

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 537
3243259

BETWEEN RAPHAEL KRUGER
Applicant

AND JOLLYBIKES LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: Tim Vogel, advocate for the Applicant
Matthias John, for the Respondent

Investigation Meeting: 7 and 8 May 2024 in Auckland

Submissions and further 24 May 2024 and 25 June 2024 from the Applicant
information received: 10 May 2024 and 14 June 2024 from the Respondent

Determination: 6 September 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Raphael Kruger was employed by Jollybikes Limited (JBL) as a general manager. He resigned from JBL, and his employment ended on 2 May 2023. Mr Kruger claimed he was unjustifiably disadvantaged and constructively dismissed by JBL. He also claimed JBL had failed to properly pay him during his employment.

[2] JBL opposed Mr Kruger's grievance claims and said Mr Kruger was responsible for managing his own work hours and was properly paid for all his work during his employment.

The Authority's investigation

[3] For the Authority's investigation, written witness statements were lodged by Mr Kruger and his wife Susanna Kruger. For JBL, witness statements were lodged by JBL director Matthias John, his wife Elena Casares del Arco and JBL employee, Rebecca

Alsbury. These witnesses attended the investigation meeting and answered questions under oath or affirmation from me and the parties' representatives.

[4] Witness statements were also admitted as evidence by consent from JBL workers, Christian Vaos, Lee Phillips, Lisa Lomas, Neil Kaku and Rene van Rijn. Witness statements were also admitted by consent for Monika Lange and Lutz Lange. The representatives also lodged written closings submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the ER 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 recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Did JBL fail to pay outstanding wages to Mr Kruger? If so, should the Authority order reimbursement of any outstanding wages to Mr Kruger?
- (b) For any order for reimbursement by JBL to Mr Kruger of outstanding wages, should interest be awarded on that amount, pursuant to clause 11 of Schedule 2 of the ER Act?
- (c) Whether JBL had breached the requirements of the Holidays Act 2003 (the HA), the Wages Protection Act 1983 (the WPA), the Minimum Wage Act 1981 (the MWA) and the ER Act? If so, should a penalty be imposed for each established breach?
- (d) Was Mr Kruger unjustifiably disadvantaged by JBL when JBL allegedly:
 - (i) failed to pay his outstanding wages; and
 - (ii) demoted him from his position of general manager for JBL?
- (e) Was Mr Kruger constructively dismissed by JBL?
- (f) If Mr Kruger was unjustifiably disadvantaged and/or unjustifiably dismissed, to determine further whether he is entitled to:

- (i) reimbursement of lost wages pursuant to s 123(1)(b) of the ER Act;
and
 - (ii) compensation under s 123(1)(c)(i) of the ER Act?
- (g) Whether Mr Kruger is entitled to special damages?
- (h) Whether one party is to pay costs of representation to the other?

Context

Mr Kruger's employment with JBL

[7] JBL's primary business was as a bike sales and tour provider situated in Thames. Mr Kruger started working for JBL on 1 June 2022. As part of his employment agreement Mr Kruger was required to work 40 hours a week from Monday to Friday. Mr Kruger was also required to work every second Saturday but was expected to adjust his hours to ensure he still worked his agreed 40 hours a week.

[8] Mr Kruger was paid a salary of \$60,000 a year. His employment agreement also had an on-call provision where if he was on call, he would receive an additional \$3 for each on-call hour. He would be paid time and a half (of his calculated hourly rate) if he was called out.

[9] Mr Kruger's duties covered many aspects of JBL's business which included managing JBL staff, being responsible for JBL's accounts and dealing with JBL's day-to-day shop customers.

The bike tours

[10] Around July 2022 a German bike tour company approached JBL requesting assistance with two bike tours in the South Island planned for January to March 2023 (the bike tours). JBL accepted and took steps to prepare for the bike tours.

[11] In preparing for the bike tours, JBL agreed with Mr Kruger for him to attend the bike tours as a designated driver for both tours. This meant he was responsible for picking up the tour participants and driving them to separate locations as part of the tours.

[12] The tour started on 23 January 2023 and ended on Sunday 12 March 2023. The parties dispute what tasks Mr Kruger carried out while he was on tour and whether he was to be paid for these tasks.

Mr Kruger's meeting with JBL

[13] Upon returning from the bike tour, JBL invited Mr Kruger to a meeting on Monday 13 March (the March meeting). Mr John attended the meeting with Mr Kruger. Mr John said the purpose of the March meeting was to discuss future work arrangements for Mr Kruger as he returned to his regular role for JBL.

[14] During the March meeting, Mr John raised a proposal to change aspects of Mr Kruger's role for JBL moving forward. No specific agreement was reached on changes to Mr Kruger's role, but both agreed for Mr Kruger to take paid leave for the following two days. After the initial two days leave, Mr Kruger took the remaining week off work as leave without pay.

[15] Following his leave without pay, Mr Kruger took sick leave during the following week. On Monday 20 March 2023 Mr Kruger through his representative (and while on sick leave), sent JBL a letter claiming he was owed unpaid hours and holidays throughout the period of his employment (including the bike tours).

[16] On Wednesday 22 March 2023 Mr Kruger resigned from his role with JBL with his intended last day of work being Tuesday 2 May 2023. After resigning, Mr Kruger returned to work and continued to work up until his last day.

[17] JBL disputed Mr Kruger's pay claims on 25 March 2023. This led to further interactions between JBL and Mr Kruger disputing aspects of Mr Kruger's employment. On 3 August 2023 Mr Kruger lodged his claims against JBL with the Authority.

Mr Kruger's wage arrears claims

General claims relating to Mr Kruger's work for JBL

[18] Mr Kruger claimed he was owed payment for 565.46 hours of work by JBL covering his work from 1 June 2022 to 2 May 2023. As a result, Mr Kruger claimed wage arrears from JBL for \$16,315.52 gross. This was based on an hourly rate of \$28.85 calculated from his annual salary and agreed work hours. Mr Kruger's claimed

hours of work were for hours he worked over and above his usual 40 hours of work a week.

[19] Both parties agreed Mr Kruger was responsible for managing his work hours and JBL's overall work roster. Upon starting his employment, Mr Kruger said he was enthusiastic about his role for the company. He said he would sometimes work over his 40 hours a week to ensure JBL's business would be appropriately serviced.

[20] Mr Kruger was not required to record his hours or report his hours to JBL. Because of this work arrangement there were no time records to show what hours Mr Kruger had worked. His pay records only showed he was constantly paid the same salary each week. Because there were no records to show what hours Mr Kruger worked, his claim for hours relied on his Google location history as recorded by his mobile phone (the Google location records).

[21] Mr John disputed Mr Kruger's wage arrears claims because he said, Mr Kruger was responsible for managing his hours in a way which meant he was able to adjust his work so he worked his 40-hour week. The parties dispute whether Mr Kruger had raised issues about working over his agreed 40 hours a week.

Outcome of Mr Kruger's general wage claims

[22] Assessing Mr Kruger's work hours was difficult for several reasons. As a salaried employee, it was not unusual for Mr Kruger's work hours to fluctuate. This was even more so in circumstances such as in Mr Kruger's case, where he was responsible for the day to day running of JBL's business.

[23] The nature of Mr Kruger's work arrangement with JBL meant there was a considerable amount of trust on Mr Kruger to assess his work hours. In evidence, he accepted he should have arranged his work hours, so he remained within his 40 hours a week. He also said it was on his own initiative to work more hours because he was enthusiastic about progressing the needs of the company.

[24] Mr Kruger was in the best position to report back to JBL when he felt he had worked considerably over and above his 40 hours a week. Although the parties dispute whether Mr Kruger raised the issue about his hours before the bike tours, there was insufficient evidence to show Mr Kruger had raised this issue before he left for the bike tours.

[25] The Google location records were also inconclusive as to what actual hours Mr Kruger had worked for JBL. Mr Kruger, Mr John, and Ms Albury all confirmed Mr Kruger having his mobile home parked at the JBL shop property at various times during his employment. Ms Albury said Mr Kruger would sometimes carry out maintenance work on his mobile home while at work for JBL. The JBL employees also referred to Mr Kruger taking extensive breaks while he was working at the shop.

[26] There was an obligation on JBL to keep wage and time records for Mr Kruger. JBL failed to keep wage and time records and as result, Mr Kruger's evidence was considered to determine what hours he had worked for JBL.¹ Due to the stated difficulties in respect of the Google location records, the evidence is inconclusive as to whether Mr Kruger had worked the additional hours he claimed.² Based on these difficulties, no finding can be made as to whether Mr Kruger is owed unpaid wages for his work for JBL.

Mr Kruger's claims in respect of the bike tours

[27] Both parties agreed Mr Kruger's work on the bike tours was different to his role as a general manager. JBL acknowledged Mr Kruger's work on the bike tours was a variation to his employment agreement with JBL.

[28] JBL did not provide Mr Kruger with a written variation to his employment agreement. Mr John said he had intended to give Mr Kruger a written variation but decided not to. His reason was because he believed Mr Kruger was sufficiently informed about all aspects of his role on the bike tours.

[29] Mr John said there was a preliminary discussion between JBL, the tour operator and Mr Kruger about his obligations before the tour started. He said they agreed for Mr Kruger to work the same hours and be paid his salary in the same way as he was usually paid under his existing employment agreement for JBL.

[30] Mr Kruger disagreed with Mr John and said it was not made clear to him what his hours and tasks would be. Once he started working on the tour, Mr Kruger said he had to carry out tasks on top of his driving tasks. His tasks included packing and

¹ Employment Relations Act 2000, s 131.

² *Rainbow falls Organic Farm Ltd v Rockwell* [2014] NZEmpC 136 at [29] - The Authority does not have to accept employee evidence about its pay, hours, days worked.

unpacking the tour bus, shopping for tour supplies and food preparation for the tour participants.

[31] Mr Kruger also said he had to work longer hours. Because he was on tour and away from home, he said he had no choice but to do the work. If he decided not to work, it would adversely affect JBL's reputation and the tourists' own needs.

[32] Lutz Lange attended the bike tours as the owner operator and guide for the tour. He confirmed Mr Kruger's various tasks and expressed the flexible but also unpredictable nature of the work required on the tour.

[33] Mr Kruger claimed he had worked 49 days while he was on tour and said he was owed \$8,336.44 gross. His calculation for his arrears took into account his normal 40 hours a week but his claim accounted only for hours he worked over and above 40 hours. This came to a deficit totalling 288.75 hours based off his google location records.

[34] Mr John also attended a portion of the bike tours. On behalf of JBL he provided his calculation based off his estimation of what hours Mr Kruger would have worked while on tour. Mr John confirmed his calculation was based on his observation of Mr Kruger after being on the bike tours for around a week.

Outcome of Mr Kruger's bike tours wage arrears claims

[35] There was a clear dispute between the parties as to what Mr Kruger's work arrangement was supposed to be during the bike tours and how he would be paid for any work over and above the 40-hour period. A written variation to Mr Kruger's employment would have helped clarify both the nature of Mr Kruger's tasks and his work hours.

[36] Based on the available evidence, Mr Kruger's account of his hours worked during the bike tours is accepted over Mr John's account. The main reason for this was because he was responsible for many different tasks (including his driving tasks). The additional hours he claimed were reasonable given the nature and the demands of the bike tours.

[37] JBL is ordered to pay Mr Kruger wage arrears of \$8,336 gross within 28 days of this determination.

Interest on the arrears

[38] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[39] It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Kruger is entitled to an award of interest on his wage arrears. JBL is ordered to pay interest, using the civil debt interest calculator, within 28 days of this determination, on the sum of \$8,336 gross, being the total of arrears awarded, calculated from 12 March 2023 until the date payment is made in full.³

Should a penalty be imposed against JBL?

[40] While Mr Kruger worked on the bike tours, he said JBL had breached various employer statutory obligations. He said these breaches stem from deliberate actions by JBL to avoid paying for the days and hours worked by him. As a result, Mr Kruger claimed penalties for JBL's breach of the:

- (a) HA for not paying him time and a half for working on two public holidays;⁴
- (b) WPA for not paying him all his wages when they became due;⁵
- (c) MWA for paying him less than the minimum adult wage;⁶ and
- (d) ER Act for not providing him with accurate details of his wages and hours.⁷

[41] Mr John disagreed with Mr Kruger's claims and said JBL had always honoured its employment obligations. He also conceded JBL had failed to pay for two public holidays during the bike tours. JBL rectified this failure by paying Mr Kruger once it became aware of its failure to do so.

[42] In terms of JBL's obligation to keep wage and time records, Mr John said Mr Kruger had a delegated responsibility to maintain these records for himself. This view was incorrect. As an employer, the overriding obligation to keep wage and time records was on JBL.⁸

³ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

⁴ Holidays Act 2003, s 55.

⁵ Wages Protection Act 2003, s 4.

⁶ Minimum Wage Act 1983, s 10.

⁷ Employment Relations Act 2000, s 130(2).

⁸ Employment Relations Act 2000, s 130.

[43] For the bike tour, there was sufficient evidence to show JBL had breached its obligations under the ER Act, HA, the WPA and the MWA. There was no evidence to show JBL's actions were intentional. Although much of the breaches related to failures between the parties to agree to Mr Kruger's working situation while on the bike tours, a nominal penalty is appropriate. A penalty in this case would send a message to employers to ensure appropriate steps are taken to properly account for their employees' minimum employment entitlements.

[44] A penalty is imposed against JBL on a global basis taking into account the various breaches. JBL is to pay a penalty of \$1,500 to the Crown and to do so within 28 days of the date of this determination.

Unjustified disadvantage claims

Disadvantage claim for non-payment of wage arrears claims

[45] Mr Kruger claimed he was unjustifiably disadvantaged when JBL failed to pay his wage arrears. Much of the circumstances behind Mr Kruger's wage claims have already been addressed in this determination.

[46] The Employment Court has recently provided guidance in interpreting whether disputes regarding payment of wages can be considered as part of an employee claim for unjustified action under the ER Act.⁹ The Court found any:

...unjustifiable action by the employer does not include an action deriving solely from the interpretation, application or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.¹⁰

[47] JBL's dispute of Mr Kruger's claims arose from its interpretation of how Mr Kruger was to manage his 40 hours work in line with his equivalent usual salary pay amount. Mr Kruger's disagreement with JBL was about the application or the operation of how Mr Kruger was to carry out his work and how he was to be paid for work over his 40 hours a week. For this reason, Mr Kruger's wage arrears claims could not be investigated as an unjustified disadvantage claim under the ER Act.

⁹ Employment Relations Act 2000, s 103(3).

¹⁰ *Breen v Prime Resources Company Ltd* [2023] ERNZ 816 at [25].

Disadvantage claims for Demotion

[48] Mr Kruger said JBL planned and eventually demoted him from his role as general manager. He admitted JBL did not specifically say he was demoted, but he took from their actions, he was being demoted.

[49] Mr Kruger relied on his discussion with Mr John during the March meeting to claim JBL had intended to demote him by changing his role. He also said his demotion occurred after he had resigned from his role, and he had returned to the workplace after being on sick leave. Upon returning, he said his role was relegated to menial tasks which included weed eating.

[50] JBL disagreed with Mr Kruger and said it always wanted Mr Kruger to retain his role as general manager up until the end of his employment. Mr John said the March meeting was his opportunity to discuss with Mr Kruger a way to change his work tasks to suit his work strengths.

[51] Leading up to the bike tours Mr John acknowledged various instances where JBL thought Mr Kruger's development in aspects of his role was not to their expectation. Although there were no formal performance discussions between Mr Kruger and JBL, steps were previously taken to address his weaknesses. As an example, Mr Kruger was not experienced in the use of JBL's business management tool Xero. A contractor was engaged to help Mr Kruger with this tool.

[52] There was insufficient evidence to support Mr Kruger's claims he was disadvantaged due to being demoted by JBL. JBL's actions during the March meeting were facilitative as it took steps to discuss (and possibly negotiate) Mr Kruger's future tasks as its general manager. No decisions were made during this meeting.

[53] Although Mr Kruger's tasks did change upon his return to the workplace (after the bike tours), he had already resigned. Aspects of his role were being passed to other JBL employees. It was reasonable for JBL to take steps to prepare for the pending departure of an employee. This was especially given the importance of Mr Kruger's responsibilities as general manager for JBL's business. It was also important to note, Mr Kruger did not appear to raise any dispute or opposition to the change of his tasks from after his resignation up until his last day of work. For these reasons, Mr Kruger

had not sufficiently established his claim for unjustified disadvantage due to being demoted by JBL.

Constructive dismissal claim

[54] Mr Kruger said he resigned from his employment due to JBL's actions which he said irreparably destroyed their employment relationship. Mr Krueger's allegations were based on his views of:

- (a) Reports from other JBL staff saying Mr Johns wanted to 'get rid of' him;
- (b) Being spied upon by other JBL staff after he returned from the bike tours;
- (c) His alleged demotion from his role as operation manager for JBL; and
- (d) JBL's refusal to pay him for hours worked.

[55] As already set out in this determination, Mr Kruger was not demoted from his general manager role. The issue regarding Mr Kruger's wage arrears has also been addressed earlier in this determination. JBL also disagreed with Mr Kruger's allegations he was being spied upon and JBL had wanted to 'get rid of him.'

[56] A constructive dismissal is when an employer's conduct compels a worker to resign. This includes circumstances where an employee's disadvantage was caused by an employer's breach of obligations owed to the employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee an employee would resign rather than put up with the ongoing breaches.¹¹

[57] In Mr Kruger's case, his claims for constructive dismissal are unsuccessful for several reasons. Firstly, there was insufficient evidence to show JBL had intended to end its employment relationship with Mr Kruger. Apart from Mr Kruger's own allegations, there was no further corroborating evidence to show any direct communication from JBL to Mr Kruger or any other JBL employee of its intention to 'get rid of' Mr Kruger.

[58] Secondly, upon returning from the bike tours, Mr Kruger went on leave and remained on leave until he resigned. Any alleged allegations of spying upon his return

¹¹ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

would have likely occurred after his resignation (and his return to the workplace). Even so, any allegations of spying at any point of Mr Kruger's employment were not sufficiently proven.

[59] Thirdly, Mr Kruger only raised his claims for wage arrears two days before resigning from JBL. It is unclear whether Mr Kruger had raised these issues previously with JBL. Almost all the evidence around the wage arrears dispute between them arose from interactions occurring after the bike tours. For these stated reasons, Mr Kruger's resignation was not reasonably foreseeable by JBL. Mr Kruger's claim for constructive dismissal is dismissed.

Remedy and special damages

[60] For the reasons given, Mr Kruger had not established JBL had unjustifiably disadvantaged him, or he was constructively dismissed. Accordingly, an analysis into remedies was not required.

[61] Mr Kruger also claimed special damages relating to legal representative fees incurred by him prior to the matter being lodged at the Authority. He claimed these costs were reasonably incurred because he was making "no headway" with JBL in trying to resolve his claims.

[62] JBL opposed Mr Kruger's claim for special damages because it said Mr Kruger chose to engage legal representation before engaging with JBL himself to discuss his dispute.

[63] Although Mr Kruger was partially successful in his claims against JBL for wage arrears, he was unsuccessful in all his other remaining claims. Any initial resistance by JBL to resolving Mr Kruger's claims (prior to coming to the Authority) were reasonable.

[64] This was especially given Mr Kruger had not previously raised an employment relationship problem with JBL (until he did so through legal representation). For this reason, Mr Kruger's claim for special damages is declined.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority

determination on costs is needed, Mr Kruger may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum JBL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[66] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

Alex Leulu
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1