

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 434
3277759

BETWEEN SEBASTIAN DE LA ROSA TORA
Applicant

AND MUSA BAIG
Respondent

Member of Authority: Rachel Larmer

Representatives: David Prisk, advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 19 July 2024 in Auckland

Oral Determination: 19 July 2024

Written Record Issued: 19 July 2024

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] The respondent, Musa Baig, employed the applicant, Mr Sebastian de la Rosa Toro as a full time Painting Labourer. He was to do work for “Painters Inc.”, which is not a legal entity but is the trading name Mr Baig used. The respondent signed the employment agreement on 30 October 2023 and the applicant signed it on 13 November 2023.

[2] The applicant started doing painting and plastering work at different locations for the respondent on 3 October 2023. He did not receive a written employment agreement until the beginning of November, which the applicant signed on 13 November 2023. The applicant required a work visa which he obtained with the respondent’s support.

The applicant's claims

[3] The applicant was employed as a fulltime permanent painting labourer and guaranteed at least 30 hours work each week. The maximum potential number of hours per week were 60. He was to be paid \$30.00 gross per hour into his nominated bank account.

[4] The applicant claimed he was not paid at all for the work her did over the period 3 October until 23 November 2023, which amounted to a total of 335.5 hours.

[5] In November the respondent called a meeting with all workers and said that he was not being paid by the construction company, so therefore had no money to pay his employees.

[6] The respondent told the applicant that he would be paid in "two more weeks". After this advice, the respondent continued to call the applicant to work, even though the applicant was not being paid, by saying that if the applicant did not show up to work, then the respondent would talk to the immigration adviser to stop the applicant's work visa application.

[7] The applicant told the Authority that he felt he had to continue working in these circumstances.

[8] The applicant said the respondent stopped contacting him (the applicant) on 20 December 2023 and from that date did not answer the applicant's messages or phone calls. The applicant said that from 23 November 2023 the respondent stopped allocating him work, thereby effectively terminating his employment.

[9] The applicant claimed the respondent:

- (a) Breached his duty of good faith under s 4 of the Employment Relations Act 2000 (the Act);
- (b) Breached the employment agreement, by failing to pay him the contractual rate of pay for all of the hours he had worked;
- (c) Unjustifiably constructively dismissed the applicant by failing to provide him with work, when he was a permanent full time employee;
- (d) Breached the Holidays Act 2003 (the HA03) by failing to pay the applicant his holiday pay entitlements when his employment ended.

Service

[10] The statement of problem was served on the applicant by a track and trace courier at 8.04am on 16 February 2024 at his Silverdale address. This was signed for by “Musa Baig”.

[11] The Authority’s notice of Case Management Conference (CMC) and the Direction to Mediation (DTM) were served by a track and trace courier on the respondent at 8.40am on 10 April 2024. These were signed for by “Musa B”.

[12] The Directions of the Authority (DoA) dated 16 April 2024 was served on the respondent by track and trace courier at 3.40pm on 23 April 2024. It was signed for by “Musa Baig”.

[13] The applicant’s amended statement of problem, witness statement, and supporting documentation were served on the respondent by track and trace courier at 8.25am on 13 May 2024. These were left on the doorstep of the respondent’s address and photo proof of delivery was provided to the Authority by New Zealand Couriers.

Non-engagement of respondent

[14] The respondent did not participate in the Authority’s investigation at all.

[15] The respondent failed to lodge a statement in reply within 14 days of the statement of problem being served on him.

[16] In the Authority’s directions dated 16 April 2024, the respondent was given until 29 April 2024 to apply for leave to lodge a statement in reply out of time. However, he failed to do so.

[17] The respondent failed to comply with the Authority’s direction to provide it with copies of the applicant’s employment documentation, consisting of his wage and time records, as required by s 130 of the Act, and his holiday and leave records, as required by s 81 of the HA03.

[18] The respondent also failed to comply with the Authority’s direction to provide it with copies of the applicant’s payslips, timesheets, and final pay advice. None of these documents have been provided by the respondent.

[19] Mediation has not occurred.

[20] The respondent failed to engage with Mediation Services after the Authority directed the parties to attend mediation. That failure resulted in a second direction by the Authority for mediation to occur on a specified date, being 8 May 2024. However, mediation again did not occur, due to the respondent's repeated failure to engage.

[21] The respondent failed to answer the Authority officer's phone calls and he did not return the voice mails that were left for him. Nor did the respondent reply to the Authority's emails to him about this matter.

[22] The respondent did not attend the CMC held on 16 April 2024 or the investigation meeting held today.

The Authority's investigation

[23] The Authority held an in-person investigation meeting in Auckland on 19 July 2024. The Authority was assisted by a Spanish interpreter.

