

[2] Vishaal Kumar says that when he commenced employment he received \$12 per hour and despite drawing this to the attention of Hobden's managing director, Mr Ashok Kumar, the company refused to increase his hourly rate. Vishaal Kumar also says that although he often worked much more than a standard 40 hour week he never received any additional (i.e. enhanced) payment for hours in excess of 40 per week.

[3] Vishaal Kumar says that over the period of his employment he was required to work in unsafe and hazardous conditions and as a consequence suffered from severe headaches, shortness of breath and chemical burns. However he says that when he raised these concerns with Ashok Kumar he was told he should look for another job. He says that by early 2008 the underpayment of his wages, the hazardous conditions and the hours he was required to work put him into a position where he believed he had no option but to resign his position.

Hobden Screen Art's response

[4] During the Authority's investigation Hobden produced an alternate employment agreement, apparently signed by Vishaal Kumar. This agreement was purportedly signed on 19 June 2007 and sets an hourly rate of \$12 per hour. Hobden said that the earlier agreement was signed *simply for the purposes of obtaining Vishaal Kumar's work permit* and that both parties had always been clear that the correct rate was \$12 per hour. Ashok Kumar says that Vishaal Kumar never complained about his hourly rate. Despite the fact that this second employment agreement appears to be an original, Vishaal Kumar categorically denies that the signature is his and says it is a forgery.

[5] In response to Vishaal Kumar's suggestion that he worked long hours without additional payment Hobden says that Mr. Kumar did not work particularly long hours, he was paid for all of the hours he worked and his employment agreement (both versions) did not provide for additional payment for hours over and above 40.

[6] Hobden say that Vishaal Kumar was not able to work unsupervised and did not have the necessary experience and knowledge to work independently. Ashok Kumar suggests that Vishaal Kumar had had a major accident prior to taking up his employment and suggests that his headaches could have been a result of that injury.

[7] Hobden say that the work area is well ventilated and modern and that the building meets OSH certification. Ashok Kumar says none of the staff has suffered from headaches or any other health problems due to working in the workshop. He says that his staff are always provided with proper work equipment including gloves, nose masks and safety boots. Ashok Kumar also says there was no pressure or stress at work.

Issues for Determination

[8] There are four issues for determination:

- a. What hourly rate was Mr Vishaal Kumar entitled too; was he underpaid and, if so by how much?
- b. Were his conditions of work unsafe?
- c. If Vishaal Kumar was underpaid and if his working conditions were unsafe did these factors result in his unjustified constructive dismissal?
and
- d. If Mr Kumar was unjustifiable dismissed what remedies is he entitled too?

Discussion and determination

What hourly rate was Vishaal Kumar entitled to?

[9] In an effort to clarify whether or not the signature on the "second" employment agreement was a forgery, as asserted by Vishaal Kumar, or an amended employment agreement as asserted by Ashok Kumar, I arranged for both documents to be sent to the New Zealand Police for analysis. The police senior document examiner reached the following conclusions:

The employee's signature on the questioned document (the agreement signed on 19 June) contains a general pictorial similarity to the specimen signatures attributed to Vishaal Kumar.

However the questioned signature also contains differences in gross features and subtle details from the specimen Vishaal Kumar signatures.

These differences provide evidence that the questioned signature is a simulation/copy of the signature style seen in the specimen's attributed to Vishaal Kumar.

Because the act of copying/simulation tends to mask the natural writing habits of the author, no opinion of authorship has been possible in relation to the questioned signature.

[10] In other words the signature on the second employment agreement, purported to have been signed by Vishaal Kumar, is a forgery. The document examiner was however not able to rule out the possibility that the "forgery" was done by Vishaal Kumar himself by "signing" his name in an unusual manner.

[11] It is of course possible that Vishaal Kumar deliberately manipulated his signature on the second employment agreement in order to subsequently claim that he had been underpaid. I reject this possibility as being extremely unlikely. It would have required forethought and considered dishonesty on Vishaal Kumar's part. On the balance of probabilities and having considered the police document examiner's full report and heard both parties evidence on the matter, I find that Vishaal Kumar did not sign the employment agreement dated 19 June 2007. **As a consequence of this finding Vishaal Kumar was entitled to receive the hourly rate set out in the agreement he did sign on 6 June 2007 i.e. \$17.00 per hour.**

Were Mr Vishaal Kumar's working conditions unsafe?

[12] The evidence in respect to the working conditions at Hobden Screen's worksop is inconclusive. As part of my investigation I visited the site and the company pointed to the extractor fan which they say kept the fumes in the area at a safe level. They told me that they had had visits from an health and safety inspector who had agreed that the working conditions were safe and other staff I spoke to all confirmed that they considered the conditions were safe and that all safety equipment was provided as required. Both Ashok Kumar and other staff say that the extractor fan had been there for a number of years, including the period of time Vishaal Kumar

was employed.. Vishaal Kumar on the other hand produced photographs taken while he was still employed which he says show that, at that time, the extractor fan was not installed. He says that safety equipment was not always available.

[13] Unfortunately the photos produced by Vishaal Kumar do not conclusively show that the extractor fan was not installed. Neither do they show that it was. The angle from which the pictures were taken has resulted in the area of the ceiling in which the extractor fan is now installed is masked by the fluorescent lights.

[14] While Vishaal Kumar says that he suffered from frequent headaches while he was employed at Hobden, the only medical certificate he has produced is dated 21 January 2008 i.e. at about the time he left Hobden's employment. Although this report includes comments regarding Vishaal Kumar's exposure to symptoms developed as a result of exposure to chemicals and fumes, this history is as reported by Vishaal Kumar to his medical practitioner at that time and cannot therefore be said to corroborate Vishaal Kumar's evidence of earlier exposure. There is also no direct evidence that Vishaal Kumar actively pursued his employer to improve his employment conditions.

[15] While I accept that Vishaal Kumar may have suffered headaches and other symptoms while working at Hobden, it is not possible to draw any absolute conclusion that the symptoms were caused by his working conditions. Without wishing to denigrate or make light of Vishaal Kumar's symptoms it is possible, for example, that he was particularly susceptible to the chemicals used in the screen printing process and that he therefore suffered symptoms which other employees did not. Without a good deal more evidence it would not be appropriate to draw any broader conclusion than that of his medical symptoms contributed to his decision to resign. It would not be appropriate to conclude that these medical symptoms were a direct result of a breach of his employer's duty to provide him with a safe work environment .

Was Mr Vishaal Kumar constructively dismissed?

[16] In *Auckland etc Shop Employees' etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The second and third categories are at issue here.

[17] Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach

[18] A consideration in this case is the fact that Vishaal Kumar did not forcefully bring to his employer's attention the fact that he was dissatisfied with his hourly rate of pay nor that his working conditions were affecting his health. There is some evidence that he raised these matters with his employer but this appears to have been in a casual and/or informal manner. On the other hand I have absolutely no doubt that Ashok Kumar was aware at very least that Vishaal Kumar believed that he was being underpaid and had some concerns about the safety of his working conditions. Ashok Kumar should reasonably have foreseen that these concerns would eventually lead Vishaal Kumar to resign. Vishaal Kumar says that he was constrained in his attempts to pursue his concerns with Ashok Kumar as Ashok Kumar threatened to influence the immigration Department to withdraw his work permit. Ashok Kumar may or may

not have had any ability to influence the Immigration Department, and his threats may or may not have been as explicit as Vishaal Kumar contends. However I have no doubt that this perceived threat did constrain Vishaal Kumar in his attempts to remedy his grievances. I accept his deteriorating health coupled with what he perceived as the underpayment of his wages eventually, and inevitably persuaded Vishaal Kumar that he had no option but to resign. **Mr Vishaal Kumar was unjustifiably constructively dismissed from his employment with Hobden Screen Art and has a personal grievance against his former employer.**

Remedies

[19] As set out above I have found that Vishaal Kumar was underpaid (by \$5.00 per hour) during his employment with Hobden Screen Art 2007 Ltd, and that that he was unjustifiably constructively dismissed. He is entitled both to the payment of the shortfall in his hourly rate while he was employed and for lost wages and hurt and humiliation caused by his unjustified constructive dismissal.

Contribution

[20] In terms of section 124 of the Employment Relations Act (the Act) I have concluded that Mr Vishaal Kumar did not contribute to the circumstances that gave rise to his personal grievance.

Underpayment of wages

[21] Vishaal Kumar was, for the period of his employment with Hobden, paid \$12.00 per hour. I have determined that, in terms of his employment agreement, he was entitled to be paid at \$17.00 per hour. Despite his assertion that he is entitled to receive some premium for hours in excess of 40 per week there is no such provision in his employment agreement. There is no dispute that Vishaal Kumar was paid at the lower hourly rate (\$12.00) for all of the hours he worked. **Hobden is ordered to pay Mr Vishaal Kumar an additional \$5.00 per hour for all of the hours he worked. In addition he is to be paid holiday pay calculated at 8% on the payment made in terms of this order.** I am confident that the parties will be able to agree, based on the company's wage records, of the correct amount to be paid. If they are unable to reach agreement they should refer the matter back to the Authority for calculation and further orders.

Recovery of lost wages

[22] Vishaal Kumar was able to find alternative employment within a few weeks of the termination of his employment with Hobden Screen Art. His first day without pay was 21 January 2008 and he commenced new employment on 25 February 2008. He is entitled to be recompensed for the income he would have received during this four week period. **In Terms of section 123(1)(b) of the Act, Hobden Screen Art is ordered to pay Mr Vishaal Kumar the sum of \$2720.00 plus holiday pay calculated at 8% on this amount, being gross wages lost (160 hrs x \$17.00 = \$2720.00 + \$217.60 holiday pay = \$2937.60).**

Compensation for hurt and humiliation

[23] Vishaal Kumar gave evidence that the circumstances which led to his constructive dismissal contributed to a deterioration in his health and caused him a good deal of emotional stress causing him to consider returning to Fiji. On the other hand his employment with Hobden was for a relatively short period of time and he was able to find alternative employment reasonably quickly. **In terms of section 123(1)(c)(i) of the Act, Hobden Screen Art is ordered to pay Vishaal Kumar \$4000.00, without deduction of tax, by way of compensation for the hurt and humiliation his unjustified constructive dismissal caused him.**

Costs

[24] Costs are reserved and the parties are urged to attempt to resolve this issue between themselves. If they are unable to do so Vishaal Kumar may file and serve submissions in respect to costs within 28 days of the date of this determination. Hobden will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority