

IN THE EMPLOYMENT RELATIONS AUTHORITY

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 18
3031071

BETWEEN SAURABH SHARMA
Applicant
AND WAYS ELECTRONICS
LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Applicant in Person
Alex Hope for Respondent
Investigation Meeting: 7 August 2018
Additional Information Received: 3 and 25 September 2018
Submissions Received: 18 October 2018 from Applicant
3 and 5 September 2018
Determination: 17 January 2019

DETERMINATION OF THE AUTHORITY

- A. Ways Electronics Limited is ordered to pay to Mr Sharma the sum of \$7,689.70 in recovery of a premium within 28 days of the date of this determination under s 12A(2) of the Wages Protection Act 1983.**
- B. Mr Sharma was unjustifiably dismissed and has established a personal grievance. In resolution of his personal grievance Ways Electronics Limited is ordered to pay to Mr Sharma the following**

sums within 28 days of the date of this determination:

a) \$3,506.25 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act;

b) \$366.50 for other money lost under s 123(1)(b) of the Employment Relations Act;

c) \$8,000 compensation under s 123(1)(c)(i) of the Employment Relations Act.

C. Ways Electronics Limited has breached the terms of the employment agreement and section 12A of the Wages Protection Act. Ways Electronics Limited is ordered to pay a penalty of \$8,000 within 28 days of the date of this determination as follows:

a) \$4,000 to Mr Sharma; and

b) \$4,000 to the Employment Relations Authority. The Authority will then pay this sum into a crown bank account.

Employment relationship problem

[1] Mr Saurabh Sharma worked for Ways Electronics Limited as an ICT Technician located in Wellington from 10 January 2017 until 8 June 2018. Ways Electronics undertakes repairs on iphones, tablets and laptops. It has offices in Wellington and Auckland.

[2] Mr Sharma's employment ended on 8 June 2018 after he was given notice of his dismissal by reason of redundancy. He has challenged that dismissal which he says was unjustified. In addition to his claim of unjustified dismissal Mr Sharma claims he was not paid for all hours worked and claims arrears of wages. He also claims that during his employment he was required to pay Ways Electronics a premium.

[3] Mr Sharma has asked the Authority to impose penalties on Ways Electronics for alleged breaches of his employment agreement, failure to maintain accurate

employment records and for breaches of his minimum entitlements including the requirement to pay a premium.

[4] The claims are denied by Ways Electronics.

Concurrent application

[5] On 25 September 2017 a Labour Inspector of the Ministry of Business Innovation and Employment lodged an application in the Authority against Ways Electronics and Mr Shobhit Saini personally. Mr Saini is the managing director for Ways Electronics. That application concerned the nature of the relationship between Ways Electronics and Mr Sharma plus three others covering a period in 2016.

[6] Ways Electronics asserted that Mr Sharma was at all times in the 2016 period a volunteer. The Authority disagreed and held that Mr Sharma was not a volunteer but was an employee.¹ An application for payment of minimum wages and the imposition of penalties is yet to be determined by the Authority.

[7] The Labour Inspector's application does not impact on the determination in this matter because it dealt with a different period of time. This current application is concerned with the period from 10 January 2017 and not 2016.

Issues

[8] In order to resolve Mr Sharma's employment relationship problems I must determine the following questions:

- a) Did Mr Sharma pay a "premium" to Ways Electronics?
- b) Is Mr Sharma owed arrears of wages?
- c) Was Mr Sharma's dismissal by reason of redundancy unjustified and if so what if any remedies should be awarded?
- d) Did Ways Electronics breach its statutory obligations or the employment agreement and if so what if any penalties should be imposed?

¹ *A Labour Inspector v Ways Electronics & Mr Saini* [2018] NZERA Wellington 76.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Payment of a premium

[10] Section 12A of the Wages Protection Act 1983 (WPA) prohibits an employer from seeking the payment of a lump sum or to make deductions from wages as an inducement to provide employment to any person.

[11] Mr Sharma says that once he had signed the employment agreement on 1 February Mr Saini required him to repay various amounts of cash each week to retain his employment. Mr Saini was located in the Auckland office of Ways Electronics.

[12] Mr Sharma says he was instructed to pay this money to Mr Tarun Saini who worked at the Wellington office with Mr Sharma. Mr Sharma told me Tarun Saini was a cousin of Mr Saini, which both Saini's deny. Whether there was a familial relationship between Mr Tarun Saini and Mr Saini is not determinative of this matter and I have not found it necessary to make any findings on the issue.

[13] Mr Sharma says he paid Mr Saini a total of \$7,689.70 in premiums throughout his employment. Ways Electronics denies Mr Sharma paid any money.

[14] Mr Sharma told me it was not just him paying money back to Ways Electronics and has provided me with video evidence of a second employee paying money to Tarun Saini. Both Tarun Saini and the second employee gave evidence at the investigation meeting that the video's were a joke. In support of this evidence they have referred me to one video where Tarun Saini is seen handing the money back to the second employee.

[15] I have not accepted the evidence of the two employees as being credible. The videos were not created by Mr Sharma but by the second employee. They were given to Mr Sharma but the second employee was reluctant for Mr Sharma to use the videos at the investigation meeting due to the fact that he was still employed at Ways Electronics and was concerned about his ongoing employment.

[16] The videos support other documents provided to the Authority which confirm Mr Saini and Mr Sharma discussed the amount Mr Sharma was to pay Ways Electronics. There is also evidence that payments made for parts purchased by Mr Sharma on behalf of the business were not reimbursed in full, instead an amount was retained as payment of the premium.

[17] Transcripts of the videos and audio recordings support Mr Sharma's evidence that the employees in Wellington openly discussed the payments being made to Ways Electronics.

[18] The evidence shows Mr Sharma paid a significant amount of money by direct credit into Tarun Saini's bank account. Mr Sharma told me that in addition to the bank payments he paid money in cash as that was the preferred option.

[19] Tarun Saini told me the payments made by Mr Sharma were in repayment of a loan made by him to Mr Sharma and other money owed to him by Mr Sharma. Mr Sharma accepts that some of the money paid to Tarun Saini was money he owed to him personally but most of it was in payment for his job.

[20] On the balance of probabilities I have concluded Mr Sharma was required to pay money to Ways Electronics as a premium to retain his employment and that the payments were made through Tarun Saini.

[21] The payments made by Mr Sharma to Ways Electronics as payment in exchange for employment amount to a premium in breach of s 12A(1) of the WPA.

[22] Ways Electronics Limited is ordered to reimburse Mr Sharma the sum of \$7,689.70 in recovery of the premium within 28 days of the date of this determination under s 12A(2) of the WPA.

Arrears of wages

[23] In his statement of problem Mr Sharma sought payment for arrears of wages. The statement of problem did not set out his claim in any detail. During a case management call held in July 2018 Mr Sharma was directed to lodge and serve an amended statement of problem to assist in the clarification of his arrears of wages claim. Mr Sharma was directed to provide a full calculation of his claim for unpaid

wages and to provide evidence of his hours worked. These directions were confirmed in writing to Mr Sharma in a Notice of Direction dated 16 July 2018.

[24] Despite the direction the amended statement of problem lodged with the Authority on 18 July has failed to provide the Authority with a calculation of Mr Sharma's claim.

[25] At the investigation meeting there was some confusion about the extent of the concurrent proceedings and whether allowing Mr Sharma's claim would double up on any determination in the proceedings taken by the Labour Inspector. This was because the Labour Inspector, in the concurrent case, was claiming payment of minimum wages on behalf of Mr Sharma. In this case Mr Sharma is also seeking payment of minimum wages. As stated earlier there are two distinct periods covered by the two separate claims and they do not overlap.

[26] I have declined Mr Sharma's claim for arrears of wages on the basis that he has not provided the information requested during the case management call. Mr Sharma has not quantified his claim and therefore Ways Electronics has not had a proper opportunity to respond to the claim.

[27] However, this may not be the end of the matter as Mr Sharma has a statutory right to claim arrears of wages for a period of up to six years. Mr Sharma should note that the onus of proof is on an applicant in arrears of wages claims.

[28] Before moving off this issue I would say further, that Mr Sharma has provided compelling and credible evidence supporting his contention that he worked on days that were not recorded in his timesheets.

Dismissal

[29] On 9 May 2018 Mr Sharma was given notice that his employment was to end due to a restructuring. In order for a redundancy to be justified Ways Electronics must demonstrate that the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether Ways Electronics met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[30] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.² That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.³ This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[31] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

Was the redundancy for genuine commercial reasons?

[32] Mr Sharma was a witness at the Authority's investigation meeting relating to the concurrent proceedings. That investigation meeting took place on 4 April. Mr Sharma told me that the night before the investigation meeting, on 3 April, Mr Saini called him and asked him to lie at the meeting. Mr Sharma refused. Mr Saini denies this discussion took place. I have preferred the evidence of Mr Sharma and accept on the balance of probabilities that such a discussion did take place.

[33] Mr Saini told me he put a document on the desk in the Wellington branch on 3 April setting out a restructure. He told me this was left for the employees in Wellington to look at. There are three signatures on the document. The signatures are dated between 3 and 6 April. Mr Sharma's signature is not on the document and Mr Sharma told me he had not seen it prior to the documents in this proceeding being lodged.

[34] On 10 April Mr Saini spoke to Mr Sharma and told him he expected the Authority to fine him as a result of the proceedings heard on 4 April. He told Mr Sharma he had also just paid his GST account to Inland Revenue. Mr Saini told Mr Sharma he needed to resign from his employment and told him he could only pay him

² [2014] NZCA 541.

³ [2013] NZEmpC 81.

for one month. Mr Saini did not make any reference to the restructuring document during that conversation.

[35] On 9 May 2018 Mr Saini emailed Mr Sharma advising him that his position was no longer required due to a new business plan/model. Mr Saini told Mr Sharma he was no longer required at work effective immediately and that he would be paid four weeks' salary in lieu of notice. Mr Saini did not reference the document dated 3 April in this correspondence.

[36] Mr Saini told me he had reviewed the work being done by Mr Sharma and found he was not productive. Mr Saini determined the work for Mr Sharma had reduced due to a change in the market.

[37] If Mr Saini reviewed the work being undertaken by Mr Sharma he did not share that information with Mr Sharma before making a decision to disestablish Mr Sharma's role. While the document Mr Saini says he left on the desk in Wellington provided some information it does not set out any reasons why it is Mr Sharma's role that should be disestablished.

[38] The financial records provided to the Authority after the investigation meeting fail to support Mr Saini's evidence that the restructuring was based on a financial need.

[39] Mr Saini says Mr Sharma did not undertake repair work to any degree and that was one of the considerations in choosing Mr Sharma for redundancy. I have not accepted that explanation as plausible. In October 2017 ACC prepared information pertaining to a return to work program for Mr Sharma following a period of absence due to an injury. In one of those documents the ACC case manager refers to repair work using small hand tools to take apart and repair electronic equipment as forming 80 percent of Mr Sharma's role. There is no evidence Mr Saini disputed the amount of repair work as described was being undertaken by Mr Sharma. The return to work program was based around accommodating these requirements.

[40] Mr Sharma told me his dismissal was in retribution for his involvement in the Authority's investigation in April and his refusal to lie. Given the timing of the 3 April document with the telephone discussion asking Mr Sharma to be untruthful in his evidence to the Authority I have concluded on the balance of probabilities that the

decision to dismiss Mr Sharma was motivated by Mr Sharma's involvement in the Labour Inspector's claims against Ways Electronics.

[41] Ways Electronics has failed to establish that the reason for the redundancy was based on genuine commercial reasons.

Procedure

[42] Mr Saini confirmed Mr Sharma's redundancy in a letter on 9 May. In his letter Mr Saini records that as a result of a recent review the position of ICT Technician is no longer needed and advises Mr Sharma that his employment will terminate immediately with the payment of four weeks' notice.

[43] There were no consultation meetings with Mr Sharma regarding the possibility of redundancy. The restructuring document which Mr Saini says was put on the desk in Wellington on 3 April does not purport to be a proposal but rather reads as if a decision has already been made to disestablish Mr Sharma's role. Mr Saini did not engage in any discussions with Mr Sharma about the content of the document or the reasons for the restructuring.

[44] The procedure followed by Ways Electronics was flawed, even having regard to the small size of the company. Ways Electronics failed to follow the requirements prescribed by the Act. There was no consultation with Mr Sharma prior to the decision being made to terminate his employment. There was no evidence Mr Sharma knew or ought to have known that work was so slow it could result in his employment being terminated. There was no opportunity for Mr Sharma to provide any response to the reasons for the redundancy or have any input into the decision made by Ways Electronics.

Conclusion

[45] For the foregoing reasons the decision to dismiss Mr Sharma by reason of redundancy was not a decision an employer acting fairly and reasonably could make in all the circumstances.

[46] Ways Electronics failure to comply with its statutory obligations were not minor and resulted in Mr Sharma being treated unfairly. The procedural failings contributed to the lack of justification for the dismissal. I find Mr Sharma was

unjustifiably dismissed from his employment with Ways Electronics and is entitled to a consideration of remedies.

Remedies

[47] Mr Sharma seeks reimbursement of lost wages, other money lost as a result of his unjustified dismissal and compensation for humiliation loss of dignity and injury to feelings.

[48] Mr Sharma obtained new employment within five weeks of his dismissal. He claims reimbursement of lost wages for the period 8 June to 12 July 2018. Mr Sharma has calculated his lost wages on the basis of five weeks at 42.5 hours each week at the rate of \$16.50 per hour being a total of \$3,506.25 gross. This calculation has not been disputed by Ways Electronics and Mr Sharma is to be reimbursed for the five weeks as claimed.

[49] Mr Sharma seeks reimbursement of \$170 being the fee he had to pay to vary the conditions of his employer-specific work visa to allow him to take up new employment. He also claims reimbursement of \$196.50 for expenses incurred in travelling to Auckland for a job interview.

[50] It is appropriate that Mr Sharma be reimbursed for money he lost as a result of his dismissal. But for the dismissal Mr Sharma would not have incurred the costs of the variation to this work visa and the costs of travelling to Auckland for a job interview.

[51] Mr Sharma also claims payment of compensation under s 123(1)(c)(i) of the Act. He told me the dismissal caused distress due to the impact on his immigration status.

[52] Taking all of the circumstances of this case into account an appropriate award of compensation is \$8,000.

[53] In order to resolve Mr Sharma's personal grievance Ways Electronics Limited is ordered to pay to Mr Sharma within 28 days of the date of this determination the following sums:

- a) \$3,506.25 gross being reimbursement of lost wages under s 123(1)(b) of the Act;
- b) \$366.50 for other money lost under s 123(1)(b) of the Act;
- c) \$8,000 compensation under s 123(1)(c)(i) of the Act.

Penalties

[54] Mr Sharma has asked the Authority to impose penalties on Ways Electronics for the following breaches:

- a) Breach of his employment agreement in failing to pay him a salary of \$35,000 and to pay him on a fortnightly basis;
- b) Failure to keep accurate employment records, particularly in relation to wages and time and holiday and leave records;
- c) Breach of minimum entitlements including the right to be paid at least the minimum wage, requirement to pay a premium and requiring Mr Sharma to work in excess of his contractual hours.

Breach of employment agreement

[55] The employment agreement provided for payment of a salary equivalent to \$35,000 per annum and for that salary to be paid fortnightly. In October 2017 Ways Electronics unilaterally altered the employment agreement to pay Mr Sharma for all hours worked at the rate of \$15.84 per hour, changing to \$16.50 per hour on 1 April 2018.

[56] Mr Saini told me the change was made so that he could correctly calculate and pay Mr Sharma's wages while he was on the ACC return to work plan. During the return to work plan Mr Sharma worked less hours.

[57] There is no evidence of any consultation before the change was implemented and no evidence that Mr Sharma agreed to the change. If the change was made to assist Ways Electronics in calculating Mr Sharma's wages during his return to work

program I would have expected the payment to return to the agreed salary rate following completion of the ACC plan. That did not occur.

[58] I find from October 2017 Ways Electronics was in breach of the employment agreement when it failed to pay Mr Sharma the agreed salary.

[59] Mr Sharma also claims Ways Electronics has failed to pay him fortnightly as required by the employment agreement. I have reviewed carefully all of the bank statements provided to the Authority to assess the regularity of the payment of wages. From that review it is clear wages were not paid each fortnight and this was a breach of the employment agreement.

Failure to keep accurate employment records

[60] This claim relates in part to the obligation on Ways Electronics to maintain wages and time records. I have been provided with copies of the relevant records maintained by Ways Electronics. Mr Sharma says the records are not accurate as he was required to provide signed timesheets that did not accurately record the hours he actually worked. I am satisfied the records meet the requirements of s 130 of the Act.

[61] While the evidence shows Mr Sharma has not claimed time worked when he may have been working that claim relates to his arrears of wages claim.

[62] Mr Sharma also claims Ways Electronics has failed to maintain an accurate holiday and leave record. The pay slips provided by Ways Electronics records the amount of leave available to Mr Sharma each pay period. This record forms part of the Ace Payroll system.

[63] Mr Sharma has failed to establish a failure by Ways Electronics to maintain a wages and time and leave and holiday records.

Breach of minimum entitlements

Failure to pay minimum wages for all hours worked

[64] This claim relates to Mr Sharma's arrears of wages claim which I have declined. It is therefore not appropriate to determine penalties.

[65] I have noted that some periods of work relating to his arrears of wages claim includes periods between March and June 2017. The Act requires claims for penalties to be taken within 12 months of the date when the cause of action became known or should reasonably have become known to the applicant. Some of the periods specified in Mr Sharma's claim for arrears of wages fall outside the 12 month period.

Payment of a premium

[66] I have found Ways Electronics unlawfully received a premium of \$7,689.70 from Mr Sharma in breach of s 12A(1) of the WPA and under s 13 of the WPA a penalty may be imposed.

Conclusion

[67] I have found Ways Electronics has breached the terms of the employment agreement between the parties and s 12A of the WPA. In these circumstances s 135 of the Act makes a company liable for penalties not exceeding \$20,000 for each breach.

[68] Penalties should be imposed at a level that signals disapproval of the conduct of Ways Electronics in not meeting its obligations and which acts as a deterrent to Ways Electronics and other employers who may not be minded to meet their obligations.

[69] The factors for determining whether to impose penalties for statutory breaches, and the level of each penalty, are drawn from s 133A of the Act and relevant case law.⁴

[70] The maximum penalty for the two breaches (I have treated the breaches of the employment agreement as a global breach and the breach of s 12A of the WPA as a separate breach) is \$40,000.

[71] I consider the breaches to be serious and intentional. Mr Saini was always fully aware of Ways Electronics obligations to pay wages on a fortnightly basis. There is no evidence that he turned his mind to reinstating the agreed salary rate after Mr Sharma returned to his full normal duties following the completion of the ACC return to work plan.

⁴ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [5]-[6].

[72] I have accepted Mr Sharma's evidence that Ways Electronics took steps to avoid the premium being uncovered by requiring payment in cash and not into Ways Electronics bank accounts. The money was paid to Tarun Saini who Mr Sharma believed was related to Mr Saini and was receiving the money on behalf of Ways Electronics.

[73] The financial statements provided by Ways Electronics indicate it is in a position to pay a penalty. The penalties imposed should be proportionate to the amount of any money unlawfully withheld.⁵ The total amount unlawfully withheld by Ways Electronics was \$7,689.70. The breach of s 12A of the WPA is serious and there is evidence that others employed by Ways Electronics are also paying, or have been required in the past, to pay a premium.

[74] I consider an appropriate penalty covering all breaches to be \$8,000. Mr Sharma has given compelling evidence of the impact on him in not having the benefit of his full salary. This evidence was supported by his partner.

[75] Ways Electronics Limited is ordered to pay a penalty of \$8,000 within 28 days of the date of this determination as follows:

- a) \$4,000 to Mr Sharma; and
- b) \$4,000 to the Employment Relations Authority. The Authority will then pay this sum into a crown bank account.

Costs

[76] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Sharma will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ways Electronics will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

⁵ Ibid at [190].

[77] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority