

**Attention is drawn to the order
for payment of a penalty at page 8 of this determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 280
5378323

BETWEEN	SAHIM MOHAMMED Applicant
AND	PRO AUTO PANEL AND PAINT LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Casey Brooks, Advocate for the Applicant on 31 July 2012 and Michelle Thum Advocate for the Applicant on 15 August 2012
No appearance for the Respondent on 31 July 2012,
Abdul Hassan for respondent on 15 August 2012

Investigation Meeting: 31 July 2012 and 15 August 2012 at Auckland

Determination: 17 August 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Mohammed was unjustifiably dismissed by Pro Auto Panel and Paint Limited (Pro Auto) on 23 February 2012;**
- B. Pro Auto is ordered to pay Mr Mohammed the sum of \$1,800 net being reimbursement of wages lost by Mr Mohammed as a result of the dismissal pursuant to s.123(1)(b) of the Employment Relations Act 2000 (the Act);**
- C. Pro Auto is ordered to pay the sum of \$4,000 compensation to Mr Mohammed pursuant to s123(1)(a) of the Act for humiliation, loss of dignity and injury to feelings suffered by him as a result of his unjustifiable dismissal;**

- D. Pro Auto is ordered to pay Mr Mohammed the sum of \$2,700 net being arrears of wages owing to him pursuant to s.131(1) of the Act together with interest at 5% per annum on that sum from the date of dismissal on 23 February 2012 down to 15 August 2012;**
- E. Pro Auto is ordered to pay a penalty of \$500 to the Crown for failure to pay arrears of wages in breach of Mr Mohammed's employment agreement;**
- F. Pro Auto is ordered to pay the sum of \$1750.00 costs to Mr Mohammed being the notional tariff for a half day investigation meeting in the Authority.**

Background

[1] The investigation meeting was held on 31 July 2012 and there was no appearance on behalf of the respondent. Following completion of the investigation meeting, the Authority received a phone call from Mr Abdul Hassan, sole director of the respondent, explaining the reason for his failure to attend the meeting was that his wife had been in hospital. Mr Hassan sent a copy of the relevant medical certificate in to the Authority.

[2] The Authority reconvened the investigation meeting on 15 August 2012 and a notice of investigation meeting was served on the parties. Mr Hassan attended the Investigation Meeting on 15 August 2012 and I continued my investigation of the matter.

Issues to be determined

- [3] The issues to be determined include:
- (a) Was Mr Mohammed employed by Pro Auto?
 - (b) If so, was Mr Mohammed dismissed by Pro Auto on 23 February 2012?
 - (c) If so, was the dismissal justified?
 - (d) Does Mr Mohammed have a wage arrears claim against Pro Auto?

- (e) If so, should a penalty be imposed?
- (f) Did Pro Auto provide Mr Mohammed with a written employment agreement?
- (g) If not, should a penalty be imposed?

First Issue

Was Mr Mohammed employed by Pro Auto?

[4] Mr Mohammed was employed by Usufz Auto Repairs and Panel Paint Limited (Usufz) from February 2010 as a diesel mechanic. He was provided with and signed an individual employment agreement on 8 October 2010. The employment agreement specified Mr Mohammed's gross salary as \$46,000 per annum but Mr Mohammed was paid \$450 per week net during the course of his employment. Usually this amount was paid by direct credit by *Usufz Auto Repairs* into his bank account each week, sometimes he was paid by cash in the hand. Mr Mohammed says when discussions began in December/January about Mr Hassan's new company taking over Usufz he did not receive a direct credit payment for wages by Usufz again. Mr Mohammed says when Pro Auto took Usufz' business over in January 2012 his wages were paid in cash.

[5] On Monday, 9 January 2012, Mr Mohammed says he was working as usual when the director of Usufz, Sahid Usufz, came into the workplace and told him and the three other staff working there that the company had changed hands and that Mr Abdul Hassan's company had taken over the business. Mr Usufz and Mr Hassan are related. Mr Mohammed and the other staff members asked Mr Usufz what was happening about wages owing for over the Christmas period. Mr Mohammed was owed two weeks wages by Usufz. Mr Usufz told Mr Mohammed and the other staff that the outstanding wages would be paid by Mr Hassan's new company. Mr Hassan agreed. Mr Mohammed also asked about on going wages and was told by Mr Usufz that he and the other staff would be paid as normal by Mr Hassan's company. Mr Hassan says he spoke to Mr Mohammed and told him that things including wages would carry on just the same as they had with Usufz. Mr Hassan and Mr Mohammed also agreed that instead of being paid the two weeks wages owed by Usufz for the Christmas period, Mr Mohammed could have his car painted. However, this never

eventuated and Mr Mohammed seeks payment of the two weeks wages from Pro Auto.

[6] Mr Hassan says he took over the management of Usufz on about 6 January 2012 and that his company Pro Auto was to take over the business about a month later. Mr Hassan says Pro Auto was not incorporated as a company until 24 January 2012 and did not commence operations until March 2012 at which time Mr Mohammed had left. Mr Hassan says Mr Mohammed was never employed by Pro Auto.

