

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 122
3137105

BETWEEN	AMAR NATH Applicant
AND	ADVANCED KITCHENS (NZ) LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Alex Kerjes, representative for the Applicant Sukdev Singh Kalsi, director for the Respondent
Investigation Meeting:	21 December 2021 (audio visual link)
Further information and submissions received:	2 February 2022 from the Applicant 13 January and 11 February 2022 from the Respondent
Determination:	1 April 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Nath was employed by Advanced Kitchens (NZ) Limited (AKL) as a cabinet maker and marble bench top installer from December 2019 until late September 2020. He left his employment because he had had a number of missed pays in the preceding weeks and when he raised concerns with AKL about non-payment of wages the situation was not remedied which he says caused him to lose confidence in AKL. Mr Nath says his employment ended by way of unjustified constructive dismissal. He seeks remedies of lost wages, compensatory damages, wage arrears, holiday pay, calculation of interest on arrears, findings of breach of statutory duties and award of penalty.

[2] AKL denies constructively dismissing Mr Nath or that any remedies should be awarded. It says actions of Mr Nath's during his employment should be taken into account by the Authority. AKL accepts it owes Mr Nath holiday pay of, it says, \$2,753.25.

The Authority's investigation

[3] There is some procedural history to this matter to be recorded.

[4] AKL did not file a statement in reply within the required 14-day period following Mr Nath lodging his statement of problem in the Authority despite being served.

[5] On 9 September 2021 by way of minute I directed the parties attend mediation, set out a proposed timetable for filing evidence leading up to an investigation meeting to be held on 21 December 2021 and a timeframe for objection to the proposal. The directions included that given AKL's failure to file a statement in reply it would need to seek leave to do so pursuant to regulation 8(3) of the Act. AKL was also directed to file with the Authority relevant documents including Mr Nath's employment agreement, wage, time and holiday records, payslips and final pay details by 25 November 2021. The 9 September minute, statement of problem, direction to mediation and notice of investigation meeting were directed to be served on AKL's registered address for service and Mr Kalsi, its sole director which, I am satisfied occurred.

[6] Neither party objected to the proposed timetable and they attended mediation as directed.

[7] AKL did not comply fully with the directions to provide relevant documents within the timetable set in the 9 September minute. However, on 30 September 2021 AKL emailed the Authority that it intended to participate in the investigation meeting and filed Mr Nath's employment agreement and a wage summary document. On 13 December AKL emailed the Authority setting out its position in response to Mr Nath's claim which has been accepted as a statement in reply. For completeness subsequent to the investigation meeting and at the direction of the Authority AKL filed further wage records relevant to this matter.

[8] Due to COVID-19 restrictions in place at the time, this investigation meeting was held by audio visual link with the consent of the parties. In the course of the investigation the Authority heard evidence from Mr Nath and Mr Kalsi. The Authority investigation was assisted by an interpreter of the Punjabi language.

[9] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

The issues

[10] The issues requiring investigation and determination are:

- (i) Was Mr Nath constructively dismissed?
- (ii) If so, was this justified?
- (iii) If Mr Nath was unjustifiably dismissed what remedies should he be awarded considering compensation under section 123(1)(c)(i) of the Act.
- (iv) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Nath that contributed to the situation giving rise to his grievance?
- (v) Does AKL owed Mr Nath arrears of wages and holiday pay?
- (vi) Has AKL breached obligations owed to Mr Nath under s 4 and 64 of the Employment Relations Act and s 13 of the Wages Protection Act?
- (vii) Should either party contribute to the costs of representation of the other party?

The employment agreement

[11] Mr Nath had a written employment agreement which he signed on 2 December 2019. The employment agreement includes the following clauses relevant to this matter:

8. Hours of work

The usual hours of work for this position are at least 30 hours per week. The remuneration for the position covers all performances. However, where a significant number of additional hours are worked, the employer will, if

possible allow the employee to take time off in compensation for the additional hours worked.

9. Remuneration

From the date that employment commences, the employee will receive a gross salary of \$20.00 per hour.

The salary will be calculated and paid on a weekly basis.

...

Background

[12] As set out above the parties' employment agreement provides Mr Nath will be paid every week for at least 30 hours at the agreed hourly rate of pay. From examination of the pay records provided (including Mr Nath's bank account records for period 6 July to 3 November 2020 which show wage payments received from AKL) he was paid in arrears that is, he performed a week's work and was paid the following Monday. During his employment Mr Nath's wages were invariably calculated for 40 hours per week.

[13] The issue with late wage payments started in August 2020. Mr Nath did not receive pays on 3, 10 and 31 August 2020 as expected. The next missed pay was 14 September however, Mr Nath's bank records show this was paid late on 18 September. He then did not receive any pay in the weeks beginning 21 or 28 September.

[14] Mr Nath said he wrote a letter to Mr Kalsi in September 2020 asking for his unpaid wages and that he would not work until he received the pay. He said he likely left a copy of the letter in Mr Kalsi's office. Mr Kalsi said he could not recall receiving the letter. They agree they had a discussion where Mr Nath said he could not work for free and Mr Kalsi said he could not pay him until he had been paid by his customers and he would be paid the following week. I am satisfied this conversation is most likely to have occurred in early September 2020 when the August wage payments were in arrears. Mr Nath then received a usual weekly pay on 7 September but arrears for pays due on 3, 10 and 31 August remained outstanding. Pays were then missed on 14 and 21 September.

[15] Mr Nath said he decided then he could not return to work after 25 September because he was not being paid what he was owed, he was not confident he would be paid what he was owed and could not afford to work without pay. Mr Nath sent a text message to Mr Kalsi asking why he had not been paid what he was owed including "I

can't work for no money!". He did not receive a reply. Mr Kalsi said in evidence to the Authority that he understood Mr Nath had ceased working for AKL because his wages had not been paid.

[16] Mr Nath next received a payment into his bank account of the usual weekly amount on 5 October and two other payments for \$278.40 and \$330.60 were received from AKL into his bank account on 8 October. Mr Nath said he did not know what these payments were for because there was no pay slip. The October payments are likely to be towards arrears.

[17] On 2 November Mr Nath's representative wrote to AKL raising a personal grievance and seeking remedies and arrears and a contribution to costs.

Discussion

Was Mr Nath unjustifiably constructively dismissed?

[18] It is well established that an employee may be constructively dismissed by his or her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.¹

[19] Mr Nath says in this case the third category applies and it was AKL's breach of duty in failing to pay him wages for three pay periods and then a further two pay periods which caused his resignation.

[20] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and

¹ [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.²

(i) *Did AKL breach the terms of the employment agreement causing Mr Nath to resign?*

[21] Failure to pay wages in full when due and owing is a serious breach of the duty owed to Mr Nath as AKL's employee.³ AKL breached this duty owed to Mr Nath because it did not pay Mr Nath for hours worked when the payment for that work fell due under the terms the parties had agreed.

[22] I am satisfied AKL breached duties owed to Mr Nath which have caused him to not return to work. This was accepted by Mr Kalsi in evidence as a resignation and I am satisfied this was the case.

(ii) *If so, was Mr Nath's resignation reasonably foreseeable given the nature of the breaches?*

[23] Yes. Mr Nath put AKL on notice that the missed pays were a serious matter for him which caused him hardship and jeopardised the employment relationship. He wrote to AKL setting out his concerns and received an assurance from Mr Kelsi that he would be paid. When pay continued to not be received as expected and arrears remained outstanding Mr Nath ended the employment relationship. He sent a text message to Mr Kelsi making it clear he considered the failure to pay a serious matter and one he could not expect to continue working under. It appears AKL did not respond to this text message and Mr Nath did not return to work. Mr Kalsi accepted the failure to pay wages when due and owing was the reason Mr Nath's employment ended.

[24] Mr Nath's resignation in the circumstances as established was readily foreseeable. He has established that he was unjustifiably constructively dismissed.

Issues raised by AKL

[25] AKL says with respect to how Mr Nath's employment ended he did not show up to work for several days and he had not applied for annual leave. It also says he

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

³ *Wages Protection Act 1983, s 4.*

started and finished at times which suited him. No compelling evidence has been provided to support this claim. The wage records provided invariably calculated Mr Nath's weekly hours as 40 and there are no time records that he worked less than those hours in any of the weeks for which arrears are claimed. No explanation was provided for the 8 October payments which fall after the employment relationship ended. AKL was provided opportunities, indeed was directed, to file wage and time records both before and after the investigation meeting. The documents filed do not record Mr Nath worked short hours and his evidence is he worked all the hours for which he has claimed arrears.

[26] AKL also says there is an issue of set off from the claim of wage arrears because Mr Nath:

- owes AKL \$2,400 being the outstanding balance for the cost of a kitchen built for him valued at \$7,800;
- damaged AKL's workshop door while using the fork hoist incorrectly;
- tried to solicit private work from AKL clients and AKL received complaints about this behaviour; and
- took equipment and stock from the workshop without authorisation.

[27] Mr Nath accepted he had purchased a kitchen from AKL but said there were no payments outstanding. Given this issue is disputed in the absence of clear evidence any monies are owed on the kitchen, for example an invoice or letter of demand, the claim cannot succeed.

[28] The situation is the same with the other issues raised by AKL – Mr Nath disputed the claims made against him and there was insufficient evidence to establish the actions ascribed to him occurred as described or caused any damage to AKL which is quantifiable.

