

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 323
5547624

BETWEEN BISHWA NAND
 Applicant

A N D SOUTH SEAS DISTRIBUTORS
 (NZ) LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 D Datt, Respondent Director

Investigation meeting: 15 October 2015 at Auckland

Submissions received: Received from both parties 15 October 2015

Oral Determination: 15 October 2015

Written Determination 16 October 2015

ORAL DETERMINATION

[1] Bishwa Nand alleges a director of his former employer, South Seas Distributors (NZ) Limited made abusive remarks to him about his mother causing him unjustified disadvantage in his employment. He also alleges he is owed wages for working 55 hours per week and unpaid annual leave.

Facts leading to dispute

[2] On 8 April 2013 Mr Nand was employed as a Sales and Marketing Representative. He had signed an employment agreement on 5 April 2013. The agreement provided, amongst other things, an annual gross salary of \$37,400.

[3] The hours of work were specified in the agreement as follows:

The hours of work are those necessary to properly and effectively perform the responsibilities of the position given the nature of the Employer's business.

Without limiting the above it is expected that the Employee's work duties and responsibilities will require a minimum of 40 hours per week.

The hourly rate specified in the agreement is deemed to cover payment for the overall performance of the Employee's employment and no overtime shall be payable.

[4] On 14 November 2013 it is alleged Dylan Datt, Respondent Director, contacted Mr Nand and told him to "f... your mother". Mr Datt later apologised for his behaviour.

[5] On 17 July 2014 Mr Nand terminated his employment due to ill health.

[6] On 24 December 2014 Mr Nand filed a statement of problem with the Authority. He stated he was lodging a formal complaint about unpaid wages, annual leave and abuse by Mr Datt.

Issues

[7] The issues identified at a previous telephone conference for hearing are:

- (a) Whether the alleged hours worked resulted in payment below the minimum wage?
- (b) What annual leave is owed?
- (c) Whether Mr Nand was unjustifiably disadvantaged by Mr Datt's behaviour on 14 November 2013?

Parties Positions

[8] Mr Nand seeks \$8,355.62 in gross wages and unpaid annual leave. The gross wages arise from his allegations he worked 55 hours per week every week of his employment. Based on a salary of \$37,400 at 55 hours per week he received less than the applicable minimum wage for an adult.

[9] Mr Nand's personal grievance alleges Dylan Datt used abusive language towards him in telephone messages on 14 November 2013 causing unjustified

disadvantage. At hearing he also raised a further swearing incident that occurred on 14 March 2015. It is the first time this has been raised and Mr Datt had no knowledge of this.

[10] Mr Nand seeks compensation because he tells me he and his family were subjected to cruel, inhuman or degrading treatment. He has suffered emotional trauma and humiliation because of phone messages which were full of swear words left on his telephone. He tells me this matter is serious because it caused emotional harm and compensation will teach employers not to do this to others.

[11] The respondent company denies Mr Nand worked continuously for 55 hours every week because he took annual leave and sick leave. It accepts there is some holiday pay owed but disputes the amount.

Personal grievance

[12] I will turn to the personal grievance first.

[13] Personal grievances must be raised within 90 days unless leave or an employer's consent is given for it to be raised later. This is a legal requirement in s.114 of the Employment Relations Act 2000 (the Act).

[14] This incident occurred on 14 November 2013. The last date for raising a personal grievance was 13 February 2014.

[15] Mr Nand accepted at hearing that the first time his personal grievance was raised was in the statement of problem. This was filed on 24 December 2014. When questioned about why he raised it so late, he told me that he thought it had been resolved at the time by Mr Datt's apology. However, Mr Datt allegedly swore at him again on 14 March 2015 and therefore he wished to now pursue the personal grievance.

[16] Given the employment relationship had ended on 17 July 2014 and Mr Datt denied swearing occurred, I cannot see any legal or factual basis to extend the time for raising a personal grievance. The employer does not consent.

[17] There is no application for me to grant leave to raise a personal grievance out of time. Even if there was an application for leave, there is no evidence of exceptional circumstances justifying the granting of leave. There is no explanation

for the delay of ten months other than a later incident which occurred after the employment relationship had ended.

[18] Accordingly, I decline to grant leave and given the employer does not consent in these circumstances, the personal grievance application shall be dismissed.

Wages arrears

[19] The respondent filed evidence which is accepted by Mr Nand that he received a payment of \$960 on 13 August 2015. Mr Datt tells me that payment was for eight days annual leave owed and it is a net payment.

[20] Mr Nand was not paid an hourly rate, he was paid a salary. His contract expressly states no overtime is payable, albeit the contract does incorrectly refer to an hourly rate as opposed to a salary being deemed as payment for all hours worked. It is plain, however, from reading the contract that this clause should refer to salary and not an hourly rate and that drafting mistake does not render the contract unenforceable in the circumstances.

[21] There is no legal or evidential basis to advance a claim for overtime or on an artificial hourly rate produced by dividing Mr Nand's salary by 52 then 40 hours per week as proposed.

[22] There is, however, a possible claim under the Minimum Wage Act 1983. Section 6 states:

Every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act shall be entitled to receive from his employer for his work at not less than that minimum rate.

[23] Mr Nand was at the time a worker to whom the Minimum Wage Act 1983 applied. The Minimum Wage Order 2013 set an hourly rate for his work at \$13.75.

[24] If I find it proved by Mr Nand that he worked 55 hours per week, dividing his salary of \$37,500 at 55 hours per week, results in an hourly rate of \$13.08. Given the applicable Minimum Wage Order 2013 rate was \$13.75 he would have been paid 67 cents less than the minimum wage, or \$36.85 per 55 hour week worked. He would be entitled to receive the difference between his actual hourly rate and the minimum hourly rate only.

[25] However, the onus is still upon Mr Nand to prove it is more probable than not that he worked the 55 hours as alleged. I am not convinced that occurred. My reasons are as follows.

[26] During his oral evidence Mr Nand became inconsistent with his written claim and brief. Initially he alleged he worked 40 hours Monday to Friday and then 15 hours on a Saturday. After some clarification, he then alleged he worked 55 hours Monday to Friday and an extra 5 hours on Saturdays. His written evidence stated he worked 50 hours Monday to Friday and 5 hours on Saturday.

[27] After accepting there were inconsistencies, Mr Nand told me he preferred his written evidence, namely that he was claiming he worked 50 hours Monday to Friday and 5 hours on a Saturday. His inconsistency did not assist his case or his credibility.

[28] Mr Nand is also seeking wage arrears for working 55 hours of every week of his employment. This is despite his acceptance he took five days leave at some stage when he could not have worked 55 hours. Although he denied taking 12 days as alleged by the respondent through their leave record, he could not give me any detail of the dates he said he did take leave. Nor was he able to provide any other supporting evidence. He referred to having evidence from a former employee in the warehouse, but unfortunately that employee could not be reached to give evidence today.

[29] From the respondent's leave records it appears the business is closed from 25 December to 3 January 2014. This is because all workers were shown as having taken leave during that period. It appears to me improbable Mr Nand would have worked this period. He was in sales and marketing. It is likely from my own knowledge of sales and marketing that his customers would have been closed and more particularly he could not have arranged delivery of goods if the warehouse employees were on holiday at the time.

[30] Mr Nand did not deny Mr Datt's evidence that he lost his licence in July 2014 and required a further five days annual leave because he could not do his job. From the evidence I heard, his job involved having to travel in a car on his own to customers for his sales and marketing job.

[31] Mr Nand accepted that he did not work on any of the public holidays and would have worked a 40 hour week, not 55 hour week during those periods. He also

accepted he took five days sick leave and could not have worked the 55 hours alleged during that week.

[32] There is also uncontested evidence from Mr Datt that he supplied his Fijian workers, one of whom was Mr Nand, with kava and alcohol to encourage after hours socialisation at the workplace. That was the explanation Mr Datt gave for why Mr Nand may have lingered at work after hours.

[33] Mr Nand's evidence was the extra hours were spent working in the warehouse arranging stock after hours Monday to Friday and on Saturdays. Mr Datt's evidence was he discouraged anyone other than the warehouse employees from dealing with stock. This was because he wished to prevent any lost stock or disorganisation occurring as a result of others being involved in the arrangement of the stock in the warehouse.

[34] Mr Datt did concede that he asked the staff to help with the warehouse move on 20 April 2014. However, he denied he directed Mr Nand to work after hours or on Saturdays in the warehouse throughout his employment. I prefer Mr Datt's evidence which was largely uncontested by Mr Nand.

[35] I do not accept Mr Nand worked 55 hours every week of his employment because it is just not supported by the majority of evidence. It is more probable he did not work the hours alleged and his evidence does not meet the burden imposed upon him to prove such an application.

Holiday pay

[36] I turn to the issue of holiday pay.

[37] Given Mr Nand's inability to recall or give detail of his leave, I prefer the respondent's evidence and determine that he did take 12 days leave as alleged.

[38] At his one year anniversary on 9 April 2014 he was entitled to four weeks' paid leave. Given both parties accept he has received a net payment for the eight days owed, it appears that he has received payment for the four weeks he would have been entitled to as at 9 April. However, both parties accept he has not received payment for the period 9 April to 17 July. He is entitled to 8% of the gross pay for that period.

Orders

[39] Accordingly, I now make the following orders:

- (a) Bishwa Nand's application for personal grievance is dismissed pursuant to s.114 of the Act.
- (b) Bishwa Nand's application for breaches of the Minimum Wage Act 1983 is dismissed.
- (c) South Seas Distributors (NZ) Limited is ordered to pay Bishwa Nand pursuant to s.131 of the Act wage arrears comprising unpaid annual leave for the period 9 April to 17 July 2014 being 8% of the gross wage earned during that period.
- (d) If the parties are unable to resolve the amount owed they are to advise the Registry by **22 October 2015 at 3pm** and the file is to be referred to me for determination on the papers.
- (e) Given both parties were self-represented, no costs order shall issue.

T G Tetitaha
Member of the Employment Relations Authority