[7] Mr Mohammed understood that from 9 January 2012, he was employed by Pro Auto and he continued to work in his role as diesel mechanic as he had done for Usufz during the preceding 18 month period.

[8] Mr Mohammed was not given a written employment agreement with Pro Auto but continued working as usual. He says he believed he received his first wage payment from Pro Auto on 23 January 2012. This was a cash deposit of \$450 made into the Westpac bank account he holds jointly with his wife. The deposit is recorded in the Westpac bank statement as "*Sam Wages*". Mr Mohammed received one further cash payment in his hand of \$450 from Pro Auto during his period of employment. Mr Mohammed received a total of \$900 net for just over 6 weeks employment by Pro Auto. Mr Hassan accepts that he paid Mr Mohammed wages in cash but says he did so as the Manager of Usufz, not as a director of Pro Auto.

[9] In early January 2012, Mr Hassan held a gathering at the workplace which included employees and their spouses. Mr Mohammed and his wife Razia Imrana Mohammed attended the gathering which Mrs Mohammed described as official with a priest in attendance. Mr Hassan's wife, son and relatives also attended. Mrs Mohammed understood the gathering was to celebrate the taking over of Usufz by Pro Auto and this is what she had been told by Mr Hassan's wife. Mr Hassan said the gathering was not for that purpose but to mark his "*prosperity*" in the business and "*for things to go without harm for the workers*".

[10] Mr Hassan travelled to Fiji twice in January/February 2012 to see his Father in law who was ill and subsequently died. On one occasion when Mr Hassan was in Fiji Mrs Mohammed had to go to Pro Auto to drop off lunch for Mr Mohammed as he had

left it at home. While there she spoke to Mr Hassan's teenage son who told her he was looking after the business while his father was in Fiji and the business was his future. Mr Usufz was not there while Mr Hassan was in Fiji having left everything in relation to the business for Mr Hassan to look after. In terms of Pro Auto taking over the business of Usufz, Mr Hassan said his company took over the debts of Usufz totalling approximately \$20,000 which Pro Auto has not been able to pay.

[11] I find that in early January 2012, on behalf of Pro Auto, a company to be incorporated, Mr Hassan took over Usufz' business including its debts and obligations. From 9 January 2012, on the same basis, Mr Hassan entered in to agreements and made arrangements with staff including Mr Mohammed regarding their employment and the payment of their wages by Pro Auto. Staff were told of the change in ownership of the business and that their wages would continue as before. Mr Hassan held a special gathering in January 2012 which I find was to mark the take over of Usufz' business by Pro Auto and Mr Usufz ceased all involvement in the business. On 24 January 2012, Pro Auto was incorporated as a company under the Companies Act. It is my finding that Mr Mohammed was employed by Mr Hassan on 9 January on behalf of Pro Auto, a company to be incorporated. The answer to the first issue is that Mr Hassan was employed by Pro Auto.

Second Issue

Was Mr Mohammed dismissed by Pro Auto on 23 February 2012?

[12] Over the Christmas holiday period and during his employment by Pro Auto, Mr Mohammed and his wife, Razia Imrana, found it difficult to make "*ends meet*". Both Mr and Mrs Mohammed said they were finding it difficult financially to live solely on Mrs Mohammed's wages. Mr Mohammed said they had rent and fuel costs to pay and their financial situation was becoming more and more difficult because he was not being paid what he should have been paid by Pro Auto. Mr Mohammed said he asked Mr Hassan about his wages and wrote to him seeking pay slips. However, Mr Hassan would make promises to provide payslips and to pay the outstanding wages but never did so.

[13] On the morning of 23 February 2012, before starting work, Mr Mohammed went to see Mr Hassan about his overdue wages. Mr Mohammed said Mr Hassan

became angry and began abusing him and yelling at him in front of the other staff in the workshop. Mr Mohammed said to Mr Hassan that he needed to pay his rent and fuel and he was not able to do so because he was not being paid.

[14] The discussion became heated. Mr Hassan yelled at Mr Mohammed that he did not have an employment contract and that there was a new law and he could “fire” Mr Mohammed within 90 days for no reason. Mr Hassan sent Mr Mohammed home, saying he would let him know when he could come back. Mr Hassan did not ring Mr Mohammed and did not offer him further work.

[15] Mr Hassan accepts that he mentioned the new law to Mr Mohammed but says that the comment was made in the context of *if* Mr Mohammed was employed by Pro Auto he would be able to fire him within 90 days.

[16] Mr Mohammed was not given further work by Mr Hassan after 23 February 2012 and found the experience extremely distressing and embarrassing.

[17] It is my finding that on 23 February 2012 Mr Mohammed’s employment was summarily terminated by Mr Hassan following a heated discussion about wages which remained owing to him by Pro Auto. No reasons for dismissal were given to Mr Mohammed by Mr Hassan because of the new law in relation to trial periods which I find Mr Hassan relied upon in dismissing Mr Mohammed.

Third Issue

Was the dismissal unjustified?

[18] Section 67A of the Act provides as follows:

- (2) ***Trial provision*** means a written provision in an employment agreement that states, or is to the effect, that –
- (a) *For a specified period (not exceeding 90 days) starting at the beginning of the employee’s employment, the employee is to serve a trial period; and*
 - (b) *During that period the employer may dismiss the employee; and*
 - (c) *If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

[19] It appears that Mr Hassan, by yelling at Mr Mohammed that he could fire him in 90 days without reason was attempting to rely on s.67A of the Act to dismiss Mr Mohammed without reason. Section 67A requires there to be a written provision in an employment agreement regarding a trial provision. There was no such written provision and there was no written provision contained in a written employment agreement. Mr Mohammed did not have a written employment agreement. The respondent cannot rely on s.67A of the Act.

[20] Mr Hassan believed that he did not have to give reasons for dismissing Mr Mohammed because of the new law in New Zealand and he did not give any reason for the dismissal.

[21] I have made a finding that Mr Hassan's actions constitute a dismissal of Mr Mohammed. The onus is on Pro Auto to prove that the dismissal of Mr Mohammed was justified. Pro Auto is unable to discharge this onus because no reasons were given to Mr Mohammed for his dismissal. No reasons for the dismissal were provided to the Authority. It is my finding that Mr Mohammed's dismissal was unjustified.

Remedies for unjustified dismissal

[22] Mr Mohammed said that he was upset and embarrassed by the dismissal and applied for some 10 to 15 jobs unsuccessfully. He finally obtained new employment on 22 March 2012. Mr Mohammed's wife said that she and Mr Mohammed were recently married in November 2011. The financial difficulties that they found themselves in as a result of the non-payment of wages by Pro Auto together with the distress of the dismissal caused them both a great deal of stress when they should have been getting on with their new marriage. Mr Mohammed seeks a compensatory sum of \$8,000 for the humiliation, loss of dignity and injury to his feelings caused by the dismissal.

[23] Mr Mohammed's dismissal was harsh and without good cause. In the circumstances, it is my view, taking into account his short period of employment, that \$4,000 is a reasonable sum to be awarded by way of compensation.

[24] Mr Mohammed's dismissal was unjustified. I order Pro Auto to pay Mr Mohammed compensation in the sum of \$4,000 pursuant to s.123(1)(c)(i) of the Act.

[25] Mr Mohammed is entitled to reimbursement of loss of wages as a result of his dismissal. Mr Mohammed did not find another job until 22 March 2012, his loss of wages from 23 February 2012 until 22 March 2012 totalled \$1,800 net.

[26] I order Pro Auto to reimburse Mr Mohammed the sum of \$1,800 net pursuant to s.123(1)(b) of the Act.

Fourth Issue

Does Mr Mohammed have a wage arrears claim against Pro Auto?

[27] Mr Mohammed seeks arrears of wages which he is entitled to do pursuant to s131(1) of the Act. Mr Mohammed worked for a period of just over six weeks for Pro Auto at an agreed salary of \$450 net per week. The total entitlement sought by Mr Mohammed for the six week period amounts to \$2,700 net. Mr Mohammed received two payments of \$450 totalling \$900 leaving a shortfall of \$1,800 owing. In addition, Pro Auto accepted liability for payment of two weeks' salary owing to Mr Mohammed by Usufz totalling \$900.

[28] I order Pro Auto to pay Mr Mohammed the total sum of \$2,700 being arrears of wages owing to him by Pro Auto together with interest at the rate of 5% from 23 February 2012 to 15 August 2012.

Fifth Issue

Should a penalty be imposed?

[29] Mr Mohammed requests the Authority to impose a penalty on Pro Auto for its failure to pay him arrears of wages following requests to do so. Pro Auto in failing to pay Mr Mohammed wages owed is in breach of his employment agreement and the Authority has the power to impose a penalty pursuant to s134 of the Act.

[30] I impose a penalty of \$500 to be paid to the Crown by Pro Auto for breach by it of Mr Mohammed's employment agreement.

Sixth Issue**Did Pro Auto provide Mr Mohammed with a written employment agreement?**

[31] Mr Mohammed was not provided with a written employment agreement by Pro Auto as required by s.65 of the Act.

Seventh Issue**Should a penalty be imposed?**

[32] Mr Mohammed seeks a penalty to be imposed by the Authority in respect of Pro Auto's failure to provide him with a written employment agreement. The Authority has jurisdiction to impose a penalty pursuant to s.65(4) of the Act but only in an action brought by a Labour Inspector. The action before the Authority has been brought by Mr Mohammed and not the Labour Inspector. Therefore, no penalty will be imposed.

Costs

[33] Mr Mohammed seeks costs of \$4000. No details of these costs were provided to the Authority. The matter took approximately half a day in total of meeting time. In these circumstances I am minded to follow the Authority's usual practice of a notional daily tariff basis, this being now accepted to be a rate of \$3500.00 per day.

[34] Accordingly, Pro Auto is ordered to pay Mr Mohammed the sum of \$1750.00 as a contribution towards his costs pursuant to clause 15 of Schedule 2 of the Act.

[35] I am satisfied that Mr Mohammed was put to some additional expense in bringing this claim, and order Pro Auto to reimburse Mr Mohammed the \$71.56 filing fee.

Anna Fitzgibbon
Member of the Employment Relations Authority