

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 259
5448429

BETWEEN

KINIKINILAU UASIKE
Applicant

A N D

S.N. WINDOWS AND DOORS
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Sione Fonua, Counsel for the Applicant
Shyam Nand Accountant for Respondent

Investigation Meeting: 24 June 2014 at Auckland

Date of Determination: 25 June 2014

DETERMINATION OF THE AUTHORITY

- A. SN Windows and Doors Limited unjustifiably dismissed Mr Uasike. It is ordered to pay him:**
- a. \$2,200 lost remuneration;**
 - b. \$2,000 distress compensation.**
- B. SN Windows and Doors Limited is ordered to pay Mr Uasike wage arrears consisting of:**
- a. \$4,698.12 shortfall in wages;**
 - b. \$660 unpaid public holidays;**
 - c. \$980.57 unpaid holiday pay.**
- C. SN Windows and Doors Limited is ordered to pay Mr Uasike:**

a. \$1,750 towards his legal costs; and

b. \$71.56 to reimburse his filing fee.

D. SN Windows and Doors is ordered to pay Mr Uasike the \$12,360.25 he has been awarded within 28 days of the date of this determination.

Employment relationship problem

[1] Mr Uasike worked as a Joiner for S.N. Windows and Doors Limited (SN Windows). He says he started work on 14 January 2013. SN Windows disputes that and says he did not start work until 13 May 2013. Mr Uasike claims he was unjustifiably dismissed on or around 28 June 2013 when he received an envelope with \$80 in it and was told not to come back as there was no work for him. SN Windows denies dismissing Mr Uasike and says he simply failed to turn up at work.

[2] Mr Uasike claims he was paid less than the minimum wage for the hours he worked, he was not paid for six statutory holidays and he was not paid any holiday pay upon termination. SN Windows claims it paid Mr Uasike correctly during his employment. It says it did not pay Mr Uasike any holiday pay because his employment had not ended.

[3] Mr Uasike says he was not given an employment agreement whilst SN Windows says he was.

Issues

[4] The following issues are to be determined:

- a. What date did Mr Uasike start work for SN Windows?
- b. Was Mr Uasike paid the minimum wage for the hours worked?
- c. Is Mr Uasike entitled to be paid for the six public holidays he is claiming?
- d. Is Mr Uasike owed holiday pay?
- e. Was Mr Uasike dismissed?

- f. If so, was dismissal justified?
- g. If not, what if any remedies should be awarded?
- h. What if any costs should be awarded?

Credibility

[5] Conflicts in the evidence must be resolved on the balance of probabilities. I have resolved the various conflicts in favour of Mr Uasike on the basis his evidence is more likely to be correct. His evidence made more logical sense, his version of events was corroborated by an existing SN Windows' employee, and Mr Uasike's actions were consistent with his account of events.

[6] I find that Mr Nand gave misleading evidence to the Authority. SN Windows' Statement in Reply says the Labour Inspector "*checked our documents and found everything in order.*" That was contradicted by Mr Denyer who gave evidence in person. It was also contradicted by the letter Mr Denyer sent to Mr Nand on 31 July 2013 which expressed concern about the nature of the purported wage and time records, and records his suspicion that they were not a true reflection of Mr Uasike's work.

[7] Mr Nand also told the Authority he had not paid Mr Uasike his holiday pay because the employment was continuing. I consider that evidence is very odd because Mr Uasike had not been given work and had not been paid for almost a year. He had also made it clear he had been working for another employer since 01 August 2013.

[8] I also consider SN Windows provided misleading information in its Employer Monthly Schedule (EMS) to Inland Revenue Department. Even on its own evidence Mr Uasike started work on 15 May 2013 but it did not identify him as an employee in its EMS (as it is legally required to do) until 03 June 2013.

[9] Mr Suresh Awadh who described himself as SN Windows' accountant told the Authority that Mr Uasike was not recorded on the EMS because he was paid cash. That is an unsatisfactory explanation for omitting Mr Uasike from the EMS as he was paid cash for the duration of his employment.

[10] It also came out during the Authority's investigation that instead of paying employees who worked on Saturdays their normal wages (as required by law) Mr

Nand only gave them “*a few beers*” contrary to the requirement of the Minimum Wage Act 1983 (MWA) that employees are paid a minimum wage for hours worked.

[11] It is also obvious that SN Windows has not complied with its legal obligations to keep accurate wage and time records or holiday and leave records as required by the Employment Relations Act 2000 (the Act) and the Holiday Act 2003 (HA03). This forms a picture of an employer that is not observing the statutory requirements which apply to all employers in New Zealand.

[12] I also doubt the veracity of the employment agreement which Mr Nand produced to the Authority claiming Mr Uasike had signed it. The agreement was not available when Mr Denyer attended the premises in July 2013. Mr Nand told Mr Denyer that an agreement had been presented to Mr Uasike who had not signed it. Mr Uasike denies that and part of his original complaint to the Labour Inspector was that he had never been given an employment agreement.

