gave evidence that Mr Kumar had borrowed \$10,000 from him but under questioning was unsure if that was correct.

[26] Mr Pardhuman acknowledged under cross examination he had made multiple deposits to Mr Sharma's business account between 24 July and 2 November 2015, totalling more than \$30,000, all with the same description of "*Help Gstech Business.*"

He could not remember how many payments he had made or why he had made them. I was not impressed with Mr Pardhuman's memory or veracity and found his evidence unreliable.

[27] Counsel for the Labour Inspector set out a chronological list of key facts which, in her submission, show that, by the time Mr Kumar started work for GSTL, he had paid \$16,000 in premiums for his job. This comprised the first premium of \$10,000 already referred to and a second premium of \$6,000 she says Mr Kumar paid on 10 and 11 September 2015. Mr Kumar's evidence was that Mr Sharma requested the \$6,000 after his visa had been granted, which was 23 September 2015. In oral evidence he said Mr Sharma had told him in advance of his visa being granted that he would need to pay the additional \$6,000 which he said he paid from his credit card and from his savings, also by way of electronic transfer to Mr Pardhuman's bank account.

[28] By Mr Kumar's evidence he paid a large sum of money to a potential employer at a time when he was already in secure employment for which he had a work visa. The position he was offered with GSTL offered only a relatively small increase on his current hourly rate.² I do not find credible Mr Kumar's evidence that he accepted employment with GSTL, a new untested start-up company, knowing that his employer required him to pay a substantial cash amount several weeks before the employment commenced.

[29] Mr Kumar had no employment agreement at the time, and nor had he resigned from his employment of two years. By his evidence he had only met Mr Sharma once before in an interview situation in which Mr Kumar had been unsuccessful.³ He told me he believed Mr Sharma would repay the money but he had no written acknowledgement to support that belief. He had not paid the money directly to either Mr Sharma or GSTL but had transferred it to the account of a friend, Mr Pardhuman.

[30] This occurred four weeks before he resigned on notice from his stable long-term employment which, by his account, was on or around 8 September 2015. I do not find Mr Kumar's evidence on this matter plausible.

² Representing approximately \$2,000 gross per annum.

³ When Mr Sharma was employed by a large telecommunications company.

[31] I accept the \$10,000 transferred from Mr Kumar to Mr Pardhuman after his interview with Mr Sharma and the commencement of his employment with GSTL was, most likely, among the various sums transferred by Mr Pardhuman to Mr Sharma's business account. However, I find the evidence insufficient to establish that the payments made at that time by Mr Kumar were premiums for his employment that had been requested by either of the respondents. It may be that those payments were in respect of a potential business opportunity for himself, which I will return to shortly. There is, however, another reason for not accepting Mr Kumar's evidence in relation to the payments.

[32] This relates to his evidence in response to a statement of Mr Sharma's. Mr Sharma had referred in his written evidence to Mr Pardhuman telling him he, Mr Pardhuman, owed money to Mr Kumar. Mr Sharma said he was going to repay Mr Pardhuman a \$20,000 loan that Mr Pardhuman had made to GSTL. Mr Pardhuman asked him to pay the money to Mr Kumar instead. However, Mr Kumar asked Mr Sharma to pay \$10,000 of the money to the bank account of a friend of his, whose bank account number he texted to Mr Sharma.

[33] Mr Kumar sent that text on 24 September 2015, which was his second day at work for GSTL. Mr Kumar did not deny this had occurred and acknowledged the purpose of the \$10,000 was to fool INZ to assist his chance of obtaining a visa, presumably by inflating GSTL's bank account during the period his work visa was under consideration and making it appear its resources were greater than they actually were.

[34] While there may be issues in this for INZ, the relevance for the purpose of my determination of the current matter is that Mr Kumar's account of premiums is not borne out by the evidence showing that at least \$10,000 of money transferred to Mr Sharma's business account before Mr Kumar's visa was granted was repaid the day after the visa came through. Neither Mr Kumar nor Mr Sharma appears in a favourable light over the transactions.

[35] Mr Kumar claims he paid a third premium in November 2015 when Mr Sharma told him he would cancel his visa unless he paid him a further \$10,000. Mr Kumar claims to have made a cash withdrawal of that amount from the bank on Mr Sharma's instruction while Mr Sharma waited outside. Mr Kumar says he borrowed

the money from a friend and provided evidence by way of bank statements. These showed that his friend, Mr Singh, drew down a bank loan of \$10,000 on 11 November 2015 and Mr Kumar received \$9,700 in his bank account shortly afterwards, with the reference line for the transaction being Mr Singh's name.

