

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 378  
5533623

BETWEEN

RONALD PRASAD

Applicant

AND

PRAKASH BHAGWANDAS

T/A WHITE SWAN AUTOS

Respondent

Member of Authority: Robin Arthur

Representatives: Alan Silberstein, Advocate for the Applicant  
The Respondent in person

Investigation Meeting: 2 December 2015

Determination: 3 December 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. The employment of Ronald Prasad by Prakash Bhagwandas was not subject to a lawful trial period.**
- B. The dismissal of Mr Prasad by Mr Bhagwandas failed to meet the requirements of the test of justification under s103A of the Employment Relations Act 2000 (the Act).**
- C. In settlement of Mr Prasad's personal grievance for unjustified dismissal Mr Bhagwandas must pay him the following sums:**
- (i) \$2000 as lost wages; and**
  - (ii) \$6000 as compensation for humiliation, loss of dignity and injury to feelings.**
- D. Mr Bhagwandas must also pay Mr Prasad the following further sums as wage arrears under s 131 of the Act:**
- (i) \$140 for seven hours work on 25 September 2014; and**

- (ii) \$2000 as notice (for two weeks' wages); and**
- (iii) \$1034.08 as holiday pay on his gross earnings.**

**E. From the amounts due to Mr Prasad the following sums may be deducted as debts due to Mr Bhagwandas from Mr Prasad:**

- (i) \$400 in reimbursement of part of a course fee Mr Bhagwandas paid on behalf of Mr Prasad; and**
- (ii) \$262 for four tyres Mr Prasad put on his car.**

**F. Mr Bhagwandas must also pay Mr Prasad the further sums of:**

- (i) \$1200 for the costs of representation in preparing for and attending the Authority investigation; and**
- (ii) \$71.56 in reimbursement of the Authority filing fee.**

### **Employment Relationship Problem**

[1] Prakash Bhagwandas, trading as White Swan Autos, operates a car repair and servicing business in Mt Roskill. On 7 July 2014 Mr Bhagwandas employed Ronald Prasad to work in the business as a mechanic. On 30 September 2014 Mr Bhagwandas dismissed Mr Prasad, some 86 days after he had started work at White Swan Autos.

[2] In a Disputes Tribunal claims form, dated 20 October 2014 and signed by him, Mr Bhagwandas gave this account of his reasons for dismissing Mr Prasad (as written):

He was on a 90 day trial period. On Thursday 25<sup>th</sup> September 2014 he went off sick at 3pm and didn't return back to work till Tuesday 30<sup>th</sup> Sept 2014. He did not ring to let us know he was not coming to work on those days.

On he's return to work on Tuesday 30<sup>th</sup> he came back with no medical certificate and a bad attitude.

I then terminated his employment as he was still on a trial period, and was not happy with he's performance.

[3] Mr Bhagwandas had lodged a claim in the Disputes Tribunal because he said Mr Prasad had failed to pay him back \$811.20 for the cost of a Warrant of Fitness Inspector's license course and \$262 for the cost of four new tyres for his car. Mr

Bhagwandas said Mr Prasad had promised to pay for half the course fees and for the cost of the tyres in weekly instalments from his wages but had not done so.

[4] On 29 November 2014 Mr Prasad raised a personal grievance about his dismissal and on 21 May 2015 lodged a statement of problem in the Authority. The matter was not resolved in mediation.

[5] The following issues required determination in an Authority investigation:

- (i) Was Mr Prasad employed under a legally valid trial period?
- (ii) Had Mr Prasad reported his absence for sickness?
- (iii) When Mr Prasad returned to work could a fair and reasonable employer have dismissed him on the grounds that he was employed on a trial period and the employer was “not happy” with his performance?
- (iv) If Mr Bhagwandas actions were not justified, what remedies should be awarded, considering:
  - (a) Lost wages (subject to evidence from Mr Prasad of reasonable endeavours to mitigate his loss); and
  - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (v) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Prasad that contributed to the situation giving rise to his grievance?
- (vi) Was Mr Prasad entitled to an order for payment of wages arrears for (i) the notice period and (ii) holiday pay?
- (vii) Did Mr Prasad owe Mr Bhagwandas any money for (a) refund of the Warrant of Fitness Inspector course fee of \$811 and (b) for the price of the tyres (\$262)?
- (viii) Should either party contribute to any costs of representation of the other party.

### **The Authority’s investigation**

[6] Mr Prasad, Mr Bhagwandas and his wife Vanita Bhagwandas each gave sworn oral evidence at the Authority investigation meeting. Documents provided by the parties included the employment agreement between them, a written agreement over the WoF inspector course fee, wage records for Mr Bhagawandas, the Disputes

Tribunal claim form, Mr Prasad's IRD records for his earnings in the period 1 April 2014 to 31 March 2015 and Mr Prasad's bank statements from August to November 2014. I also took account of what was written in the statement of problem, the statement in reply, and a written witness statement from Mrs Bhagwandas. I took no account of a statement lodged by a client of Mr Bhagwandas. The client did not attend the investigation meeting to answer any questions and his statement largely repeated information he was told by Mr Bhagwandas, from whom I was able to hear directly.

[7] At the commencement of the investigation meeting Mr Bhagwandas said he could not hear my explanation of what would happen during the meeting. He had brought his reading glasses to the meeting but not his hearing aid. I adjourned the meeting for one hour to give him time to go home and get his hearing aid. The meeting continued on his return.

[8] After the witnesses had answered questions from me, the parties had the opportunity to ask additional questions and provide their views on the issues for determination.

[9] At the close of the investigation meeting I gave an oral indication of preliminary findings, now confirmed by this written determination.<sup>1</sup>

[10] As permitted by 174E of the Act the written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The trial period**

[11] The employment agreement comprised a single piece of A4 paper headed with the business address and phone number and then the following text (as written):

Employment Agreement between: Prakash Bhagwandas (Owner) and Ronald Prasad

Dated: 7<sup>th</sup> July 2014

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<sup>1</sup> Employment Relations Act 2000, s 174B.

- (1) You will be on a trial period of 90 days at the rate of \$18.00 hour. After 3 months, if both sides are satisfactory, we will increase the Rate of pay at \$20.00 hour.
- (2) Hours of work will be: Monday-Friday 8am-5pm, & alternate Saturdays 8am 1pm.
- (3) Sick leave will be eligible only after the 3 month trial period, at 6 days per Annum.
- (4) Annual leave will be Three weeks during the Christmas and New Year Holidays.

If this agreement is satisfactory to you, please sign, and date it and return to me.

[12] Both men had signed the agreement on 7 July 2014.

[13] In his oral evidence Mr Bhagwandas said he had used the same form of agreement in business for the last 25 years. He appeared unaware that the agreement did not comply with the minimum statutory requirements for the content of an individual employment agreement.<sup>2</sup> It did not include a description of the work Mr Prasad was to perform. It had no explanation of services available to resolve employment relationship problems. It did not include any reference to the period of 90 days within which a personal grievance must be raised. It included one clause also clearly contrary to law because the Holidays Act provides for four weeks' leave after 12 months of continuous service, not the three weeks stated in the agreement.<sup>3</sup>

[14] The circumstances of when and how it was signed meant the agreement also failed to meet the requirements for a valid trial period under s 67A and s 67 B of the Act. Mr Bhagwandas confirmed in his oral evidence that he gave the agreement to Mr Prasad when he started work on 7 July and that Mr Prasad had then read and signed the agreement. Mr Prasad was not given the agreement before his employment started and he was given no opportunity, once handed the intended agreement, to seek independent advice about it.<sup>4</sup>

[15] The Employment Court has explained the requirements for establishing a valid trial period in this way:<sup>5</sup>

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<sup>2</sup> Employment Relations Act 2000, s 65.

<sup>3</sup> Holidays Act 2003, s 16.

<sup>4</sup> Employment Relations Act 2000, s63(2).

<sup>5</sup> *Blackmore v Honick Properties Limited* [2011] NZEmpC 152.

[65] ... Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential precondition of a trial period.

[66] It is not too onerous an expectation that employer will get the correct paper work and do things in a correct sequence. The benefits of ss 67A and 67B, ..., are the quid pro quo for the significant advantages to the employer of removing longstanding rights of challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee. ...

[69] Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. ...

[70] What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement have been settled, and the agreement has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of commencement of work.

[16] The failure to meet the statutory requirements for a 90-day trial period meant Mr Bhagwandas could not avail himself of the statutory protection against Mr Prasad raising a personal grievance if he was dismissed within that period. It also meant any decision by Mr Bhagwandas to dismiss Mr Prasad had to meet the statutory test of justification under s103A of the Act.

### **Reporting in sick**

[17] On 25 September 2014 Mr Prasad told Mr Bhagwandas that he was feeling ill and wanted to go home. He left work around 3pm. He did not return to work until the morning of Tuesday, 30 September.

[18] Mr Prasad had been expected to work on 26, 27 and 29 September. In his Disputes Tribunal claim form Mr Bhagwandas wrote that Mr Prasad "did not ring to let us know he was not coming to work on those days". For the Authority investigation Mr Prasad provided a copy of records for calls from his mobile phone. Those records showed he called a mobile telephone number – which Mrs Bhagwandas

accepted was her number – at 7.21 am on 26 September and at 6.37 pm on 28 September. Mrs Bhagwandas said she could not recall receiving those calls from Mr Prasad. Mr Prasad said the calls made at those times were for the purpose of advising that he was still sick and not able to return to work.

[19] Mr Prasad provided a medical certificate dated 29 September 2014 from a medical centre near his home in Henderson. His bank records also showed an eftpos transaction at the medical centre that day. He said he had not felt well enough to drive to the doctors before that day and his wife was unable to drive his car.

[20] Mr Bhagwandas said he did not accept Mr Prasad was genuinely ill for so many days. He suggested that Mr Prasad, who was from Fiji, frequently felt unwell and was tired as a result of attending kava parties. Mr Prasad denied that accusation. He said he had suffered from a high fever and diarrhoea during the week before he asked to leave work on Thursday, 25 September.

[21] Mrs Bhagwandas also said she had rung Mr Prasad's house on Saturday, 27 September and was told by a woman, whom she could not identify, that Mr Prasad was not there as he had gone to visit relatives in Hamilton. Mr Prasad denied that he was away from his house and questioned who Mrs Bhagwandas could have spoken to as his wife was at work that day.

### **The dismissal**

[22] When Mr Prasad returned to work on Tuesday, 30 September he went to the office to hand over his medical certificate but Mr Bhagwandas said he did not want it. Mr Prasad was directed to finish work on an Audi car. Repairs on the car had been delayed by Mr Prasad's absence, including because a small part for the car had been left in Mr Prasad's overall pockets when he left work on 25 September.

[23] Once the car was working Mr Bhagwandas call Mr Prasad to the office and told him that he no longer had a job. Mr Bhagwandas described himself as being "in a bad mood" that day because of Mr Prasad's absence since 25 September and because of delays in repairing a client's Audi.

[24] Mr Bhagwandas told Mr Prasad to leave the premises but did not let him take his toolbox with him. Mr Bhagwandas told Mr Prasad he could take the toolbox once he paid his debts for the course fee and the tyres.

[25] Mr Prasad arranged for the Police to attend at White Swan Autos premises the next day, 1 October. A Police offence report stated that when Police officers escorted Mr Bhagwandas to their patrol vehicle to talk with him about the toolbox issue, Mr Bhagwandas “hit [Mr] Prasad over the head with an open palm strike”. In his evidence to the Authority Mr Bhagwandas described his actions as “less than a tap”. Mr Prasad described how he had flinched and dropped down when Mr Bhagwandas hit him. He said the Police officers then pushed Mr Bhagwandas down on to the front of their car and put him in the back seat of the car while Mr Prasad went into the premises and retrieved his toolbox. The officers then released Mr Bhagwandas with a warning. He was not charged with assault.

