

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 324
5634151

BETWEEN MUSTAFA BHAMJI
 Applicant

A N D GLOBAL COVER
 INSURANCES LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in Person
 No Appearance for Respondent

Investigation Meeting: 22 September 2016 at Auckland

Written Record of Oral 22 September 2016
Determination:

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

No Appearance by Respondent

[1] Global Cover Insurances Limited's (Global Cover's) Statement in Reply says that Mr Bhamji is claiming money from a company that has no funds. It says the business did not earn sufficient money to meet its obligations. Global Cover says it has no funds and no income.

[2] Global Cover was directed to provide copies of Mr Bhamji's wage and time records, holiday and leave records and payroll information but it failed to do so.

[3] The Authority did not receive a witness statement from any Global Cover witness so earlier this week it attempted to find out if anyone would be attending the investigation meeting today. Global Cover did not respond to these inquiries.

[4] Shortly before the Authority started its investigation meeting today Mr Nikhil (Nik) Naidu emailed the Authority saying he would not be attending because he had a sick child. Mr Naidu described himself in the email as a “*Consultant*” to Global Cover.

[5] Mr Bhamji says that Mr Naidu actually worked in the business as Global Cover’s Managing Director. Rajjeli Jiurria (Rachael) Mario is Global cover’s shareholder and is also the sole Director. There was no explanation as to why she did not attend, although Mr Naidu’s email says she was “*distressed and distraught about this issue.*”

[6] The Authority contacted Mr Naidu¹ and asked him to attend the investigation meeting by telephone conference so he could be questioned about his email, the contents of which were strongly disputed by Mr Bhamji. Mr Naidu did not respond to that request.

[7] Mr Naidu’s email claims that the parties agreed on 01 June 2015 to change Mr Bhamji’s remuneration from a salary to commission only. I do not accept that unsworn and untested evidence which is disputed by Ms Bhamji.

[8] There is no documentation to support such a fundamental change to the contractual remuneration arrangements. It was also raised by Mr Naidu for the first time today and not at the time Mr Bhamji (while employed) was seeking to be paid his unpaid salary.

[9] Mr Naidu’s email further claims that he and Mr Bhamji agreed that Mr Naidu would loan Mr Bhamji funds as a “*commission advance*” until Global Cover’s income was sufficient to cover its outgoings and Mr Bhamji’s income. I do not accept that evidence which was disputed by Mr Bhamji.

[10] I prefer Mr Bhamji’s evidence that never occurred. It is not supported by any document, it contradicts the IRD information which shows PAYE was being remitted for Mr Bhamji’s salary payments (PAFE is not payable on a loan). This claim was also only raised for the first time today and is inherently unlikely.

[11] I accept Mr Bhamji’s evidence that as the sole income earner in a family with two small children, he would never have agreed to take out a personal loan to cover

¹ By email, as we do not have a telephone number for him.

his own salary or commission which should have been paid by his employer and not him.

Employment relationship problem

[12] Mr Mustafa Bhamji was employed by Global Cover Insurances Limited (Global Cover) as an insurance broker on 27 January 2015. The parties signed an employment agreement which was dated 26 January 2015 but was not signed until 07 May 2015.

[13] In accordance with clause 4.1 of the employment agreement, Mr Bhamji's remuneration was set out in clause 6 of Schedule 1 of his employment agreement. Mr Bhamji's remuneration consisted of:

- (a) \$90,000 per annum to be paid directly into his nominated bank account on a fortnightly basis;
- (b) 5% commission on total net commission received on the specified gross written premium, to be paid every three months; and
- (c) A bonus of 5% of the total net commission for life and mortgage insurance which he referred to Global Cover.

[14] On 21 December 2015 Mr Naidu emailed Mr Bhamji with a Companies Office document which showed that Global Cover had given Mr Bhamji a new share allocation of 10 shares.

[15] Mr Bhamji says he was surprised to receive that without any prior discussion and without his consent being required but he considered it to be an indication of his achievement and security within the business.

[16] On 20 May 2016, Mr Bhamji discovered that Global Cover had failed to pay his fortnightly wages for the period 09-20 May 2016.

[17] When Mr Bhamji raised that with Global Cover Ms Mario she told him Global Cover had insufficient funds to meet its costs and asked him how Global Cover could obtain more funds. Mr Bhamji says he was shocked and surprised by this information.

[18] On 30 May 2016, Ms Mario emailed Mr Bhamji saying that Global Cover's financial situation was critical so she needed his suggestions on what to do and where they could obtain funding.

[19] Mr Bhamji raised concern with Ms Mario about why Global Cover's lack of funds was only advised to him after he queried non-payment of his wages and he reminded her that he was expecting his next fortnightly pay to be paid as usual on 03 June 2016.

[20] Mr Bhamji also advised Ms Mario that he had received a KiwiSaver statement from the Inland Revenue Department (IRD) which indicated that Global Cover had not been passing on his KiwiSaver contributions to IRD.

[21] Mr Bhamji asked Ms Mario to advise him what had happened to his KiwiSaver contributions which were being deducted from his salary in accordance with his employment agreement. He did not receive any response.

[22] Mr Bhamji says he submitted some options for Global Cover to explore to generate more revenue and some options to reduce costs.

[23] In the first week of June 2016, Mr Bhamji says he received a text message telling him to return his company vehicle. He met with Ms Mario on 02 June 2016 and during this meeting she told him to take out a personal loan to help fund the business and to help pay for his missed wages. Ms Mario stated that as a shareholder Mr Bhamji should "*help the business out*" so it could cover the immediate and short term needs of the business.

[24] Mr Bhamji said he advised Ms Mario that he had no money and no savings and was unable to borrow because he did not have an ability to service a loan so he was unable to contribute his own funds to the business.

[25] Mr Bhamji raised a personal grievance and employment relationship problem by letter dated 03 June 2016 referring to non-payment of wages and non-payment of his KiwiSaver contributions.

[26] On 17 June 2016, Mr Bhamji was required to return his tools of trade which rendered him unable to perform the duties of his role. He was also asked for all of his computer passwords and user names and logins for other business-related systems,

websites and portals that he used for work. Mr Bhamji engaged representation on 17 June 2016 and took steps to try to resolve his concerns.

[27] On 20 June 2016 Global Cover emailed Mr Bhamji with an urgent directive to return all of its property by 4pm that day. Mr Bhamji responded via his representative asking for confirmation about his employment status and raising concern that he believed he was being dismissed.

[28] On 21 June 2016, Mr Bhamji received a distressed phone call from his wife who said that Ms Mario had showed up at her (Mrs Bhamji's) work and handed the receptionist an opened letter addressed to Mr Bhamji making unsubstantiated allegations against him. Mr Bhamji and his wife both found this disclosure of his employment issues at his wife's work very distressing. They allege it is a breach of their privacy and of confidentiality of his employment agreement.

[29] On 22 June 2016, Mr Bhamji discovered that Global Cover had disconnected his mobile phone. By this stage Mr Bhamji said he was so distressed he says he was required to seek medical attention.

[30] Mr Bhamji's representative emailed Global Cover on 23 June 2016 advising that he had been constructively dismissed because he had not been paid, the company had not responded to the concerns he had raised and he had been advised to return all of his tools of trade.

[31] Mr Bhamji claims that he was unjustifiably disadvantaged in his employment and he was unjustifiably dismissed. He seeks wage arrears for unpaid wages, unpaid holiday pay and unpaid KiwiSaver contributions.

[32] Mr Bhamji also claims that Global Cover has breached his employment agreement and its obligations under the Employment Relations Act 2000 (the Act), the Wages Protection Act 1983, the Holidays Act 2003 and its good faith obligations. Mr Bhamji seeks penalties be imposed for these breaches and that some or all of the penalties be paid to him instead of the Crown.

[33] Global Cover says that it has no funds because Mr Bhamji was the sole employee managing the business income and he did not perform to expected levels. Mr Bhamji disputes that. There is no documentation to back up Global Cover's allegations about this.

The issues

[34] The following issues are to be determined:

- (a) Is Mr Bhamji owed wage arrears?
- (b) Did Global Cover dismiss Mr Bhamji?
- (c) If so, was Mr Bhamji's dismissal justified?
- (d) If not, what if any remedies should be awarded?
- (e) Did Global Cover unjustifiably disadvantage Mr Bhamji in his employment?
- (f) If so, what if any remedies should be imposed?
- (g) Did Global Cover breach its good faith obligations?
- (h) If so, should a penalty be imposed?
- (i) Did Global Cover breach Mr Bhamji's employment agreement?
- (j) If so, should a penalty be imposed?
- (k) Did Global Cover breach its obligations under the Act, the Holidays Act or the Wages Protection Act?
- (l) If so, should a penalty be imposed?
- (m) Should some or all of any penalties that may be awarded be paid to Mr Bhamji?
- (n) What if any costs should be awarded?

Is Mr Bhamji owed wage arrears?*Short payment of wages*

[35] I am satisfied on the balance of probabilities that Global Cover short paid Mr Bhamji \$119 over the period 27 January 2015 to 09 May 2016. It is ordered to repay him that amount.

KiwiSaver contributions

[36] For the purposes of this part of Mr Bhamji's claim I have used the period 27 January 2015 to 09 May 2016 which was the period during which he was being paid. I address the period from 09 May 2016 to 23 June 2016, during which Mr Bhamji was still working but not being paid, separately.

[37] Mr Bhamji was a member of KiwiSaver before he started work for Global Cover so it was required to deduct 3% of his salary and remit it to Inland Revenue Department (IRD) as his compulsory Employee KiwiSaver contribution.

[38] Mr Bhamji's compulsory Employee KiwiSaver Contribution for period from January 2015 – 09 May 2016 based on his salary of \$90,000 was \$3,427.05.

[39] Global Cover has been making deductions from Mr Bhamji's salary before paying it to him which he assumed were for his KiwiSaver. However Mr Bhamji's evidence, based on his KiwiSaver account, is that Global Cover has only remitted \$73.73 to IRD as his Employee KiiwSaver contribution.

[40] It therefore appears that Global Cover has held on to Mr Bhamji's money and used it for its own benefit because it should have but does not appear in his KiwiSaver account.

[41] Global Cover is ordered to repay Mr Bhamji \$3,353.32 for the Employee KiwiSaver Contributions it deducted from him while he was employed but which it held onto instead of forwarding to IRD on Mr Bhamji's behalf.

[42] Global Cover was also required to pay 3% of Mr Bhamji's salary to his KiwiSaver account as its compulsory KiwiSaver Contribution. For the period 27 January 2015 to 09 May 2016, Global Cover should have paid \$3,427.08.

[43] However Mr Bhamji's evidence based on his KiwiSaver records show that Global Cover only made Employer Contributions of \$207.32. Global Cover is ordered to pay Mr Bhamji \$3,219.62 as its Employer KiwiSaver Contribution arrears.

Unpaid wages

[44] I find that Global Cover failed to pay Mr Bhamji his salary from 09 May 2016 until 23 June 2016. Global Cover is ordered to pay Mr Bhamji \$9,519.23 unpaid wages plus \$258.57 Employer KiwiSaver Contribution on that amount. Global Cover is required to remit \$285.57 of the \$9,519.23 it has been ordered to pay as Mr Bhamji's compulsory Employee KiwiSaver contribution.

Holiday pay

[45] Mr Bhamji says he did not take any paid annual holiday while employed but was not paid any annual holiday pay when his employment ended.

[46] Mr Bhamji is entitled to be paid \$6,923.08 holiday pay under s.24 Holidays Act 2003 (HA03) for the first year he was employed plus \$2,907.69 being 8% of his earnings \$36,346.17² (from his anniversary date on 27 January 2016 until his employment ended on 23 June 2016).

[47] Global Cover is ordered to pay Mr Bhamji \$9,830.77 total holiday pay arrears plus \$294.92 Employer KiwiSaver to IRD on top of that. Global Cover is to remit \$294.92 of the holiday pay that has been awarded to IRD for credit to Mr Bhamji's KiwiSaver account.

PAYE deducted but not paid to IRD

[48] Global Cover should have paid PAYE to IRD of \$20,620 per annum on his salary of \$90,000. However Mr Bhamji's IRD records show that Global Cover paid PAYE of \$3,373.04 for year end 31 March 2015 and \$3,822.37 for year end 31 March 2016. Global Cover did not remit any PAYE to IRD after 31 March 2016.

[49] The total PAYE Global Cover paid to IRD was \$7,195.41. However Global Cover deducted PAYE from Mr Bhamji's salary before it paid it to him so it appears to have improperly held on to his PAYE for its use instead of passing it onto IRD.

² 21 weeks x \$1,730.77 per week.

[50] Mr Bhamji's PAYE was \$396.53 per week. He was employed for 21 weeks over period 27 January 2016 to 23 June 2016 so the total PAYE Global Cover should have paid to IRD was \$8,327.31.

[51] The total PAYE Global Cover should have paid to IRD over the duration of Mr Bhamji's employment from 27 January 2015 to 23 June 2016 was \$28,947.31 (being \$20620 plus \$8,327.31). It only paid \$7,195.41 so there is a PAYE shortfall of \$21,751.90.

[52] Global Cover is ordered to remit to IRD the \$21,751.90 PAYE which is currently missing from Mr Bhamji's IRD account.

Did Global Cover dismiss Mr Bhamji?

[53] Mr Bhamji bears the onus of establishing on the balance of probabilities that his employment ended because he was constructively dismissed. Dismissal is a situation where the initiative for the ending of the employment comes from the employer, notwithstanding the employer may not have actually used the words "*you are dismissed*".

[54] I find that Mr Bhamji has discharged the onus of establishing that he was dismissed.

[55] It is a fundamental breach of a key term of his employment for Global Cover to fail to pay him at the agreed time for work he had done. Mr Bhamji took reasonable steps to address Global Cover's failure to pay him but the issue was not resolved.

[56] In addition to not paying him, Global Cover also took steps to remove his tools of trade such as his vehicle, his business equipment such as a mobile phone, company information, computers, stationery, client files and documentation and the like.

[57] Global Cover also required Mr Bhamji to relinquish access to Global Cover's computer systems and to his usernames, passwords and logins for business-related systems, websites and portals.

[58] I am satisfied that these were fundamental breaches by Global Cover of its obligations as an employer. These breaches were so serious that it was reasonably foreseeable that Mr Bhamji would not agree to continue working in the face of such breaches.

[59] I find that Global Cover repudiated its obligations under Mr Bhamji's employment agreement and he accepted that repudiatory conduct had ended his employment.

Was Mr Bhamji's dismissal justified?

Justification test

[60] Justification is to be objectively assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether how the employer acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances.

[61] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s.4(1A) of the Act. Section 4(1A) of the Act requires an employer which is proposing to make a decision that may adversely impact on an employee's employment to provide the employee with relevant information and an opportunity to comment on it before a final decision is made.

[62] It also includes each of the four procedural fairness tests set out in s.103A(3) of the Act. A failure by an employer to comply with its statutory obligations is likely to fundamentally undermine its ability to justify its dismissal.

Breach of good faith obligations

[63] In this case, I find that Global Cover breached its good faith obligations because although it advised Mr Bhamji that the company was facing money problems it only did so after it had already fundamentally breached its obligations to him by failing to pay him his wages.

[64] I also find that Global Cover did not provide Mr Bhamji with all relevant information which would have enabled him to understand the company's situation and therefore have an input into decisions which were being made which adversely affected his ongoing employment.

Procedural fairness tests – s.103A(4) of the Act

[65] I find that none of the four procedural fairness tests in s.103A(3) of the Act were met because Global Cover constructively dismissed Mr Bhamji without any fair or proper process having been adopted.

Section 103A(5) of the Act

[66] I find that s.103A(5) of the Act does not prevent the Authority from finding that Mr Bhamji's dismissal was justified solely because of minor process defects that did not result in unfairness. I find that the process defects here were fundamental and resulted in significant unfairness to Mr Bhamji.

Substantive justification

[67] Global Cover also failed to provide sufficient information to establish that it had a substantive justification for acting in the way that it did. I consider the fact that it did not raise its financial difficulties with Mr Bhamji at the outset but rather left it in his hand to chase up his unpaid wages and to try to extract information about what the company's financial position meant for him personally has undermined its attempts to establish substantive justification.

[68] I find that Global Cover is unable to discharge its onus of justifying Mr Bhamji's dismissal.

Outcome

[69] I find that Mr Bhamji's dismissal was substantively and procedurally unjustified.

What if any remedies should Mr Bhamji be awarded?*Mitigation*

[70] Mr Bhamji has an obligation to mitigate his loss. I am satisfied that he did so because he obtained a new job last month.

Lost remuneration

[71] Mr Bhamji says he has not earned anything between his employment ending on 23 June 2016 and obtaining new employment on 17 August 2016.

[72] I am satisfied that Mr Bhamji has lost eight weeks' remuneration as a result of his unjustified dismissal so he is entitled to be compensated for that.

[73] Global Cover is ordered to pay Mr Bhamji \$13,846.15 lost remuneration under s.128(2) of the Act plus \$415.38 to IRD as its Employer KiwiSaver Contribution on the lost remuneration awarded. Global Cover is also ordered to remit \$415.38 of the lost remuneration awarded to IRD as Mr Bhamji's Employee KiwiSaver Contribution.

Distress compensation

[74] I accept Mr Bhamji's evidence that the circumstances of his dismissal were acutely embarrassing and humiliating for him. I consider that this situation was aggravated by Global Cover's inappropriate actions towards Mr Bhamji which included making unsubstantiated allegations against him and threatening him with potential legal action.

[75] I also consider that the manner in which Global Cover turned up at Mr Bhamji's wife's work and presented an opened letter about her husband to one of her work colleagues has increased the distress Mr Bhamji has suffered as a result of his unjustified dismissal.

[76] Mr Bhamji and his wife both gave compelling evidence of the very real stress and humiliation they suffered. Mr Bhamji also required medical support. I do not set the detail of their evidence out here in order to preserve their privacy.

[77] Global Cover is ordered to pay Mr Bhamji \$10,000 under s.123(1)(c)(i) of the Act.

Contribution

[78] In accordance with s.124 of the Act, having established that Mr Bhamji has a grievance, I must now consider whether or not his remedies should be reduced on the grounds of contribution. I find that they should not.

[79] I am not satisfied that Mr Bhamji has engaged in any blameworthy conduct which would warrant a reduction in remedies. Accordingly, no reduction is to be made to the remedies he has been awarded.

Did Global Cover breach its good faith obligations?

[80] I have already found as part of Mr Bhamji's dismissal grievance that Global Cover breached its obligations under s.4(1A) of the Act.

Should a penalty be imposed?

[81] I consider that the breach of good faith forms part of Mr Bhamji's dismissal grievance, so it has been dealt with under that heading. I therefore decline to impose a separate penalty for the breach of good faith.

Did Global Cover breach Mr Bhamji's employment agreement?

[82] I have already found that Global Cover did breach Mr Bhamji's employment agreements part of my findings regarding his dismissal grievance.

Should a penalty be imposed?

[83] I decline to impose a penalty because I consider this matter has been dealt with as part of Mr Bhamji's dismissal grievance.

Did Global Cover breach its obligations under the Act, the Holidays Act or the Wages Protection Act?

[84] I have already found as part of Mr Bhamji's dismissal grievance that Global Cover breached the Act by failing to meet its good faith obligations to him under s.4(1A) of the Act.

[85] I further find that Global Cover's failure to pay Mr Bhamji his holiday pay upon termination is a breach of its obligations under the HA03 and its failure to pay him his wages without deduction is a breach of the WPA83.

Should a penalty be imposed for these breaches?

[86] I consider it appropriate to impose a penalty on Global Cover to express disapproval of its actions, to punish it for its breaches of minimum code legislation

and to act as a deterrent to other employers who may be tempted to engage in such breaches.

[87] I take a totality approach to awarding penalties for these various breaches. Accordingly, Global Cover is ordered to pay \$4,000 to the Crown for its breaches of the Act, the Holidays Act and the Wages Protection Act.

Should some or all of the penalty be paid to Mr Bhamji?

[88] I accept Mr Bhamji's evidence that he has suffered as a result of Global Cover's breaches. I therefore order Global Cover to pay \$2,000 of the penalty that has been imposed on it directly to Mr Bhamji. The remaining \$2,000 penalty is to be paid to the Crown bank account.

Should Mr Bhamji be awarded interest?

[89] I am satisfied that this is an appropriate case within which to exercise the Authority's discretion to order Global Cover to pay interest on the amounts outstanding.

[90] Global Cover is ordered to pay Mr Bhamji interest at the current prescribed rate of 5% per annum on the amount of \$40,883.95.³ Interest on this amount therefore accrues at the rate of \$5.60 per day.

Costs

[91] Mr Bhamji as the successful party is entitled to a contribution towards his actual costs. Although Mr Bhamji appeared himself today he told me he has incurred actual legal costs of \$11,000 getting to this point so he seeks to be reimbursed for that.

[92] I adopt the Authority's usual notional daily tariff based approach to costs. The current tariff is \$3,500 which needs to be adjusted pro-rata for the investigation meeting time required.

[93] This matter involved five hours so Global Cover is ordered to pay Mr Bhamji \$2,500 towards his actual legal costs plus \$71.56 to reimburse him for his filing fee.

³ Being \$26,622.42 total wage arrears and \$14,261.53 total lost remuneration awarded for his unjustified dismissal

Outcome

[94] Within 28 days of the date of this determination Global Cover is ordered to pay Mr Bhamji:

- a. \$14,261.53⁴ lost remuneration inclusive of Employer KiwiSaver Contribution;
- b. \$10,000 distress compensation;
- c. \$26,622.42 wage arrears⁵;
- d. \$2,000 of the penalties imposed on him.
- e. \$2,500 towards his legal costs;
- f. \$71.56 for his filing fee.

[95] Within 28 days of the date of this determination Global Cover is also ordered to pay:

- a. \$2,000 of the penalties imposed on it to the Crown bank account;
- b. \$21,751.90 PAYE arrears to IRD.

Rachel Larmer
Member of the Employment Relations Authority

⁴ Includes \$415.38 as the 3% Employer KiwiSaver Contribution on the lost remuneration of \$13,846.15 awarded.

⁵ \$119 short pay + \$3,219.62 Employer KiwiSaver Contribution arrear + \$3,353.32 Employee KiwiSaver arrears + \$9,830.76 unpaid salary + \$285.57 Employer KiwiSaver Contribution on unpaid salary + \$9,830.76 unpaid holiday pay + \$294 Employer KiwiSaver Contribution on unpaid holiday pay.