[36] Mr Kumar's bank statement confirms he withdrew \$10,000 on 26 November 2015. There is, however, no evidence, other than Mr Kumar's assertion, that the \$9,700 he borrowed from his friend Mr Singh and the \$10,000 he subsequently withdrew in cash from his account, was for the purpose of paying his employer or Mr Sharma. The same applies to his claims in relation to the fourth, fifth and sixth premiums of, respectively, \$1,500, \$2,000 and \$700, which he says he paid in cash in December 2015, and January and February 2016.

[37] Mr Sharma denies that Mr Kumar paid any money to him or to GSTL. Speaking as a director of GSTL, and in his capacity as second respondent, he says Mr Kumar sought to acquire a franchise of another business, Select Cleaning, and sought the assistance of GSTL in acquiring that franchise. I find that to be a more likely explanation for any payments made by Mr Kumar to his employer and/or Mr Sharma during the six months of his employment with the first respondent.

[38] I dismiss the Labour Inspector's claims in relation to the payment of premiums to either respondent for lack of credible evidence. I note that, even if I had found Mr Sharma had sought or received premiums from Mr Kumar, which I have not, that would not have constituted a breach of s.12 A of the WPA as it applied in 2015.

[39] This is because the wording of that Act as it stood at the time provided that only the employer was subject to sanction not, as the 1 April 2016 amendment allowed, the employer "*or person engaged on behalf of the employer*". Mr Kumar's Job Description provided that he reported to Mr Sharma in his role as Director of the company, but his IEA named his employer as GSTL. The Labour Inspector put forward no evidence to suggest otherwise.

Did Mr Sharma and/or GSTL fail to pay Mr Kumar the minimum wage during his employment?

[40] As noted above, there was no dispute that Mr Kumar was paid for 40 hours per week at the rate of \$19 per hour during his employment with GSTL. However, in addition to his IT Technician's role, Mr Kumar claims he was forced by Mr Sharma to

undertake cleaning work, either for GSTL or for Mr Sharma. He says this started in October 2015, two or three weeks into his employment, and he was given no choice in the matter. It is his evidence that Mr Sharma told him he would replace him if he refused to undertake the work which would leave him without a job or a visa.

[41] In addition to the cleaning work, Mr Kumar says that from 26 November 2015 Mr Sharma began assigning him work for the company trading as Connecting. Mr Kumar says he did this work around his cleaning and GSTL work. He says he was not paid for the work he performed for Connecting. On his behalf the Labour Inspector is seeking \$9,130.25 in unpaid wages and \$741.12 and \$160.81 for public holidays worked in respect of the additional work she claims Mr Kumar performed.

The claims in respect of the cleaning work

[42] By Mr Kumar's account he was required to perform cleaning duties on an almost daily basis for several hours per day. The cleaning jobs were sent to him by Mr Sharma by email or text message and he received no payment for them.

[43] The respondents deny Mr Kumar's claims. Mr Sharma says Mr Kumar asked for his help to purchase a cleaning franchise which he was unable to do in his own name as he did not hold New Zealand residency. Mr Sharma says he agreed to do so on three conditions. These were, firstly, that Mr Kumar would need to apply for a change in his visa conditions; secondly, he would have to sign an agreement that he would be fully responsible for the cleaning business; and thirdly, the cleaning work should not impact on his GSTL work.

[44] Mr Sharma's evidence is that Mr Kumar did not fulfil the second condition and consequently he (Mr Sharma) did not complete any written agreement with the franchisor. He says he attended, at Mr Kumar's request, a meeting Mr Kumar had arranged on 4 October 2015 with the Master Franchise holder for Select Cleaning in Wellington. His evidence was that Mr Kumar made a verbal agreement at the meeting to buy the franchise.

[45] Mr Kwong Man Lo is the holder of the Wellington Master franchise. His evidence is that it was clear to him at the 4 October meeting that Mr Kumar was to be an owner, if not the owner, of the franchise. He says at Mr Kumar's request he set up an email account for the cleaning business which combined Mr Sharma's and Mr

Kumar's first names. The contact detail he had for the franchise owner was Mr Kumar's mobile phone number. Mr Lo also referred to Select business cards that had been printed for the franchise. These named "*GStech Limited (Griffin and Pardeep)*" as the franchisee.

[46] I am not persuaded Mr Sharma's role in the cleaning operation was as minimal as he depicted it. However, nor am I persuaded by the evidence provided by the Labour Inspector or Mr Kumar that his role was as he described. I find he was not forced by either respondent to undertake cleaning jobs and it is more likely than not that any cleaning work he undertook related to the franchise arrangements he wished to enter into with the active acquiescence of Mr Sharma. It was a business Mr Kumar hoped to develop as a money-making venture outside his employment with GSTL.

[47] It follows that I do not accept the minimum wage claims of the Labour Inspector regarding cleaning work Mr Kumar undertook in addition to his technician's duties with GSTL.