[26] The actions of Mr Bhagwandas in dismissing Mr Prasad on 30 September plainly failed to meet the requirements set by s103A of the Act. A fair and reasonable employer could not have justifiably dismissed Mr Prasad at the time without properly investigating any concerns about the validity of his absence from work (including considering the medical certificate he had obtained) and properly putting to him any concerns about the quality of his work and his attitude to that work. Once that discussion had been held, a reasonable employer could not have fairly dismissed him without first providing a further opportunity to improve.

[27] Mr Bhagwandas had not followed those steps. He failed to do so because he wrongly believed he was entitled to rely on the so-called trial period to dismiss Mr Prasad without any such fair process or opportunity to improve. His actions, objectively assessed, were consequently not within the range of what a fair and reasonable employer could have done in the circumstances at the time. In short, Mr Bhagwandas’ dismissal of Mr Prasad was unjustified. Mr Prasad had a personal grievance for unjustified dismissal, for which he was entitled to have remedies assessed.

## **Remedies for unjustified dismissal**

### *Lost wages and mitigation efforts*

[28] Mr Prasad was entitled to an award of lost wages for the period until he found further work, provided that he had during that time made reasonable endeavours to look for other work. He started a new job on 1 November 2015 so his period of loss was a little over four weeks. For two of those weeks, for reasons addressed later in this determination, he was entitled to be paid notice. The award of wage arrears for those two weeks meant they were excluded from the assessment of lost wages.

[29] On 3 October Mr Bhagwandas offered to re-employ Mr Prasad. Mr Prasad did not take up that offer. I accept it was reasonable not to do so. Mr Bhagwandas said the job would be subject to a three month trial period (which again would have been illegal as a previous employee cannot be subject to a trial period).<sup>6</sup> In light of Mr Prasad's experience of being hit on the head by Mr Bhagwandas in the presence of Police officers, Mr Prasad may also reasonably have doubted he would be fairly treated if he returned to work at White Swan Autos. He said he feared that Mr Bhagwandas intended to have him work for a week to cover the costs of the debts for the course fee and tyres and then dismiss him without paying him.

[30] Accordingly I have accepted Mr Prasad made reasonable endeavours to mitigate his loss but still lost two weeks' wages as a result of his unjustified dismissal. He was paid \$1000 a week (for 50 hours a week at \$20 an hour) so was entitled to an award of \$2000 under s123(1)(b) of the Act.

### *Compensation for loss of dignity, humiliation and injury to feelings*

[31] Mr Prasad sought an order of \$8000 as compensation for hurt and humiliation resulting from his unjustified dismissal. He gave limited evidence in support of the claim. He described himself as "feeling like someone died in my family". He was distressed by the financial consequences of his dismissal and his ability to provide for his immediate family, comprising his wife and two daughters, aged 8 and 3 years old. They relied on his wife's earnings for the four weeks until he found another job. He was embarrassed when he got behind on paying the rent for their house and the instalments on his car.

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<sup>6</sup> Employment Relations Act 2000, s 67A(3).

[32] From his evidence Mr Prasad appeared to be a relatively resilient man who suffered some short term but no ongoing or long term effects from his unjustified dismissal. While mindful of the need not to keep compensatory payments artificially low, in light of his evidence and the need for moderation in such awards, I concluded \$6000 was the appropriate amount to order be paid under s123(1)(c)(i) of the Act.<sup>7</sup>

*Reduction of remedies due to contributory behaviour?*

[33] As directed by s124 of the Act I considered the extent to which actions by Mr Prasad contributed to the situation that gave rise to his grievance and whether any reduction was required from the remedies of lost wages and distress compensation awarded. I concluded no reduction was required.

[34] The failure of Mr Bhagwandas to carry out a fair process before deciding to dismiss Mr Prasad meant there was no properly tested information to support his allegations about the validity of the sick leave taken by Mr Prasad or that Mr Prasad was sullen, sloppy, and had a bad attitude to his work.

