

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 364
3069073

BETWEEN

ANIL VERMA
Applicant

AND

SHEPHERD NDAROWA
First Respondent

S-NET TECHNOLOGIES
LIMITED
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Nathan Santesso, advocate for Applicant
Shepherd Ndarowa for the Respondents

Investigation Meeting: 15 May 2020 via Zoom

Submissions and further information received: 19 and 29 May, 25 June, 5 and 12 August 2020 from Applicant
20 May, 4 July and 6 August 2020 from Respondents

Determination: 10 September 2020

DETERMINATION OF THE AUTHORITY

- A. S-Net Technologies Limited breached the terms of Mr Verma's employment agreement.**
- B. Mr Ndarowa aided and abetted the breaches of Mr Verma's employment agreement.**
- C. S-Net Technologies Limited is ordered to pay to Mr Verma arrears of wages totalling \$37,878.53 gross plus \$6,103.83 net**

under s 131 of the Act within 14 days of the date of this determination being:

- a) \$32,471.50 gross for unpaid wages;**
- b) \$6,103.83 net for unlawful deductions;**
- c) \$5,407.03 gross for unpaid holiday pay.**

D. S-Net Technologies breached minimum standards.

E. Mr Ndarowa was a person involved in the breaches of minimum standards.

F. It is appropriate for penalties to be imposed for the breaches of the employment agreement. S-Net Technologies Limited and Mr Ndarowa are ordered to pay the following penalties to the Employment Relations Authority within 14 days of the date of this determination:

- a) S-Net Technologies Limited is ordered to pay a sum of \$5,000 for its breaches;**
- b) Mr Ndarowa is ordered to pay the sum of \$2,000 for aiding and abetting the breaches.**

G. Once the full amount of the penalty is recovered by the Employment Relations Authority \$2,000 is to be transferred to the Crown account and \$5,000 paid to Mr Verma.

H. Mr Verma was unjustifiably dismissed. In resolution of his personal grievance S-Net Technologies Limited is ordered to pay to Mr Verma within 14 days of the date of this determination:

- a) \$10,320 under s 123(1)(b) of the Employment Relations Act 2000;**
- b) \$15,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

I. Costs are reserved.

Employment relationship problem

[1] S-Net Technologies Limited is a telecommunications contracting company. Its primary contract was with Visionstream repairing cables and providing services installing cabling and fibre networks.

[2] Mr Verma worked for GM Global Solutions Limited under the terms of a written employment agreement from 1 September 2016 to February 2017. Mr Shepherd Ndarowa was one of two shareholder directors of GM Global Solutions Ltd (GM Global), a company that was removed from the New Zealand Companies Register on 20 July 2018.

[3] Mr Verma was employed by S-Net Technologies from 10 April 2017 where he worked until 3 March 2019 as a Fibre Technician. Mr Ndarowa is the sole shareholder and director of S-Net Technologies Ltd.

[4] Mr Verma alleges S-Net Technologies breached the terms of his employment agreement and seeks to recover arrears of wages for unpaid wages and outstanding holiday pay. He claims S-Net Technologies breached the Holidays Act 2003, the Wages Protection Act 1983 (the WPA) and the Employment Relations Act 2000 (the Act).

[5] Mr Verma claims Mr Ndarowa aided and abetted the breaches of the employment agreement and was a person involved in breaches of minimum standards by S-Net Technologies.

Claims against Mr Ndarowa personally

[6] In his statement of problem Mr Verma claimed arrears of wages against Mr Ndarowa personally for the period between September 2016 and April 2017.

[7] At the investigation meeting it became apparent, and Mr Verma conceded, that for the period from September 2016 to February 2017 he was employed by GM Global and not Mr Ndarowa. This is consistent with Mr Verma having signed a written employment agreement with GM Global in 2016.

[8] GM Global was not included as a respondent in Mr Verma's statement of problem and given that it no longer exists as a legal entity no orders could be made against it.

[9] Mr Verma has amended his claim to exclude the period from September 2016 to April 2017.

Issues

[10] In order to resolve Mr Verma's application I must determine:

- a) Did S-Net Technologies breach the terms of the employment agreement relating to Mr Verma's hours of work?
- b) Did Mr Ndarowa aid and abet any breaches of the employment agreement?
- c) Is Mr Verma owed arrears of wages by S-Net Technologies?
- d) Did S-Net Technologies breach minimum standards by breaching the Wages Protection Act 1983 (WPA)?
- e) If there were breaches of minimum standards was Mr Ndarowa a person involved in the breaches under s 142W of the Employment Relations Act?
- f) What, if any, penalties should be imposed?
- g) Was Mr Verma unjustifiably dismissed and if so what, if any, remedies should be awarded?

[11] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Mr Verma's employment history

[12] Mr Verma worked under the terms of a work visa issued to him by Immigration New Zealand. In August 2016 he was offered and accepted an employment agreement from GM Global which Mr Verma used to support an application for the renewal of his work visa which was expiring.

[13] The hourly rate specified in the employment agreement was the minimum wage at that time of \$15.25. Mr Verma's application for a visa based on the GM Global employment agreement was declined because the wages offered were below the required threshold.

[14] Mr Verma received a new employment agreement with an improved hourly rate of \$20 per hour. Mr Verma submitted the new employment agreement to Immigration New Zealand and he was issued with a new work visa.

[15] Between October 2016 and January 2017 Mr Verma began being paid by S-Net Technologies rather than GM Global although his employment remained with the latter company. He raised this with Mr Ndarowa because it appeared to be a breach of his visa conditions which limited Mr Verma to work for GM Global only. Mr Verma was assured it was all legitimate and he should not be concerned.

[16] Between 15 February and 2 April 2017 Mr Verma returned to India to marry. On his return to New Zealand Mr Verma started working in the same position as he had held prior to his departure however, his employment was now with S-Net Technologies.

[17] In June 2017 Mr Verma submitted an application to Immigration New Zealand for a visa for his new wife. The application was declined on the grounds that he was in breach of his visa requirements. This is because Mr Verma was working for S-Net Technologies and not GM Global.

[18] After raising this with Mr Ndarowa a new employment agreement was signed by Mr Verma and S-Net Technologies. The employment agreement was backdated to 10 April 2017 which coincides with the date Mr Verma started working for S-Net Technologies on his return from India.

[19] After submitting the updated documents to Immigration New Zealand a visitor's visa was approved for Mr Verma's wife. Mr Verma's wife arrived in New Zealand in October 2017.

[20] Mr Verma applied for a new work visa in September 2018. At that time he signed another employment agreement with S-Net Technologies which he used to support his new visa application. His visa was approved in December 2018 with the condition that he work only for S-Net Technologies.

Did S-Net Technologies breach terms of the employment agreement?

[21] Throughout his employment with S-Net Technologies Mr Verma signed three employment agreements, the first was signed in June 2017 but back-dated to 10 April 2017, the second was signed in August 2017 and the final agreement was signed in August 2018. Each of the agreements contained similar terms and conditions, however, there were some minor differences relating to the hours of work.

[22] Determining Mr Verma's contractual entitlement for hours of work and consequently any arrears of wages that he may be owed required me to consider the meaning of the relevant terms set out in each of the three employment agreements based on the natural and ordinary meaning of the language used by the parties.

10 April to 29 August 2017

[23] The first employment agreement between Mr Verma and S-Net Technologies was dated 10 April 2017. The terms of the agreement recorded Mr Verma's position as Technical Assistant.

[24] The hours of work clause states:

The employee will work for 80 hours each Fortnight on Monday to Friday, between the hours of 6am to 8pm.

The employee can choose when to start and end work each day (within agreed limits), as long as they work the agreed number of hours.

[25] The hourly rate specified in the employment agreement is \$16.50 per hour to be paid fortnightly.

[26] The agreement also provided for changes to the terms of the agreement in the following terms:

The employer and employee can agree to change the terms of this agreement at any time. Any changes must be in writing and agreed to by both employer and employee.

[27] The clause states Mr Verma "...**will** work for 80 hours each fortnight...". The use of the word "will" confirms Mr Verma's obligation to work 80 hours each fortnight is mandatory. Further, the second part of the clause makes it clear he was required to work the "...agreed number of hours".

[28] The 80 hours were to be worked on Monday to Friday, although it is apparent from the documents provided to the Authority that Mr Verma worked some Saturdays and Sundays throughout the period of this employment agreement.

[29] As set out in the agreement any changes to the hours of work were required to be agreed by both S-Net Technologies and Mr Verma and any variation had to be in writing. There is no evidence of any agreement between the parties to reduce Mr Verma's hours of work.

[30] I am satisfied S-Net Technologies was contractually obliged to provide Mr Verma payment of at least 80 hours work per fortnight. For the period 10 April to 29 August 2017 Mr Verma's contracted hours of 80 per fortnight was to be paid at the rate of \$16.50 per hour.

29 August 2017 to 18 August 2018

[31] The second employment agreement entered into by Mr Verma and S-Net Technologies is dated 29 August 2017. This agreement records Mr Verma's position as Fibre Technician.

[32] The hours of work clause states:

6.1 Full Time Hours of Work

The Employee's hours of work shall be minimum 80 hours fortnightly and the salary must be credited by the employer on Friday in nominated bank account.

...

6.4 Variation to Hours of Work

The Employee's hours of work may be varied as follows:

- (i) By mutual agreement between the Employee and the Employer; or
- (ii) If agreement cannot be reached, by the Employer, following consultation with the Employee, provided that the Employees minimum hours of work are not reduced below 40 hours and that any increase in hours of work is reasonable.

When seeking to vary the Employee's hours, the Employer shall act reasonably, and shall take into account the Employee's personal circumstances and commitments.

[33] Mr Verma's hourly rate is stipulated to be \$20 per hour.

[34] Clause 6.1 states that Mr Verma's hours "...**shall** be a minimum 80 hours...". An obligation clearly arises from the use of the word "shall". The clause also clearly sets at 80 hours per fortnight the minimum number of hours to be worked.

[35] Clause 6.4 allows for variations to the hours of work by mutual agreement or by S-Net Technologies, after consultation. If S-Net Technologies wanted to reduce Mr Verma's hours of work, clause 6.4 required it to take into account his personal circumstances and commitments.

[36] There is no evidence of any agreement between S-Net Technologies and Mr Verma to reduce his minimum hours of work, neither is there any evidence that S-Net Technologies consulted with Mr Verma before requiring him to work reduced hours during the period of this agreement.

[37] The evidence shows Mr Verma's hours were set unilaterally by Mr Ndarowa with no discussion or consultation about the number of hours Mr Verma would work in any fortnightly period.

[38] I am satisfied S-Net Technologies was contractually obliged to provide Mr Verma payment of at least 80 hours work per fortnight. For the period 9 August 2017 to 18 August 2018 Mr Verma's contracted hours of 80 per fortnight was to be paid at the rate of \$20.00 per hour.

August 2018 agreement

[39] The third employment agreement entered by Mr Verma and S-Net Technologies was dated 18 August 2018. Mr Verma's position is described as Copper/Fibre Technician.

[40] The hours of work clause states:

The employee will work for 80 hours each Fortnight on Monday to Saturday, between the hours of 6am to 8pm.

The employee can choose when to start and end work each day (within agreed limits), as long as they work the agreed number of hours.

[41] Mr Verma's hourly rate was stated to be \$21.50 per hour with an annual review.

[42] As with the April 2017 agreement, this agreement uses the word "will" in setting the number of hours Mr Verma was to work. This confirms the mandatory nature of the requirement that Mr Verma work 80 hours each week. The second part of this clause allows Mr Verma to choose his starting and finishing times each day but reinforces the requirement that he work 80 hours per fortnight.

[43] Also, in line with the April 2017 agreement any variations to the terms were required to be by agreement between the parties and reduced to writing. There is no evidence that this requirement was met.

[44] I am satisfied S-Net Technologies was contractually obliged to provide Mr Verma payment of at least 80 hours work per fortnight. For the period 18 August 2018 to 3 March 2019 Mr Verma's contracted hours of 80 per fortnight was to be paid at the rate of \$21.50 per hour.

Conclusion

[45] S-Net Technologies breached the terms of Mr Verma's employment agreement when it failed to provide him with his contracted hours of work. Mr Verma has applied for penalties to be imposed on S-Net Technologies and this has been addressed later in this determination.

Did Mr Ndarowa aid and abet the breaches of the employment agreement?

[46] I find Mr Ndarowa aided and abetted the breaches of the employment agreement. Mr Ndarowa was Mr Verma's sole point of contact with S-Net Technologies and he was the decision maker with respect to the hours Mr Verma worked. At the investigation meeting Mr Ndarowa conceded he had made a mistake in not providing Mr Verma with 80 hours work each fortnight.

[47] Mr Verma has applied for penalties to be imposed on Mr Ndarowa for aiding and abetting the terms of the employment agreement. This has been addressed later in this determination.

Arrears of wages

[48] Mr Verma seeks to recover payment for the balance between the hours he worked for which he received payment, and the contracted hours of 80 per fortnight. He also seeks to recover payment for unlawful deductions made from his wages and payment for outstanding holiday pay.

Outstanding wages

[49] When he returned from India Mr Verma was offered and accepted an employment agreement with S-Net Technologies starting on 10 April 2017.

[50] Mr Verma's wages and time records have been provided by S-Net Technologies. These records show Mr Verma was not paid the minimum agreed contracted number of hours each fortnight. At the investigation meeting Mr Ndarowa accepted he had not provided 80 hours work each fortnight for Mr Verma and that this was a mistake.

[51] The records also show Mr Verma was not paid at the appropriate hourly rate from August 2018. For the period from 19 August 2018 to 3 March 2019 Mr Verma was paid at the rate of \$20 per hour and not the contracted rate of \$21.50 per hour.

[52] I have carefully reviewed the wages and time records provided by S-Net Technologies. I have used the records as the basis for cross-checking Mr Verma's calculations of what he says he is owed and the money S-Net Technology says it paid to Mr Verma.

[53] S-Net Technologies has provided the Authority with information which it says shows a significant number of absences by Mr Verma. I am not satisfied the information is reliable. While it purports to be a record of the days Mr Verma was absent from work I am not satisfied the absences were as a result of Mr Verma being unavailable for work. Instead, I have concluded on the balance of probabilities that a significant number of the days in the record were days when Mr Verma was simply not offered work.

[54] My assessment of Mr Verma's outstanding wages has been completed in three periods of time aligned to the dates for each of the three employment agreements.

10 April to 27 August 2017

[55] On seven fortnights during this period Mr Verma was not paid for his full contracted hours. Over those seven fortnights he worked a total of 501 hours instead of his contracted 560 hours.

[56] Mr Verma is entitled to recover payment of the difference of 59 hours at the rate of \$16.50 per hour totalling \$973.50 gross.

28 August 2017 to 5 August 2018

[57] At no time during this period was Mr Verma paid for his full contracted hours.

Over the 26 fortnight period he worked and was paid for a total of 1162.8 hours instead of his contracted hours of 2080.

[58] Mr Verma is entitled to recover payment of the difference of 917.2 hours at the rate of \$20.00 per hour totalling \$18,344 gross.

6 August 2018 to 3 March 2019

[59] During this period of time Mr Verma was paid at \$20 per hour instead of his contracted rate of \$21.50 per hour. He worked a total of 632.3 hours. He is entitled to recover the difference between what he was paid and what he ought to have been paid for those hours, which amounts to \$948.45 gross.

[60] In addition at no time during this period was Mr Verma paid for his full contracted hours. Over the 15 fortnight period he worked and was paid for a total of 632.3 hours instead of his contracted hours of 1200.

[61] Mr Verma is entitled to recover payment of the difference of 567.7 hours at the rate of \$21.50 totalling \$12,205.55 gross.

Unlawful deductions

[62] Mr Verma claims S-Net Technologies made unlawful deductions from his pay which equate to an unlawful premium under s 12A of the WPA. There are two elements to his claim:

- a) Firstly, that S-Net Technologies clawed back wage payments by requiring him to pay back the difference between the hourly rate shown on his pay slip and the minimum wage applicable at the time; and
- b) Secondly, that he was required to pay for advertising to retain his job when he applied for a renewal to his work visa.

[63] Section 12A of the WPA prohibits an employer seeking or receiving a premium in respect of the employment of any person.¹ Employees such as Mr Verma may recover any amount of money paid in contravention of s 12A of the WPA.²

¹ Wages Protection Act 1983, s 12A(1).

² Ibid, s 12A(2).

Claw-back on wages

[64] In his statement of problem Mr Verma seeks recovery of the amount of \$3,612.04. In a document lodged with the Authority on 19 May 2020 this claim is reduced to \$819.68.

[65] It was common ground at the investigation meeting that Mr Ndarowa and Mr Verma agreed Mr Verma would pay money back to S-Net Technologies from his pay each fortnight. The money was the difference between the applicable minimum wage rate and the rate of pay set out in the employment agreement.

[66] At the beginning S-Net Technologies received payments from Mr Verma in cash. However, from 27 October 2017 money was deducted from Mr Verma's wages as a post-tax deduction.

[67] I consider the deductions made from Mr Verma's wages were a claw back from the wages paid to him and was illegally sought and received by S-Net Technologies. The deductions were, in my considered view, a premium on employment contrary to s 12A of the WPA and were unlawful.

[68] Mr Verma's claim does not reflect the true picture of the amounts deducted which, based on the wages and time records provided to the Authority, I have assessed as amounting to \$5,823.83 net and it is that sum Mr Verma is entitled to recover.

Advertising

[69] In August 2018 Mr Verma had to apply to renew his work visa. Mr Verma approached Mr Ndarowa in July seeking his support for his renewal application.

[70] Mr Ndarowa told Mr Verma that before he could support his application for a new visa he would have to advertise the role. An advertisement was placed and Mr Ndarowa required Mr Verma to pay the advertising fee.

[71] I have categorised the payments deducted from Mr Verma's wages for advertisements advertising his role, as an illegal premium. The purpose of the advertisements were in respect of Mr Verma's continued employment.

[72] The wages and time records show two payments were deducted from Mr Verma's wages on 13 and 27 July in the sums of \$130 and \$150 respectively amounting to \$280 net.

Unpaid holiday pay

[73] Mr Verma claims he is owed unpaid holiday pay. The final pay slip provided by S-Net Technologies shows an outstanding entitlement to annual leave of 89.78 hours.

[74] The employment agreement provided for a close down period during the Christmas/New Year period each year. Where Mr Verma had worked for less than a year at the first close down the employment agreement provides for him to receive a payment equal to 8 per cent of his gross earnings to the date of the closedown.

[75] According to the payslips produced by S-Net Technologies the payment of 8 per cent was not made to Mr Verma. Instead he has been paid for two weeks annual holidays. I have concluded Mr Verma took and was paid annual leave in advance of his entitlement falling due.

[76] Mr Verma became entitled to four weeks annual leave on 10 April 2018. Taking into account the leave taken in advance at the closedown period in 2017, Mr Verma had a balance of two weeks (equivalent to 80 hours) annual leave entitlement on 10 April 2018.

[77] In the period 1 to 14 October 2018 Mr Verma took and was paid for a further 31.85 hours annual leave leaving a balance of 48.15 hours of annual leave entitlement. Mr Verma took no further holidays during his employment. When his employment ended on 3 March 2019 the entitlement to 48.15 hours remained and he was entitled to receive payment of these hours at the greater rate of either:³

- a) His ordinary weekly pay as at the end of his employment; or
- b) His average weekly earnings during the 12 months immediately before the end of the last pay period before the end of his employment.

³ Holidays Act 2003, s 24.

[78] Mr Verma's ordinary weekly pay as at 3 March 2019 and his average weekly earnings (taking into account the outstanding wages owed to him) are the same, \$860 per week, or \$21.50 per hour. On the date his employment terminated Mr Verma should have been paid for the balance of his annual leave entitlement of 48.15 hours that had arisen during his employment. At \$21.50 per hour this equates to \$1,035.23 gross.

[79] On the date of termination Mr Verma was entitled to a payment equalling 8 per cent of his gross earnings for the period from 11 April 2018 and 3 March 2019.⁴ During this period Mr Verma received payment of wages totalling \$22,176.00 gross. His arrears of wages for the same period amounts to \$18,675.55 giving him a total gross earnings of \$40,851.55. Eight per cent of this sum equates to \$3,268.12 gross.

[80] Mr Verma is also entitled to a calculation of 8 per cent on the remaining outstanding wages of \$13,795.95 which equates to \$1,103.68 gross.

[81] I am satisfied Mr Verma is entitled to recover payment for outstanding holiday pay of \$5,407.03 gross.

Conclusion

[82] Mr Verma has established he is owed arrears of wages for unpaid wages, unlawful deductions and holiday pay.

[83] S-Net Technologies Limited is ordered to pay to Mr Verma arrears of wages totalling \$37,878.53 gross plus a further amount of \$6,103.83 net under s 131 of the Act within 14 days of the date of this determination. Made up as follows:

- a) \$32,471.50 gross for unpaid wages;
- b) \$6,103.83 net for unlawful deductions;
- c) \$5,407.03 gross for unpaid holiday pay.

[84] The net payment is to recognise that tax has been paid on the sum unlawfully deducted from Mr Verma's wages. When paying the gross amounts S-Net Technologies should make the usual PAYE deductions and remit them to the Inland Revenue on Mr Verma's behalf.

⁴ Holidays Act 2003, s 25.

Did S-Net breach minimum entitlement provisions?

[85] In his statement of problem Mr Verma alleges S-Net Technologies breached minimum entitlement provisions when it:

- a) Breached the WPA by making unlawful deductions from Mr Verma's wages, requiring the payment of a premium and failing to pay wages when due;
- b) Breached the Holidays Act when it failed to pay him outstanding holiday pay at the end of his employment.

[86] Minimum entitlement provisions as defined in the Act include minimum entitlements under the WPA and the Holidays Act.⁵

Breaches of the WPA

[87] Earlier in this determination I have found S-Net Technologies:

- a) Made unlawful deductions from Mr Verma's wages;
- b) That the unlawful deductions were a "premium" in respect of Mr Verma's employment; and
- c) Failed to pay Mr Verma the entire amount of wages when they became payable.

[88] Each of those actions constitute a breach of the WPA. No penalties have been sought against S-Net Technologies for these breaches and accordingly none will be imposed.

[89] In his statement of problem Mr Verma asked the Authority to impose penalties on Mr Ndarowa personally for these breaches, however, in a document lodged in the Authority on 19 May 2020 this claim was withdrawn.

Failure to pay annual holiday entitlements

[90] Section 27 of the Holidays Act requires payment for annual holidays to be made in the pay that relates to the employee's final period of employment.

⁵ Employment Relations Act 2000, s 5.

[91] Mr Verma was not paid his full entitlement to annual holidays at the time his employment ended and accordingly S-Net Technologies has breached the Holidays Act.

[92] Mr Verma has not sought a penalty for this breach and accordingly none will be imposed.

Person involved in breaches

[93] Mr Verma sought a finding that Mr Ndarowa was a person involved in the breaches of minimum entitlements as defined in s 142W of the Act. The significance of such a finding is that, in certain circumstances, an employee may seek leave to recover wages or other money from that person if the employing entity is unable to pay those sums.⁶ This provision applies where the default in the payment of wages or other money is due to a breach of employment standards.

[94] The relevant employment standards here were the failure to pay holiday pay when due at the end of the employment, requiring Mr Verma to pay a premium for his employment and failure to pay the entire amount of wages when due.

[95] Mr Ndarowa, as the sole director of S-Net Technologies, and in his actions in operating the business, procured the breaches. He was accordingly, a person involved in a breach of employment standards under s 142W of the Act.

[96] This finding will enable Mr Verma to make a further application to the Authority under s 142Y of the Act for leave to recover the arrears of wages and holiday pay owed to him from Mr Ndarowa personally if S-Net Technologies is unable to pay those arrears.

Penalties

[97] Mr Verma seeks penalties against S-Net Technologies for its breaches of the employment agreement and against Mr Ndarowa for aiding and abetting those breaches.⁷

[98] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty where a breach is established. These considerations include whether the breach was intentional, inadvertent or negligent and

⁶ Employment Relations Act 2000, s 142Y.

⁷ Employment Relations Act 2000, s 134.

the nature and extent of any loss or damage suffered by the person in breach or the person involved in the breach.

[99] The Court has set out additional considerations in its judgments in *Borsboom v Preet PVT Limited* and *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.⁸

[100] Having considered the mandatory and common law considerations, I reach the following findings:

- a) S-Net Technologies and Mr Ndarowa's actions in failing to provide the contracted hours undermined the objectives of the Act. Particularly the objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship.
- b) The breaches were ongoing however I am satisfied that it is appropriate to deal with the breaches as one breach. The maximum total penalty available in respect of the breach is \$20,000 for S-Net Technologies and \$10,000 for Mr Ndarowa.
- c) It is likely that S-Net Technologies breaches were intentional. The failure to provide the contracted number of hours was not a one off incident and resulted in Mr Verma being under paid by in excess of \$40,000.
- d) S-Net Technologies and Mr Ndarowa's failure to offer the contracted number of hours and accordingly pay Mr Verma the amounts due resulted in him losing the use of the money he was entitled to at the time his wages became due and suffering financial hardship. S-Net Technologies on the other hand gained financially by retaining use of the money.
- e) During the investigation meeting, Mr Ndarowa acknowledged the mistakes made and that S-Net Technologies should have complied with its obligations.

⁸ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

- f) I am not aware of any other previous similar conduct by S-Net Technologies or Mr Ndarowa.
- g) It is important that a penalty be set at a level where it deters employers from failing to adhere to their contractual obligations. However, I must also take into account that S-Net Technologies is no longer conducting business operations. Its contract with Visionstream was terminated on 30 September 2019. Further, the recovery of the arrears of wages owed to Mr Verma will provide some restitution. The evidence shows Mr Ndarowa attempted to resolve the arrears of wages claims early in these proceedings but his offers were rejected,
- h) There are several aggravating factors. For example, the intentional nature of the breach, Mr Verma's loss of use of the money he was entitled to at the time it became due, the length of time over which the breaches occurred, the unlawful deductions for premiums on employment and S-Net Technologies financial gain by retaining the funds. Mr Verma was subject to a work visa binding him to employment with S-Net Technologies and was a vulnerable employee.
- i) In considering an ability to pay, or not pay a penalty I have taken into account Mr Ndarowa's evidence. He told me, and I accept, the company is no longer operating and has no assets. Mr Ndarowa told me when the contract with Visionstream was terminated he was plunged into financial hardship from which he has still not recovered. He is not currently employed and has had to sell his house.

[101] Taking into account the foregoing, I order S-Net Technologies Limited to pay a sum of \$5,000 for its breaches. This sum is proportionate to the seriousness of the breaches; the harm occasioned by them, and is just in all the circumstances.

[102] Mr Ndarowa is also liable for penalties as he aided and abetted the breaches. In all the circumstances it is appropriate that Mr Ndarowa is ordered to pay the sum of \$2,000 for aiding and abetting the breaches.

[103] These sums, are consistent with other penalties imposed by the Authority in similar cases and are appropriate taking into account the financial situation of both S-

Net Technologies and Mr Ndarowa.⁹

[104] Payment of the penalties must be made within 14 days of the date of this determination to the Employment Relations Authority.

[105] Mr Verma sought an order that the penalties, once recovered, be paid to him.¹⁰ Once the full amount of the penalty has been recovered by the Employment Relations Authority, \$2,000 is to be transferred to the Crown account and \$5,000 paid to Mr Verma.

Unjustified dismissal

[106] On 29 January 2019 Mr Verma received a letter from Mr Ndarowa advising him that S-Net Technologies was facing severe challenges with regards to shrinking workloads which was affecting the company financially. Mr Verma was advised that his contract was being discontinued and his position would become redundant on 1 March 2019.

[107] On 16 March 2019 a new employment agreement was offered to Mr Verma on the condition that he forgive his arrears of wages claims. Mr Verma declined the offer.

[108] Mr Verma's employment ended on 3 March 2019 by reason of redundancy.

[109] In order for a redundancy to be justified S-Net Technologies must demonstrate the decision to dismiss was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether S-Net Technologies 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.

[110] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.¹¹ 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

⁹ *Baker v Hauraki Rail Trail Ltd & 1 Or* [2019] NZERA 679 (s 134 \$5,000 but no evidence as to ability to pay); *Cowley v The Agri Company Ltd & 1 Or* [2019] NZERA 707; *Bicknell v Red Stag Metal Fabrication Ltd & 1 Or* [2019] NZERA 541 (s 134(2) \$500).

¹⁰ Employment Relations Act 2000, s 136(2).

¹¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

requirements.¹² This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[111] 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.