Claims in respect of work performed for Connecting

[48] The Labour Inspector claims the employer paid less than the minimum wage to Mr Kumar in respect of both the cleaning work, which I have already dealt with, and the sales duties he undertook with Connecting. Those duties comprised cold calling by telephone and door to door sales for Connecting from 20 November 2015 to early February 2016 according to Mr Kumar.

[49] He says he did not sign any employment agreement with that company but was required by Mr Sharma to undertake the duties. Mr Kumar claims the Connecting work took place after he had performed his GSTL duties. Under questioning he acknowledged he understood he was working for GSTL while undertaking the Connecting duties.

[50] Mr Kumar says he would normally start on the sales duties between 3 and 4 p.m. on weekdays and work until 7.30 p.m. In his written evidence he stated "*So I could argue that I in fact did work 40 or more hours per week and most of the time I was working 7 days Monday to Sunday, doing all three roles simultaneously*". In making that statement Mr Kumar was including the cleaning work I have already found he was undertaking as a separate business interest.

[51] Mr Sharma's evidence is that, as part of Mr Kumar's work for GSTL, he was asked to do some limited business development work, as provided for under his Job Description, and agreed to do so. That work entailed some sales duties which were undertaken under a contract entered into between GSTL and Connecting. Mr Kumar, as he acknowledged, remained employed by GSTL while he did the Connecting work. Mr Sharma said Mr Kumar performed the Connecting work in his GSTL hours, and in total he spent no more than 15 days on that work.

[52] While I accept Mr Sharma's evidence about the number of days Mr Kumar spent on Connecting work, I do not accept that payment for that work was all within his GSTL hours. In reaching that conclusion I have taken into account evidence of the logs of calls of a "*chat group*" established by Mr Sharma and Connecting to maintain contact with the employees undertaking sales work.

[53] There was insufficient credible evidence of Mr Kumar's usual start and finish times but the hours of work provided in his IEA were to be "*minimum of 40 hours per week*". His remuneration was expressed as an hourly rate of \$19 rather than an annual salary. In the absence of prescribed start and finish times I will assume they were 8.00 a.m. to 5 p.m. with an hour's unpaid lunch break.

[54] I accept Mr Kumar's claim that he was not paid for the work his employer arranged for him with Connecting when that work took place after 5 p.m. Taking Mr Sharma's evidence of 15 days worked, and 3 hours per day (as per Mr Sharma's *chat group* instruction of 20 November 2015), I find Mr Kumar was not paid for 45 hours at \$19.00 per hour, totalling \$855 to which holiday pay would need to be added.

[55] Taking Mr Kumar's account of days worked and the *chat group* log and texts relating to the Connecting work I find the 15 days were 23 to 26 November 2015 inclusive; 1 to 4 December and 7 December 2015; and 14, 15, 19, 20, 22 and 27 January 2016. Mr Kumar was paid fortnightly on a Thursday on the basis of 40 hours at \$19 per hour. The relevant pay dates were 4 and 18 December 2015 and 28 January 2016. The minimum wage at the time was \$14.75. Mr Kumar's fortnightly pay was \$1,520 gross.

[56] By my calculation Mr Kumar would have been required to work an additional 23.05 hours in any fortnightly period to have been paid less than the minimum wage. Based on an assumption that his pay encompassed work performed in the previous

fortnight on a Thursday to Wednesday basis, he did not do so. Accordingly I find no breach of the minimum wage in relation to the work Mr Kumar performed for Connecting while employed by GSTL. He is, however, owed wages and holiday pay as noted above.

Is holiday pay owing?

[57] Holiday pay is owing, as noted above, in relation to the 45 hours for which Mr Kumar was not paid when undertaking Connecting work for GSTL.

Did the employer fail to maintain wage and time records?

[58] The short answer is no. I accept the evidence of the respondents that wage and time records were supplied by GSTL when first requested by Mr Chandra Naidu, Mr Kumar's representative at the time.

Was Mr Kumar provided with public holidays or paid appropriately for work carried out on public holidays?

[59] I am not persuaded that Mr Kumar worked any public holidays during his employment with GSTL. There is no evidence he was not paid for public holidays that fell within his period of employment with GSTL.

Did Mr Sharma and/or GSTL fail to keep holiday and leave records?

[60] I have insufficient evidence to determine this. As far as I am able to tell, the response to Mr Naidu referred to in paragraph 58 encompassed holidays information.

Should a penalty or penalties be imposed on GSTL and/or Mr Sharma?

[61] As none of the claims for which penalties have been sought have been upheld, there is no reason to award penalties.

Determination

[62] The Labour Inspector's claims in respect of GSTL and Mr Sharma are dismissed.

[63] However, Mr Kumar was underpaid wages in relation to the work he undertook for Connecting at his employer's request.

Orders

[64] GSTL is ordered to pay the Labour Inspector for Mr Kumar's use the sum of \$923.40 gross, being wage arrears and holiday pay.

Costs

[65] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority