

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 94  
5620179

BETWEEN	KRISHNEEL SINGH Applicant
A N D	TYRES 2 GO LIMITED First Respondent
A N D	JT AUTOMOTIVE LIMITED Second Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person  
John Taylor, Representative of Respondents

Investigation Meeting: 21 June 2016 at Christchurch

Date of Oral Indication: 21 June 2016

Date of Written Determination: 24 June 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Tyres 2 Go Limited is to pay Krishneel Singh the sum of \$2,226.06 gross for annual holiday pay owing on termination of his employment.**
- B. JT Automotive Limited is to pay Krishneel Singh \$1,627.92 gross for annual holiday pay owing on termination of his employment.**
- C. JT Automotive Limited is to pay Krishneel Singh \$271.46 net for wage arrears owed for work undertaken in the period July 2015 until the termination of his employment.**
- D. There is no order for costs save that JT Automotive Limited is to pay Krishneel Singh the sum of \$71.56 being the filing fee in this matter.**

**Employment relationship problem**

[1] The applicant, Krishneel Singh, claims he is owed holiday pay for the period in which he was employed from 4 April 2014 until 12 October 2015. Krishneel also claims he should be paid wage arrears, as he was not paid the correct hourly rate of \$20.00 for part of his employment.

[2] The respondents, JT Automotive Limited (JT Auto) and Tyres 2 Go Limited (Tyres 2 Go), accept that they owe holiday pay. However, say they have been unable to calculate that because of discrepancies in the wage and time records that they have maintained and because they believed there were issues outstanding between the parties in respect of Krishneel's compliance with the immigration requirements attached to his work visa and his failure to fulfil his obligations during the notice period.

**Preliminary matter**

[3] Krishneel issued a statement of problem against JT Automotive (Tyres 2 Go) Blenheim Road. There is no company incorporated with this name. This name appears to be a combination of the two companies Krishneel believed employed him during the period 4 April 2014 until 12 October 2015, JT Auto and Tyres 2 Go Blenheim Road Limited.

[4] For the relevant period in his statement of problem, 4 April 2014 until 12 October 2015, Krishneel had two work visas issued under the New Zealand Immigration Act 2009:

- a. The first is a work visa issued for Krishneel to work as a tyre service technician for Tyres 2 Go, the visa being valid for the period 4 April 2014 to 4 April 2015.
- b. The second is a work visa issued for Krishneel to work as an automotive technician for JT Auto, the visa being valid for the period 8 April 2015 to 8 April 2017.

[5] It follows that there are two periods of employment pursuant to Krishneel's work visas with two different employers that give rise to the employment relationship problem:

- a. The first period of employment is 4 April 2014 until 5 April 2015. Krishneel was employed by Tyres 2 Go during this period of time.
- b. The second period of employment is from 8 April 2015 until 12 October 2015 when Krishneel resigned. Krishneel was employed by JT Auto during this period of time.

[6] I note that in the course of the investigation meeting, Mr Taylor on behalf of JT Auto and Tyres 2 Go accepted that each company had employed Krishneel for the periods identified and in fact had sponsored him for the work visa he obtained so that he could work during those periods. Both JT Auto and Tyres 2 Go did not dispute their status as employer nor did they dispute that there was holiday pay owing and in the case of JT Auto there were arrears of wages due to a miscalculation of payments for a certain period of time.

[7] For these reasons, I have exercised my powers under s 221 of the Employment Relations Act 2000 (the Act) and removed the respondent recorded by Krishneel and joined Tyres 2 Go as the first respondent and JT Auto as the second respondent.

### **The facts**

[8] Tyres 2 Go employed Krishneel from 4 April 2014 until 4 April 2015. Whilst there was an employment agreement that the parties signed, neither Krishneel nor Tyres 2 Go kept a copy.

[9] There was, however, no dispute over the relevant terms of Krishneel's employment with Tyres 2 Go. Those terms were that he was to work on a full time basis, which was a minimum of 35-40 hours per week with additional work as required. Krishneel's wage was \$17.00 per hour.

[10] In the course of the 12 months that Tyres 2 Go employed Krishneel, he took two weeks holiday during Tyres 2 Go's annual Christmas shutdown. During this time, Tyres 2 Go paid Krishneel two weeks holiday pay based on a 40-hour week at the rate of \$17.00 per hour.

[11] Krishneel's employment with Tyres 2 Go ended when his first work visa expired on 4 April 2015. Tyres 2 Go did not pay the balance of his holiday pay at that time.

[12] Krishneel then commenced employment with JT Auto from 8 April 2015.

[13] I note here that I was told that JT Auto is a subsidiary company of Tyres 2 Go but a search of the Companies Office register shows that this is in fact not the case and that Tyres 2 Go and JT Auto have one shareholder in common (being Andrew Taylor), but there is otherwise not a parent/subsidiary relationship.

[14] I accept the evidence of Mr Taylor that the two companies are related in terms of the industry in which they operate and the way in which they are managed. It is this understanding between Tyres 2 Go and JT Auto that explained why Krishneel was not paid holiday pay at the completion of his employment with Tyres 2 Go. Simply put, Tyres 2 Go and JT Auto viewed Krishneel's employment as continuing and did not recognise that one came to an end and new employment commenced.

[15] However, for the purposes of this determination and the payments that must be made, JT Auto and Tyres 2 Go are distinct and separate entities and both employed Krishneel on different occasions.

[16] JT Auto employed Krishneel from 8 April 2015 until 12 October 2015. Again, whilst there was an employment agreement that the parties signed, neither Krishneel nor JT Auto kept a copy.

[17] Again there was, however, no dispute over the relevant terms of Krishneel's employment with JT Auto. Those terms were that he was to work on a full time basis, which was a minimum of 35-40 hours per week with additional work as required. Krishneel's wage was \$20.00 per hour.

[18] Krishneel did not take any holidays during his employment with JT Autos and did not receive any holiday pay.

[19] Krishneel resigned from JT Autos by giving one week's notice on 5 October 2015.

[20] At the end of the employment at JT Auto on 12 October 2015, Krishneel did not receive any payment for annual holidays.

[21] Krishneel believes JT Auto underpaid him. He says JT Auto paid him at the rate of \$17.00 per hour rather than \$20.00 per hour.

[22] A review of Krishneel's payslips provided by JT Auto shows that JT Autos paid Krishneel at the rate of \$20.00 per hour. However, a comparison of the pay slips against Krishneel's bank statements shows a discrepancy between the net pay recorded as being paid and the actual amounts that Krishneel received in his bank account.

[23] From the period of 5 July 2015 to 12 October 2015, there was a series of underpayments and one overpayment. JT Auto failed to pay the correct amount into Krishneel's bank account.

[24] JT Auto alleges that in September 2015, Krishneel began working for another entity in breach of his work visa. Krishneel denies this.

[25] Krishneel's statement of "Earnings information for Income tax" from the Inland Revenue Department evidences that the only salary or wages he received in September 2015 was from JT Autos. However, the IRD statement does record Woolston Auto Surgery 2014 Limited as an employer or payer for the period 1 September to 30 November 2015.

[26] I am not satisfied that Krishneel did in fact work for Woolston Auto Surgery 2014 Limited or any other employer other than JT Autos in September 2015.

[27] On 5 October 2015, Immigration New Zealand granted Krishneel a new work visa that was essentially an amendment of his previous visa with JT Auto. That visa enabled him to *work as MECHANIC for ANY EMPLOYER in CANTERBURY*. That visa was valid until 8 April 2017. It was once this new work visa was obtained that Krishneel then gave notice of the termination of his employment.

[28] Krishneel says that in the last two weeks of employment in October 2015 he did not work for any other employer and only commenced work with Woolston Auto Surgery 2014 Limited after 12 October 2015.

[29] JT Auto claims Krishneel did not fulfil his notice requirements, as he did not attend work in the week 5 October 2015 to 12 October 2015. On the evidence, I have heard I accept that Krishneel failed to work the full week but this was because he was ill and unable to attend work. There was no evidence to suggest this illness was feigned in order to avoid work so I take it on face value that he was absent from work for valid reasons.

[30] In any event, JT Auto did not lead any evidence to show that this breach of the employment agreement by Krishneel, if it was in fact a breach, led to it suffering any quantifiable loss.

### **Determination**

*Holiday pay owing for employment 4 April 2014 until 4 April 2015*

[31] Krishneel worked for a period of 12 months for Tyres 2 Go. Because of this employment, he is entitled to four weeks' annual holidays<sup>1</sup>.

[32] However, Krishneel took two weeks leave because of the annual Christmas shutdown prior to the accrual of his four-week entitlement. This was paid to Krishneel based on two 40-hour weeks at \$17.00 per hour.

[33] The calculation of annual holiday pay if that holiday is taken in advance of the four week entitlement is calculated pursuant to s 22 of the Holidays Act 2003. Section 22 provides:

22. ***Calculation of annual holiday pay if holiday is taken in advance***
  - (1) *If the employee takes an annual holiday in advance, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).*
  - (2) *Annual holiday pay must be –*
    - (a) *For the agreed portion of the annual holiday entitlement; and*
    - (b) *At a rate that is based on the greater of –*
      - (i) *The employee's ordinary weekly pay at the beginning of the annual holiday; or*
      - (ii) *The employee's average weekly earnings for –*
        - (A) *The 12 months immediately before the end of the last pay period before the annual holiday if the employee has worked for the employer for not less than 12 months; or*
        - (B) *The period of employment before the end of the last pay period before the annual holiday if the employee has worked for the employer for less than 12 months.*
  - (3) *To avoid doubt, for the purposes of subsection (2)(b)(ii)(B) the divisor of 52 for the purpose of calculating the employee's average weekly earnings is to be reduced so that it represents the number of whole or part weeks that the*

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<sup>1</sup> Pursuant to s 16(1) of the Holidays Act 2003

*employee worked for the employer in the period of employment.*

[34] On this basis then, Krishneel was to be paid two weeks' of annual holiday pay at the rate of the greater of ordinary weekly pay or his average weekly earnings for the period of employment leading up to that holiday.

[35] Tyres 2 Go incorrectly calculated the payment of annual holiday pay paid to Krishneel for the holiday he took during the Christmas shutdown:

- a. Firstly, Tyres 2 Go incorrectly calculated Krishneel's ordinary weekly pay;
- b. Second, Tyres 2 Go did not calculate Krishneel's average weekly earnings for the period of employment leading up to the holiday; and then
- c. Third, Tyres 2 Go did not take the greater of these two calculations and pay Krishneel at that rate.

[36] Ordinary weekly pay is calculated according to s 8 of the Holidays Act. Section 8 provides:

8. ***Meaning of ordinary weekly pay***

(1) *In this Act, unless the context otherwise requires, **ordinary weekly pay**, for the purposes of calculating annual holiday pay,-*

(a) *means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and*

(b) *includes-*

(i) *productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay;*

(ii) *payments for overtime if those payments are a regular part of the employee's pay;*

(iii) *the cash value of any board or lodgings provided by the employer to the employee; but*

(c) *excludes-*

(i) *productivity or incentive-based payments that are not a regular part of the employee's pay;*

(ii) *payments for overtime that are not a regular part of the employee's pay;*

(iii) *any one-off or exceptional payments;*

(iv) *any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay to the employee;*

- (v) any payment of any employer contribution to a superannuation scheme for the benefit of the employee.
- (2) If it is not possible to determine an employee's ordinary weekly pay under subsection (1), the pay must be calculated in accordance with the formula:

$$\frac{a - b}{c}$$

where-

- a* is the employee's gross earnings for-
- (i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or
- (ii) if, the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made
- b* is the total amount of payments described in subsection (1)(c)(i) to (iii)
- c* is 4.

[37] Krishneel's payslips show that he always worked more than 40 hours per week, except for time when he was off work ill. Payment for this overtime was therefore regular and should be included in the calculation of ordinary weekly pay under s 8(1)(b) of the Holidays but as it varied in quantum this is not possible.

[38] In the situation where an employee has specified hours in an employment agreement but regularly works different hours, it is not possible to calculate the employee's ordinary weekly pay under s 8(1) of the Holidays Act and s 8(2) should be used.

[39] Applying s 8(2) of the Holidays Act and based on the evidence I have regarding Krishneel's payments in the four weeks prior to the Christmas shutdown, I calculate Krishneel's *ordinary weekly pay* to be \$866.50.

[40] In contrast, applying s 22(b)(ii) of the Holidays Act to the evidence I have regarding payments made to Krishneel in the period 4 April 2014 up until the Christmas shutdown period commencing on 22 December 2014, I calculate Krishneel's *average weekly earnings* to be \$872.81.

[41] Krishneel should have been paid for \$872.81 per week for the two weeks annual holiday he took during the Christmas shutdown.

[42] Tyres 2 Go paid Krishneel \$680.00 per week for the two weeks annual holiday he took, calculated on 40 hours per week at \$17.00 per hour.

[43] There is therefore a shortfall in Krishneel's annual holiday pay for the Christmas shutdown of \$192.81 per week being \$385.62.

[44] At the end of his employment with Tyres 2 Go Krishneel had accrued a further entitlement of two weeks of annual holidays. Tyres 2 Go has not paid Krishneel for those two weeks annual holiday.

[45] Payment for those two weeks is calculated according to s 24 of the Holidays Act. This section provides:

24. ***Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen***
- (1) *Subsection (2) applies if –*
- (a) *The employment of an employee comes to an end; and*
  - (b) *The employee is entitled to annual holidays; and*
  - (c) *The employee has not taken annual holidays or has only taken some of them.*
- (2) *The employer must pay the employee for the portion of the annual holidays entitlement not taken at the rate that is based on the greater of –*
- (a) *The employee's ordinary weekly pay as at the date of the end of the employee's employment; or*
  - (b) *The employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.*

[46] As I have already determined, Krishneel's ordinary weekly pay is calculated pursuant to s 8(2) of the Holidays Act. Based on the evidence I have of payments made to Krishneel in the four weeks before the end of the pay period before 4 April 2015, I calculate Krishneel's *ordinary weekly pay* to be \$845.50.

[47] In contrast applying s 24(2)(b) of the Holidays Act, for the period during which Tyres 2 Go employed Krishneel he earned \$47,851.00 and his *average weekly earnings* during this 12-month period was \$920.22.

[48] Applying the greater of these two amounts I determine that Krishneel is to be paid two weeks annual holiday pay at the rate of \$920.22 per week, being \$1,840.44.

[49] I add to this amount the shortfall in the two weeks annual holiday pay paid for the Christmas shutdown and calculate the total owing for annual holiday pay to be \$2,226.06.

[50] I order that Tyres 2 Go pay Krishneel, \$2,226.06 gross for his outstanding annual holiday pay entitlement when his employment ended.

*Holiday pay owing from 8 April 2015 until 12 October 2015*

[51] JT Auto employed Krishneel for less than 12 months. The calculation of annual holiday pay when employment ends within 12 months is calculated in accordance with s 23 of the Holidays Act.

[52] Section 23 of the Holidays Act provides:

23. ***Calculation of annual holiday pay if employment ends within 12 months***
- (1) *Subsection (2) applies if–*
- (a) *The employment of an employee comes to an end; and*
  - (b) *The employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of s.16.*
- (2) *An employer must pay the employee 8% of the employee’s gross earnings since the commencement of employment, less any amount –*
- (a) *Paid to the employee for annual holidays taken in advance; or*
  - (b) *Paid in accordance with s.28.*

[53] JT Auto did not pay Krishneel any annual holiday pay in advance or in accordance with s 28 of the Holidays Act. Krishneel is entitled to 8% of his gross earnings pursuant to s 23(2).

[54] Krishneel earned \$20,349.00 during his employment with JT Auto. 8% of this is \$1,627.92.

[55] I order JT Auto to pay Krishneel annual holiday pay in the sum of \$1,627.92 gross.

*Wage arrears*

[56] As discussed there was a discrepancy between the amounts recorded as payable in Krishneel’s pay slips and the actual amounts he received. I have calculated that to be an underpayment of \$271.46.

[57] I therefore order JT Auto to pay the net sum of \$271.46 to Krishneel.

[58] JT Auto is to calculate the gross amount that gives rise to the net payment for Krishneel and then account for PAYE and/or any other deductions that are to be made on that gross amount to IRD.

*Set off*

[59] There was no evidence that established that Krishneel had breached his employment agreement by failing to work his notice period. In addition, there was no evidence that Krishneel acted in breach of his work visa. Further, and in any event, there was no evidence that JT Auto suffered any loss from the alleged breaches.

[60] JT Auto does not have a valid counterclaim against Krishneel. JT Auto has no set off against the holiday pay I have ordered it to pay to Krishneel.

**Costs**

[61] Neither party was represented by counsel or an advocate in this matter. Therefore, I make no order for costs save that Krishneel is entitled to be reimbursed for the filing fee on the statement of problem.

[62] I order JT Auto to pay Krishneel the sum of \$71.56.

Peter van Keulen  
Member of the Employment Relations Authority