[112] The requirements in relation to consultation have been summarised by the Employment Court:¹³

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires a provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[113] The genuineness of a redundancy is an important aspect of the Authority's investigation. Once that is established, if an employer concludes an employee is surplus to its needs, the Authority is not to substitute its business judgement for that of the employer.¹⁴

Was the redundancy for genuine business requirements?

[114] Mr Ndarowa told me that S-Net Technologies suffered from financial problems and low work volumes but has failed to provide any financial information to support his assertions.

[115] Based on the evidence before me and for the following reasons I am not satisfied S-Net Technologies has established to my satisfaction that the decision to dismiss Mr Verma for redundancy was based on genuine business requirements. On balance I am satisfied the decision was for ulterior motives:

¹² *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

¹³ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54]; [2017] ERNZ 352 (2017) 14 NZELR 789

¹⁴ Above n 1 at [98].

- a) Mr Verma raised his concerns about the payment of his wages in 2018. Mr Verma met with Mr Ndarowa in April 2018 and told him of the significant financial impact the lack of hours of work and wages was having on him. Despite promises by Mr Ndarowa to rectify the issue no steps were taken by him to do so;
- b) S-Net Technologies supported Mr Verma's renewal application for his work visa in late 2018 knowing he would be constrained to working for S-Net Technologies for the duration of the renewed visa;
- c) On 16 March 2019 S-Net Technologies offered Mr Verma a new employment agreement on the condition that Mr Verma no longer pursued payment for his arrears of wages.

Was a fair process followed?

[116] The employment agreement deals with redundancy and requires notice to be given after following a good faith restructuring process.

[117] Mr Verma received written notice of his dismissal on 29 January 2019. The letter came out of the blue. The procedure followed by S-Net Technologies was non-existent.

[118] S-Net Technologies failed to follow the requirements prescribed by the Act. There was no consultation with Mr Verma prior to the decision being made to terminate his employment. There was no evidence Mr Verma knew or ought to have known that a restructuring was being considered by S-Net Technologies. There was no opportunity for Mr Verma to provide any response to the reasons for the redundancy or have any input into the decision made by S-Net Technologies and there was no exploration of alternatives to redundancy.

[119] These failures to adhere to any process were not minor and resulted in Mr Verma being treated unfairly.¹⁵ The procedural failings contributed to the lack of justification for the dismissal.

¹⁵ Employment Relations Act 2000, s 103A(5).

[120] A decision to dismiss in all the circumstances known at the time was not one a fair and reasonable employer could have made. Mr Verma was unjustifiably dismissed.

Remedies

[121] Having established a personal grievance for unjustified dismissal I may award any of the remedies provided for under s 123 of the Act. In this regard Mr Verma seeks reimbursement of lost wages for a period of 12 weeks from 3 March and compensation for humiliation loss of dignity and injury to feelings.

Lost remuneration

[122] Section 123(1)(b) of the Act provides for the Authority to award reimbursement to an employee of the whole or any part of wages or other money lost by an employee as a result of a grievance. Section 128(2) of the Act provides for mandatory reimbursement of the amount actually lost or three months' ordinary time remuneration whichever is the lesser amount.

[123] I am satisfied Mr Verma has lost wages as a result of his personal grievance. S-Net Technologies Limited is ordered to pay to Mr Verma the sum of \$10,320 under s 123(1)(b) of the Act within 14 days of the date of this determination.

Compensation

[124] Mr Verma gave compelling evidence about the effect his dismissal had on him. He relayed to me a call he received from Mr Ndarowa in October 2019 threatening him that harm would be caused to his family. He told me of the financial pressures of not having a job and the stress this caused to him particularly during his wife's pregnancy and then when she gave birth to their first child in November 2019.

[125] In all of the circumstances of this case an appropriate amount of compensation is \$15,000. S-Net Technologies Limited is ordered to pay to Mr Verma the sum of \$15,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[126] Having found Mr Verma is entitled remedies for his personal grievance for unjustified dismissal, I am required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

[127] I find Mr Verma did not contribute in any blameworthy way to the decision by S-Net Technologies to terminate his employment. Accordingly, no reduction for contribution will be made.

Costs

[128] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Verma shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. S-Net Technologies and Mr Ndarowa shall have a further seven 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.

[129] 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