Remedies in relation the personal grievance

[29] Mr Nath has established a personal grievance for unjustified constructive dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement

[30] Mr Nath seeks reimbursement of 13 weeks of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The question of mitigation of lost income is to be viewed on a case-by-case basis the assessment of which involves a consideration of whether the employee's actions (or inactions) in finding alternative work was reasonable in all the circumstances.⁴

[31] Mr Nath gave evidence he tried to find alternative employment and was unable to until 19 April 2021. The evidence of his attempts to do so are not strong. He is entitled to be reimbursed two months (eight weeks) wages calculated at his usual rate of pay being \$6766.48 (gross).⁵

Compensation for humiliation, loss of dignity and injury to feelings

[32] Mr Nath said he feels the way he has been treated by AKL has had a significant, negative impact on him and his family and it has been stressful not to receive the money he was owed which has caused him financial hardship. He is the sole provider for his family and the non-payment of wages caused additional and unnecessary stress to a family member who is very unwell. He said he left a good job at Mr Kalsi's request, who he had known for many years and feels he has been let down by AKL. Mr Nath said it was humiliating to have to ask his employer for his pay and that he felt ashamed when he was unable to pay bills consequent to not receiving wages.

[33] The Authority is satisfied Mr Nath has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation.⁶ Having regard to the particular circumstances of this case, I consider that an award of \$12,000 under section 123(1)(c)(i) is appropriate.⁷

⁴ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [62] and [65].

⁵ $\$845.81 \times 8 = \6766.48 .

⁶ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

⁷ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

Contribution

[34] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[35] Mr Nath did not contribute in a blameworthy way to the circumstances which led to his employment ending. AKL has raised issues about Mr Nath's conduct which are considered above. Notwithstanding the Authority's findings, even if they were accepted, they are not circumstances which contributed to the circumstances of the personal grievance which arose from AKL's failure to pay wages when due and owing in breach of the parties' employment agreement.

[36] There are to be no deductions from the remedies awarded for reasons of contribution.

Arrears

[37] Mr Nath also seeks orders for wage arrears and holiday pay and calculation of interest on any such order.

(i) Wages

[38] In the period in question Mr Nath worked nine weeks.⁸ Given the parties' employment agreement provides wages were to be paid weekly and I am satisfied such pays were to be paid in arrears, Mr Nath could have expected nine weekly pays in the corresponding pay period.⁹ He received four such pays into his bank account during this period. He did not receive pays in the weeks beginning 3, 10, 31 August and 21 and 28 September as he could have expected under the terms of his employment agreement. After his employment ended there were three payments made into his bank account totalling \$1322.86 (net) (the October payments). He did not receive a pay slip or other explanation for the October payments. It is likely they are payments towards the wage arrears.

⁸ Week beginning 27 July to week ending 27 September 2020.

⁹ Week beginning 3 August to week beginning 28 September 2020.

[39] The evidence establishes AKL breached the employment agreement when it did not pay Mr Nath's wages when they were due and owing in the weeks beginning 3, 10, 31 August, 21 and 28 September (missed weeks) because:

- under clause 9 of the employment agreement wages were to be paid weekly;
- there was insufficient evidence to suggest he did not work the usual 40 hours in the missed weeks;
- Mr Nath's bank account records do not show payments received from AKL in the missed weeks; and
- there is insufficient evidence before the Authority to suggest the pays due to Mr Nath in the missed weeks were otherwise paid to him during the relevant period either by way of late payment or alternative method of payment.

[40] AKL is ordered to pay Mr Nath arrears of wages of \$2,678.89 within 21 days of the date of this determination.¹⁰

(ii) *Holiday pay*

[41] There is no dispute Mr Nath's holiday pay entitlement remains outstanding. AKL accepts it owes Mr Nath holiday pay of \$2,753.25. This calculation does not take into account the award of arrears of wages upon which 8% holiday pay is properly claimed and calculated.¹¹

[42] AKL is ordered to pay Mr Nath \$2,967.56 in holiday pay entitlements within 21 days of the date of this determination.

(iii) *Interest*

[43] Mr Nath is entitled to an award of interest on the wage arrears and holiday pay awards. 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.

¹⁰ \$7,612.29 (9 x \$845.81) - \$4,933.40 = \$2,678.89.

¹¹ 8% of \$2,678.89 = \$214.31

[44] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[45] Advanced Kitchens (NZ) Limited is ordered to pay interest on total arrears ordered, using the civil debt interest calculator, within 21 days of this determination, as follows:¹²

- (i) Interest on the sum of \$5,646.45 from 29 October 2020 until the date payment is made in full.

[46] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Breaches of statutory duties

[47] Mr Nath says AKL have breached the following statutory duties:¹³

- (i) Section 4 and 64 Employment Relations Act; and
- (ii) Wages Protection Act 1983.

[48] Section 4 of the Act requires parties to employment relationships to deal with each other in good faith and requires parties to be active and constructive in establishing and maintaining a productive employment relationship instances of which include being responsive and communicative. To not pay wages when due and owing is a serious breach of statutory duty. To not respond constructively when concerns about non-payment are raised by the effected employee would amount to a breach of the duty of good faith which I am satisfied is the case here; AKL defaulted on payments without explanation, continued to default without further explanation having undertaken to pay arrears aware of Mr Nath's concerns including the impact on the employment relationship and then did not respond when Mr Nath advised he was calling halt on the employment relationship. AKL has breached the s 4 duty of good faith.

¹² www.justice.govt.nz/fines/civil-debt-interest-calculator

¹³ As claimed in the statement of problem dated 29 April 2021 and recorded in the Authority minute 9 September 2021. Though wage and records were requested in the statement of problem a penalty for failure to provide was not raised prior to the investigation meeting. I am not satisfied AKL has been sufficiently put on notice of this claim, which is a serious one and what has been provided by AKL may meet the bare requirements of wage and time recording. Likewise, the penalty sought for breach of the Holidays Act 2003.

[49] Section 64 of the Act requires an employer to retain a copy of the relevant individual employment agreement. The employment agreement has provided to the Authority. The breach is not established.

[50] Failure to pay wages when due and owing without deduction is a breach of s 4 of the Wages Protection Act 1983. This breach is established.

Penalties

[51] Having found AKL has breached statutory duties owed to Mr Nath I must next consider whether the award of a penalty (or penalties) is warranted as sought. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹⁴

[52] AKL's communications with Mr Nath regarding the default in wage payments and when he would be paid were not consistent with and amount to a breach of the section 4 duty of good faith because they undermined Mr Nath's confidence in the employment relationship. Mr Nath submits penalties are warranted because AKL's actions were deliberate and sustained.

[53] The factual matrix of the good faith breach is the same as the personal grievance for which the remedies have been awarded in Mr Nath's favour. I decline to exercise my discretion and award a penalty for breach of good faith.

[54] With respect to the breach of the Wages Protection Act 1983 as found above AKL's failure to pay wages when they were due and owing without deduction is a breach of statutory duty.

[55] The maximum penalty against a company is \$20,000.¹⁵ Though AKL has found to have failed to pay wages when due on five occasions it is appropriate that it is treated as one statutory breach. The starting point for assessing the penalty is \$20,000.

¹⁴ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

¹⁵ Employment Relations Act 2000, s 135.

[56] AKL's actions have been found to amount to a breach of the statutory obligation to pay wages when they fall due without deduction. Mr Nath did not consent to not being paid and AKL's actions in not paying him his full wages when they were due have undermined the employment relationship to such a degree that it caused Mr Nath to resign. AKL's actions were intentional and its culpability high. As the employer it was responsible for paying Mr Nath's wages. The failure to do so is a serious breach.

[57] There is compelling evidence of direct loss suffered by Mr Nath as a result of the breach of duty including financial difficulties. In addition, he has spent time and resources seeking to enforce obligations owed in law and which were clearly described and expressly agreed by the parties in the employment agreement.

[58] There is no relevant previous conduct of AKL to consider. There is no specific evidence before the Authority of any financial difficulty AKL may have in paying any penalty though I note the suggestion in the evidence AKL was facing financial difficulties in the period around the end of Mr Nath's employment.

[59] Standing back, looking at that figure, including in comparison to other cases, I conclude that a fair penalty is \$2,000. AKL is ordered to pay half the penalty to Mr Nath to compensate him for the inconvenience and resources expended in pursuing this matter. The balance of the penalty is to be paid to the Crown. The penalty is to be paid within 21 days of the date of this determination.

Summary of orders

[60] Mr Nath was unjustifiably constructively dismissed. His claims for wage arrears and holiday pay have been upheld. The Authority orders as follows:

- a) Within 21 days of the date of determination Advanced Kitchen (NZ) Limited is ordered to pay Amar Nath the following sums:
 - (i) \$6,766.48 under s 123(1)(b) and s 128;
 - (ii) \$12,000 under s 123(1)(c)(i);
 - (iii) \$2,678.89 (gross) in wage arrears;
 - (iv) \$2,967.56 (gross) in holiday pay; and
 - (v) penalty half of which is to be paid to the Crown and half to

- b) Within 21 days of the date of determination Advanced Kitchens (NZ) Limited is to calculate and pay Amar Nath interest on wage arrears, and holiday pay as awarded in paragraph [45] above.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Nath may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Advanced Kitchens (NZ) Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[62] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁶

Marija Urlich
Member of the Employment Relations Authority

¹⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1