[35] Mr Prasad got a medical certificate and (accepting the information in his phone records) twice rang Mrs Bhagwandas during his absence from work. It was conduct that suggested he was acting responsibly rather than in a blameworthy manner that would require a reduction of his remedies.

[36] If Mr Prasad's conduct or 'attitude' at work was not satisfactory, there was no evidence that issue had been properly addressed with him. He was not to blame for Mr Bhagwandas' failure to do so. From Mr Bhagwandas' offer to re-employ Mr Prasad on 3 October, it may also reasonably be inferred that Mr Bhagwanda himself did not regard Mr Prasad's conduct as particularly blameworthy.

**Wages arrears**

*Unpaid wages*

[37] Mr Prasad was not paid for seven hours he worked on 25 September 2014. The amount was listed in the wage and time records book kept by Mr Bhagwandas but Mr Prasad had not received payment for it. The amount of \$140 was due as wage arrears for that day.

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<sup>7</sup> *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

### *Notice*

[38] Mr Prasad was entitled to be paid reasonable notice on his dismissal, which was supposedly for performance matters, not serious misconduct.<sup>8</sup> No notice period was stated in the skeletal terms of the written employment agreement. Two weeks' notice was reasonable in the circumstances and for the nature of the job. \$2000 was due as wages arrears for two weeks' notice not paid to Mr Prasad at the time of his dismissal.

### *Holiday pay*

[39] Mr Prasad was not paid holiday pay during his employment or at its termination. On questioning during the Authority investigation meeting Mr Bhagwandas said he was unaware employees were entitled to be paid holiday pay of eight per cent of their gross earnings if the employment ended within 12 months.<sup>9</sup>

[40] Mr Prasad had not taken any paid holidays during his employment. The gross total for wages paid to him during his employment was \$10,786. The wage arrears due for 25 September (\$140) and the two weeks' notice (\$2000) had to be added to that amount. Eight per cent of the resulting total (\$12,926) was \$1034.08, being the holiday pay due to Mr Prasad as wage arrears under s23 of the Holidays Act 2003.

### **The debts for course fees and for tyres**

#### *The warrant of fitness inspector course*

[41] Mr Bhagwandas thought Mr Prasad should repay him the full cost of the WoF inspectors course fee. He relied on the following agreement that he and Mr Prasad signed on 16 September 2014 (as written):

That Prakash will pay for the Unitec course for the WoF, off \$811.20 for Ronald, and that you will pay back only \$400.00.

This agreement is based on the fact that you will work for the company for at least one year.

If you decide to leave before that time you will pay back the full Amount of \$811.20.

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<sup>8</sup> *The Cabinet Place Limited v Kubesch* [2015] NZEmpC 193 at [25].

<sup>9</sup> Holidays Act 2003, s 23.

Payment can be made by instalments off \$10.00 per week, by you're preferred method of payment.

[42] Mr Prasad accepted he owed \$400 to Mr Bhagwandas and had made no repayment instalments.

[43] Mr Bhagwandas could not claim the full amount because that was only due, under the terms of their agreement, if Mr Prasad decided to leave the employment before one year was complete. Mr Prasad made no such decision. His departure was imposed on him by dismissal, a decision of Mr Bhagwandas. The amount due was \$400.

#### *The tyres*

[44] Mr Prasad accepted he owed \$262 for four tyres.

[45] He also accepted the amount he owed Mr Bhagwandas for the course fees and the tyres – totalling \$662 – could be offset against the amount due to him in wage arrears.

#### **Costs**

[46] As Mr Prasad had succeeded in his personal grievance application he was entitled to have Mr Bhagwandas contribute to his costs of representation. The investigation meeting took less than three hours. The preparation and participation required from Mr Prasad's representative was relatively limited. Applying the discretion provided in awarding costs I concluded \$1200 was a reasonable amount to order Mr Bhagwandas to pay Mr Prasad.<sup>10</sup> Reimbursement of the Authority filing fee of \$71.56 was also a reasonable expense for Mr Bhagwandas to pay Mr Prasad.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>10</sup> Employment Relations Act 2000, Schedule 2 clause 15.