[13] Mr Nand then produced an employment agreement which he says was signed by Mr Uasike. Mr Uasike denies it is his signature and says he had never seen it before. Mr Nand did not give any information about the circumstances of the purported signing of the agreement or why it was not produced to Mr Denyer when he visited. It is obvious that the signature on it is quite different from the signature on Mr Uasike’s witness statement.

[14] I also found Mr Nand’s evidence that he gave another employee \$80 to give to Mr Uasike odd. Mr Uasike claims he was given that as termination pay. Mr Nand says the \$80 he gave another employee to give to Mr Uasike was the employer’s contribution towards a speeding fine Mr Uasike had incurred. There was no documentation around that cash payment.

[15] I am sceptical about that because the vehicle was in SN Windows name so it was responsible for paying the fine. Mr Uasike was on a minimum wage and had previously disputed to Mr Nand liability to pay the fine because Mr Uasike said he did not have to pay because he did not have an employment agreement. I therefore consider the likelihood of Mr Uasike paying the fine was low so it is odd for Mr Nand to give Mr Uasike cash instead of directly paying the company’s fine. I consider Mr Uasike’s evidence that it was a termination payment is more likely.

[16] I consider the forgoing matters tend to undermine the credibility of the evidence Mr Nand gave on behalf of SN Windows. The evidence shows SN Windows was not complying with basic employment law requirements. These factors have led me to prefer Mr Uasike's evidence.

What date did Mr Uasike start work for SN Windows?

[17] Mr Uasike claims he started work on 14 January 2013. He says he recalls the date because the first whole week of prayer for his church had finished on Friday 11 January 2013 and he started the Monday after that. Mr Nand says the factory did not open until 21 January but no other evidence was produced in support of that claim.

[18] SN Windows has failed to produce Mr Uasike's wage and time records when requested by Mr Uasike, the Labour Inspector and the Authority. I consider this failure has prejudiced Mr Uasike's ability to bring an accurate wage arrears claim.¹ In accordance with s.132(2) of the Act I may accept as proved all of Mr Uasike's claims regarding his hours, days and times of work and amount paid. I do not consider there is any credible evidence contradicting Mr Uasike's evidence about these matters.

[19] I further note that SN Windows also failed to record (as it was legally required to do) in its EMS the dates on which Mr Uasike's employment started and ended. I consider that the conflict over Mr Uasike's start date would not have occurred had SN Windows complied with its legal obligations regarding the provision of a written employment agreement, the keeping of wage and time and holiday and leave records and providing accurate EMSs to Inland Revenue Department.

[20] I find on the balance of probabilities that Mr Uasike started work with SN Windows on 14 January 2013.

Was Mr Uasike paid the minimum wage for the hours worked?

[21] Mr Uasike says he started recording his hours of work and the amounts he had been paid in April after his requests for payslips were not responded to. Mr Uasike provided the Authority with his diary notes which record his days and hours of work and what he had been paid on what date.

¹ Section 123(1)(b) of the Act.

[22] Mr Uasike claims that he was paid less than the minimum wage. His wage arrears claim is for \$2,349.06 for the period 22 April – 28 June 2013 which is based on the information he recorded in his diary. He claims the same amount again for the period from 14 January – 19 April 2013 which was before he started making diary notes. However he believes that he is owed more or less the same amount.

[23] In accordance with s.132(2) of the Act I accept as proved all claims made by Mr Uasike in respect of the wages paid to him and the hours, days and times he has worked on the basis that SN Windows has not provided credible evidence to suggest Mr Uasike's evidence is incorrect.

[24] I find that Mr Uasike is owed \$4,698.12 from the period 14 January to 28 June 2013 because he was paid less than the minimum wage of \$13.75 per hour for the total hours he worked. SN Windows is ordered to pay Mr Uasike \$4,698.12 wage arrears.

Is Mr Uasike entitled to be paid for the six public holidays he is claiming?

[25] Mr Uasike also says he did not work but as a full time permanent employee was entitled to be paid for six public holidays that occurred whilst he was employed by SN Windows. These are Auckland Anniversary 25 January; Waitangi Day 6 February; Good Friday 29 March; Easter Monday 1 April; Anzac Day 25 April and Queens Birthday 3 June.

[26] Mr Uasike was entitled to be paid for these public holidays which would otherwise have been normal working days for him. SN Windows is ordered to pay him \$660 for unpaid public holidays.

Is Mr Uasike owed holiday pay?

[27] Mr Uasike was entitled to be paid 8% of his total gross earnings as holiday pay upon termination. That has not occurred. Mr Uasike did not take any paid annual holidays whilst employed and he has not received any holiday pay.

[28] I do not accept Mr Nand's suggestion that holiday pay is not due because Mr Uasike's employment has not ended. Mr Uasike has not worked and has not been paid since 28 June 2013. He has been working for a new employer since August 2013. Mr Uasike complained to the Labour Inspector in early July that he had not

been paid minimum wage and had not received an employment agreement. He filed his Statement of Problem with the Authority on 13 February 2014. SN Windows did not claim in its Statement in Reply that Mr Uasike was still employed.

[29] Mr Uasike's total gross earnings were \$12,257.12 (\$6,899 received whilst employed; \$660 unpaid statutory holidays; \$4,698.12 shortfall in wages due to being paid less than the minimum wage). SN Windows is ordered to pay Mr Uasike \$980.57 ($\$12,257.12 \times 8\%$) unpaid holiday pay.

Was Mr Uasike dismissed?

[30] Mr Uasike bears the onus of establishing on the balance of probabilities that his employment ended because he was dismissed. I find that he has discharged that onus because I consider it more likely than not he was dismissed.

[31] Mr Uasike claims that on or around 28 June 2013 an employee called Epina Fonua gave him \$80 cash and told him not to come to work because there was no job for him. Mr Fonua is a current employee of SN Windows. Mr Fonua told the Authority that Mr Nand gave him the envelope and told him to give it to Mr Uasike and tell not to come to work because there was no work for him. This was the envelope that had \$80 in it which Mr Nand says was the company's share of the speeding fine Mr Uasike had incurred.

[32] Mr Uasike says he was shocked and angry to be told there was no work for him. He believes that he was dismissed because he had been asking for payslips which were never provided and he had refused to pay the speeding fine because he did not have an employment agreement. Mr Uasike says he tried to contact Mr Nand by telephone a couple of times but was told Mr Nand was too busy to speak to him.

[33] Mr Uasike says he spoke to the Company Manager Mr Amit Berme saying he wanted to talk to Mr Nand about returning to work. When that did not result in him being able to speak to Mr Nand Mr Uasike then progressed his concerns by seeking advice from the Ministry of Business Employment & Innovation. He also laid a complaint with the Labour Inspector and engaged a lawyer to raise a dismissal grievance and wage arrears claim. These actions are consistent with his evidence that he was unexpectedly dismissed by his employer.

[34] Mr Nand's evidence is that Mr Uasike simply failed to turn up for work. However Mr Nand did not appear to act consistently with that by making inquiries with Mr Uasike about why he was not at work or by communicating that it considered he had abandoned his employment.

[35] I accept the evidence given by Mr Fonua that Mr Nand told him to tell Mr Uasike not to come back to work. I consider that amounts to a dismissal of Mr Uasike because it was a sending away that occurred at his employer's sole initiative.

[36] I find that SN Windows dismissed Mr Uasike.

Was dismissal justified?

[37] Given Mr Uasike has established on the balance of probabilities that he was dismissed the onus passes to SN Windows to justify his dismissal in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether SN Windows actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Uasike's dismissal occurred.²

[38] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the good faith obligations in s.4(1A) of the Act to provide an employee whose employment may be adversely affected by an employer's decision with relevant information before a final decision is made. It also includes compliance with each of the four procedural fairness tests set out in s.103A(3) of the Act.

[39] I find that SN Windows did not comply with its good faith obligations and it failed to comply with any of the procedural fairness tests in s.103A(3) of the Act. These failures mean it is unable to justify Mr Uasike's dismissal. Accordingly, I find SN Windows unjustifiably dismissed Mr Uasike.

What if any remedies should be awarded?

[40] I accept Mr Uasike's evidence that he took appropriate steps to mitigate his loss. He is entitled to be reimbursed the remuneration he lost as a result of his unjustified dismissal.

² Section 103A(2) of the Act.

[41] Mr Uasike lost one month's remuneration before obtaining a new job that he started on 01 August 2013. SN Windows is ordered to pay Mr Uasike \$2,200 under s.128(1) of the Act to reimburse him for his actual lost remuneration.

[42] I also accept Mr Uasike's evidence that he was humiliated, distressed and stressed as a result of his expected and unjustified dismissal. SN Windows is ordered to pay him \$2,000 to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

What if any costs should be awarded?

[43] Mr Uasike as the successful party is entitled to a contribution towards his actual legal costs. I am satisfied that he has incurred actual legal costs in excess of the Authority's notional daily tariff. This matter involved a half a day investigation meeting.

[44] The starting point for assessing costs is therefore \$1,750 (being half of the current notional daily tariff of \$3,500). There are no factors which warrant adjusting the notional daily tariff. Accordingly I order SN Windows to pay Mr Uasike \$1,750 towards his actual legal costs. It is also ordered to pay him \$71.56 to reimburse his filing fee.

Outcome

[45] SN Windows is ordered to pay Mr Uasike a total of \$12,360.25 within 28 days of the date of this determination. This amount is calculated as follows:

- a. \$2,200 lost remuneration;
- b. \$2,000 distress compensation.
- c. \$2,349.06 wages arrears from 14 January to 19 April 2013;
- d. \$2,349.06 wage arrears from 20 April to 28 June 2013;
- e. \$660 for six public holidays he was not paid for;
- f. \$980.57 unpaid holiday pay;
- g. \$1,750 legal costs;

h. \$71.56 reimbursement of his filing fee.

Rachel Larmer
Member of the Employment Relations Authority