[24] The start of the investigation meeting was delayed by fifteen minutes to give the respondent additional time to appear. However, he failed to do so. The respondent had notice of the time and date of this investigation meeting, so has elected not to participate in these Authority proceedings.

[25] The applicant attended the investigation meeting. He gave evidence under affirmation and was questioned by the Authority about his claims, and the documents he had provided. The applicant's evidence was uncontested.

[26] The respondent's failure to provide employment documentation prejudiced the applicant's ability to bring an accurate claim for wage arrears under s 131 of the Act. The Authority therefore accepted the applicant's evidence of his wage arrears in accordance with s 132(2) of the Act.

[27] Accordingly, the applicant's records of the days and hours he worked each week he was employed, which had been disclosed to the respondent prior to the investigation meeting, were accepted as credible as they had not been disproved.

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

The issues

[29] The following issues are to be determined:

- (a) Is the applicant owed wage arrears?
- (b) Should the applicant be awarded interest on any wage arrears he is owed?
- (c) Have breaches of employment standards occurred?
- (d) Was the applicant constructively dismissed?
- (e) If so, was his dismissal justified?
- (f) If not, what remedies should the applicant be awarded?
- (g) What costs and disbursements should be awarded?

Is the applicant owed wage arrears?

[30] The Authority accepted the applicant's uncontested evidence about the days and dates and hours he had worked and the fact that he had not been paid any wages for the work he had done.

[31] Pursuant to his employment agreement, the applicant should have been paid a total of \$10,065.00 gross for the 335.5 hours he had actually worked over the period 3 October to 23 November 2023, which was calculated at the contractual rate of \$30.00 per hour.

[32] The applicant provided the Authority with messages between him and the respondent which established that he (the applicant) had repeatedly raised with the respondent concerns that he (the applicant) had not been paid. The applicant also referred to the significant hardship the failure to pay him was causing him and his family.

[33] The applicant told the Authority that in mid-January 2024, the respondent contacted him on the WhatsApp group they had used for work to say that he would try to pay the applicant.

[34] The respondent told the applicant that he would talk to the construction company to get the money that he was owed from them. For the following weeks the respondent kept telling the applicant that he would "pay on Friday," but the applicant

was never paid. When the applicant threatened to take the issue of his wage arrears further, the respondent told him, “Do what you have to do legally”.

[35] After the applicant told the respondent that he was going to report to him to a lawyer, he said he began receiving intimidating messages from the respondent’s friends, warning the applicant to be careful who he was dealing with and threatening to take his work visa away. The applicant was also told “to think carefully about what he had to lose in Chile” if he did not stop his legal action.

Outcome of wage arrears claim

[36] The respondent is ordered to pay the applicant wage arrears of \$10,065.00 gross.

[37] The applicant is also entitled to be paid eight per cent of his total gross earnings as holiday pay, pursuant to s 23 of the HA03. The respondent is therefore ordered to pay the applicant \$805.20 gross as holiday pay.

[38] The total wage arrears that the respondent is ordered to pay the applicant is \$10,870.20 gross.

Should the applicant be awarded interest on his wage arrears?

[39] The respondent has had the benefit of money that should have been paid to the applicant weekly into his nominated bank account. Because the applicant’s first day of work was 3 October 2023, he should have received his first week’s wages by 10 October 2023.

[40] It is therefore appropriate for the respondent to pay the applicant interest to reflect that he (the applicant) has been deprived of the use of what should have been his own money.

Award of interest

[41] Interest is to run on the total gross wage arrears of \$10,870.20 from 20 November 2023 (being the last day he attended work) until the full amount, including all interest outstanding, has been paid to the applicant. Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website.

Have breaches of employment standards occurred?

[42] The term “employment standards” is defined in s 5 of the Act. This includes the failure to provide wage and time records as required by s 130 of the Act, the failure to pay minimum entitlements under the HA03, and breaches of the Wages Protection Act 1983 (the WPA).

[43] The respondent has breached employment standards by failing to pay the applicant his wages in breach of the provisions of his employment agreement and in breach of s 4 of the WPA, which requires wages to be paid without deduction when they become due. The respondent also breached ss 23 and 27 of the HA03 by failing to pay the applicant his annual holiday entitlements when his employment ended.

[44] The respondent is the person who employed the applicant and who was responsible for paying him, so he was personally involved in the breaches of employment standards that occurred.

[45] This finding that the respondent has breached employment standards has been recorded by the Authority as it may be relevant Immigration New Zealand’s assessment of the respondent’s future support of work visa applications for other employees.

Was the applicant constructively dismissed?

[46] The requirement to pay an employee for the hours they work, in accordance with the terms recorded in the applicable employment agreement, is a requirement of the employment relationship. The failure to pay an employee for work they have done is a fundamental of the employment agreement, minimum code protections and of employment standards.

[47] These breaches were aggravated by the fact that the respondent apparently knew that he was unable to pay the applicant for the work that he had done, but continued to encourage him to attend work by threatening to undermine his work visa application if he did not continue working, even though he had not been paid.

[48] The applicant was employed as a permanent fulltime employee, so he was entitled to be paid when he was ready, willing, and available to work his contractual hours of work. That was the case here. The only reason the applicant did not attend work was because the respondent failed to allocate him any work to do, against a background of not having paid him at all for work already done.

[49] These are fundamental breaches of the trust and confidence that is inherent in an employment relationship. It was reasonably foreseeable the applicant would not be able to continue working under such circumstances.

[50] Accordingly, these fundamental breaches amounted to a constructive dismissal by the respondent of the applicant from his employment. The ending of the applicant's employment occurred at the respondent's initiative. If the applicant had been paid and if the respondent had continued to give him work, then he would have continued working in accordance with the provisions of his employment agreement.

Was the applicant's dismissal justified?

[51] Justification is to be assessed in accordance with the justification test in s 103A(2) of the Act. This requires the Authority to objectively assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in the circumstances at the time the employee was dismissed.

[52] A fair and reasonable employer is expected to comply with the statutory good faith obligations recorded in s 4 of the Act, and with each of the four procedural fairness tests set out in s 103A(3) of the Act. That did not occur in this case.

[53] The respondent was not justified in failing to pay the applicant for work he had already done.

[54] The respondent was also not justified in simply deciding not to allocate the applicant any more work. If he was unable to provide work to the applicant, then the respondent was required to undergo a fair and proper restructuring, during which the applicant's role could have been disestablished, and he could have potentially been made redundant. However, none of that occurred.

[55] The respondent's constructive dismissal of the applicant was substantively and procedurally unjustified.

What remedies should be awarded?

Mitigation

[56] The applicant required a work visa to work in New Zealand, so his ability to mitigate his loss was dependent on him finding a new employer who would support a

new work visa application. The applicant applied for a migrant exploitation visa and commenced looking for other jobs. He has been unable to obtain replacement work.

Lost remuneration

[57] The applicant is awarded \$11,700 gross, being three months' lost remuneration under s 128(2) of the Act.

[58] Although the applicant's loss exceeded three months, the Authority considered it more likely than not, because of the financial problems the respondent faced, that his employment would have been unlikely to have continued past three months had he not been constructively dismissed.

Distress compensation

[59] The applicant gave evidence of the distress, stress, hurt, and humiliation he had suffered as a result of his unjustified dismissal. As a migrant worker on a work visa that was linked to his employer, he was in a particularly vulnerable position.

[60] When the applicant lost work he had to use up his savings while attempting to find alternative work. The need for him to have a work visa has also undermined his ability to secure alternative work.

[61] The applicant described feeling threatened and intimidated by the messages he received from the respondent's friends, warning him to be careful who he was dealing with and threatening that his visa would be taken away.

[62] The respondent also personally threatened the applicant with visa removal, which increased the stress, hurt, and humiliation the applicant said he has suffered. The applicant's family and friends in Chile were also threatened by the respondent and by the respondent's friends if the applicant continued with his legal action.

[63] The respondent is ordered to pay the applicant \$20,000.00 under s 123(1)(c)(i) of the Act, to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his unjustified dismissal.

What costs and disbursements should be awarded?

[64] The applicant, as the successful party, is entitled to a contribution towards his actual costs and disbursements. This matter involved a half-day investigation meeting,

so the starting point for assessing costs was \$2,250.00, being half of the current notional daily tariff of \$4,500.00 for the first day of an investigation meeting.

[65] There are no factors that warrant adjustments being made to this notional starting tariff.

[66] Accordingly, the respondent is ordered to pay the applicant \$2,250.00 towards his actual legal costs. He is also ordered to reimburse the applicant \$71.55 for his filing fee.

Orders

[67] Within 28 days of the date of this determination, the respondent is ordered to pay the applicant:

- (a) \$10,870.20 gross wage arrears;
- (b) Interest on \$10,870.20 gross which is to run from 20 November 2023 until it has been paid in full. Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website;
- (c) \$11,700.00 lost remuneration under s 128(2) of the Act;
- (d) \$20,000.00 distress compensation under s 123(1)(c)(i) of the Act;
- (e) \$2,500.00 contribution towards his actual legal costs; and
- (f) \$71.55 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority