

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 197
5603727

BETWEEN HEMAL KUMAR PATEL
Applicant

AND S & G PLUS AUTO
ELECTRICAL LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Wi Pere Mita for Applicant
No appearance for Respondent

Investigation Meeting: 8 June 2016

Determination: 16 June 2016

DETERMINATION OF THE AUTHORITY

- A. S & G Plus Auto Electrical Limited is ordered to pay to Mr Patel unpaid wages in the amount of \$40,848 gross plus 8% holiday pay of \$3,267.84 gross within 28 days of the date of this determination.**
- B. S & G Plus Autos Electrical Limited is ordered to pay to Mr Patel the amount of \$4,207.61 without deduction within 28 days of the date of this determination.**
- C. Mr Patel was unjustifiably constructively dismissed and S & G Plus Auto Electrical Limited is ordered to pay to Mr Patel within 28 days of the date of this determination:**
- lost wages in the amount of \$2,368 gross plus 8% holiday pay**

of \$189.44 gross; and

- **compensation in the amount of \$5,000 without deduction.**

D. S & G Plus Auto Electrical Limited is ordered to reimburse the filing fee of \$71.56 within 28 days of the date of this determination.

Employment relationship problem

[1] Mr Hemal Kumar Patel claims he was not paid wages and was unjustifiably constructively dismissed from his position as Marketing Manager for S & G Plus Auto Electrical Limited (S & G). Mr Patel also claims S & G has breached its statutory obligations of good faith.

[2] Despite an agreement to attend mediation in October 2015 the respondent failed to attend. Further attempts at mediation were made by the applicant, however, the respondent has failed to engage in either that process or the Authority's processes.

[3] The Authority encountered difficulties in serving the statement of problem on S & G and Mr Patel was directed to arrange for personal service. The statement of problem was served on S & G on 14 March 2016.

[4] On 5 April 2016 the Authority attempted to set up a case management call with the parties but this was not successful. By this time the Authority was in receipt of an email address, fax number and contact telephone number for S & G.

[5] When the Authority Officer attempted to connect the case management call at a previously agreed time, Mr Shanta Kumar, who answered the call and who is identified as the sole director and shareholder of S & G on the companies register, advised the Authority that Mr Govind Ashok was the Managing Director and he needed to take the call but he was not available at that time. Despite agreeing to have Mr Ashok contact the Authority to arrange an alternative suitable time, no further contact was made by S & G.

[6] The respondent has not lodged a statement in reply and has provided no reasons for its failure to do so.

[7] In order to progress the matter I set the matter down for an investigation meeting. The Notice of Investigation Meeting detailing the time and venue for the investigation meeting was sent to S & G by fax and email together with a hard copy being delivered by courier and signed for at 12.22pm on 16 May 2016.

[8] S & G did not attend the Authority at the appointed time on 8 June 2016. In order to ascertain whether S & G intended to be present at the investigation meeting I asked the Authority Officer to make telephone contact with the company. The Authority Officer rang the company and spoke with Mr Ashok who told the Authority Officer that he had the flu and was unable to attend the investigation meeting. Mr Ashok advised the Authority Officer that he had a medical certificate and he would email it to the Authority within 10 minutes. The Authority Officer reiterated the statement contained on the Notice of Investigation Meeting that failure to attend the investigation may result in the matter proceeding in S & G's absence.

[9] I adjourned the commencement time of the investigation meeting for a further 15 minutes to allow time for Mr Ashok to produce his medical certificate but it did not arrive.

[10] I was satisfied there was no good cause shown for S & G's failure to attend the investigation meeting and so I proceeded under clause 12 of Schedule 2 of the Act to act fully in the matter as if the respondent was present or represented.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Patel but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[12] S & G is in the business of selling and repairing motor vehicles. Mr Patel is from India. He arrived in New Zealand and had a full time open work visa. In discussion with his immigration advisor Mr Patel became aware of a position with S & G. He applied to Immigration New Zealand for a work visa specifically for the work at S & G. The Visa was granted in February 2014 and he started work for S & G on 17 February 2014.

[13] Mr Patel's employment was subject to a written employment agreement dated 21 December 2013. The written terms of the employment agreement included payment of wages at the hourly rate of \$18.50 and a minimum of 32 hours to be worked each week.

[14] Mr Patel advised Mr Kumar on 27 June 2015 that he no longer wished to work for S & G. Mr Patel says the catalyst for his decision to leave S & G was that he was not being paid for his work.

[15] Mr Patel raised a personal grievance on 10 September 2015 alleging that he had been constructively dismissed and that he was owed arrears of wages.

Issues

[16] The statement of problem sought the payment of damages in respect of S & G's failure to pay wages under a claim for breach of good faith. This was not the appropriate mechanism for seeking reimbursement of unpaid wages. The correct mechanism is to make a claim for arrears of wages under section 131 of the Act.

[17] I am satisfied S & G has been on notice throughout these proceedings that Mr Patel was seeking payment of unpaid wages and have therefore exercised my discretion pursuant to section 160(3) of the Act to concentrate on resolving the employment relationship problem however described.

[18] The issues for determination are:

- a) whether Mr Patel is owed arrears of wages and if so, how much;
- b) whether Mr Patel was unjustifiably constructively dismissed and if so what, if any remedies should be awarded; and
- c) whether S & G has breached its statutory obligations of good faith.

Arrears of wages and reimbursement of moneys paid by Mr Patel

[19] Mr Patel claims he was not paid for all of his time worked for S & G and claims the sum of \$40,848 gross plus holiday pay. Mr Patel also seeks reimbursement

of money he personally paid to Inland Revenue which he says should have been deducted from his wages and paid by S & G.

[20] Mr Patel is entitled to be paid for each hour he worked for S & G. I have accepted Mr Patel's evidence that in accordance with his employment agreement he worked 32 hours each week for the period of 73 weeks in total. Mr Patel seeks payment for 69 weeks which takes into account that he was paid for four weeks of his employment during a period when Mr Kumar was in India. The claim amounts to a total of \$40,848 gross.

[21] I have inspected Mr Patel's bank statements, which confirms Mr Patel's evidence that he did not receive any payments for wages from S & G during his employment. In the absence of any evidence to the contrary I have accepted Mr Patel's claim for unpaid wages as proven.

[22] S & G Plus Auto Electrical Limited is ordered to pay to Mr Patel unpaid wages in the amount of \$40,848 gross within 28 days of the date of this determination.

[23] Mr Patel is entitled to holiday pay on his outstanding wages and S & G is ordered to pay the equivalent of 8% holiday pay of \$3,267.84 gross within 28 days of the date of this determination.

[24] Not only did Mr Patel not receive payment of wages during his employment, Mr Patel has provided evidence which confirms his evidence that he was required by S & G to make payments to the Inland Revenue as if they were payments of PAYE on his wages. The total amount paid by Mr Patel is \$4,207.61. Mr Patel says he was instructed by a Manager for S & G of the amounts he was required to pay to Inland Revenue. In the absence of any evidence to the contrary, I have accepted Mr Patel's evidence of the payments he says he made.

[25] I have considered whether I should order of reimbursement of these payments given that PAYE will need to be deducted from the arrears of wages and holiday amounts when S & G complies with the orders in this determination. I am satisfied that the best course of action is to order S & G to reimburse Mr Patel for the sums he has paid to the Inland Revenue and it will then be up to S & G to calculate and pay the

correct sums to the Inland Revenue taking into account the sums already paid by Mr Patel.

[26] S & G Plus Autos Electrical Limited is ordered to reimburse to Mr Patel the amount of \$4,207.61 without deduction within 28 days of the date of this determination.

Unjustified constructive dismissal

[27] Mr Patel resigned from his job on 25 June 2015. Mr Patel claims that his resignation was in law a constructive dismissal.

[28] A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[29] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer.¹ The Court of Appeal has concluded:

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.²

[30] Mr Patel told me that he was afraid to raise any issues about non-payment of wages for fear of dismissal which would possibly affect his work permit and his ability to remain in New Zealand.

[31] In lieu of being paid his wages, Mr Patel lived on a credit facility and on money loaned to him from his family in India.

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

² *Ibid* at p172; p 419.

[32] The failure to pay wages is a fundamental breach of the employment agreement. Mr Patel was entitled to treat this failure as a repudiation of the employment agreement by S & G. The failure to pay over a period of 69 weeks is a clear intention by S & G that it did not intend to be bound by the terms of the employment agreement. I find it was reasonably foreseeable by S & G that Mr Patel would not be prepared to continue to work under these conditions.

[33] Mr Patel was constructively dismissed and in the absence of any evidence from S & G I am satisfied the dismissal was unjustified. The failure to pay wages is not the action an employer acting fairly and reasonably could take. Mr Patel is entitled to a consideration of remedies for his unjustified constructive dismissal.

Remedies

[34] Mr Patel seeks reimbursement of lost wages arising from his dismissal of four weeks and the payment of \$5,000 compensation for humiliation, distress and injury to feelings.

[35] Pursuant to section 124 of the Act I am satisfied Mr Patel has not contributed to the actions giving rise to his personal grievance and accordingly his remedies will not be reduced.

[36] Mr Patel took immediate steps to obtain a new work visa and was successful in gaining alternative employment in July 2015. Mr Patel was out of work for a period of four weeks. He is entitled to reimbursement of the four weeks' lost wages which I am satisfied arose as a direct result of his constructive dismissal.

[37] S & G Plus Auto Electrical Limited is ordered to pay to Mr Patel lost wages in the amount of \$2,368 gross plus 8% holiday pay of \$189.44 gross within 28 days of the date of this determination.

Compensation

[38] Mr Patel gave compelling evidence of the impact not being paid his wages and the subsequent dismissal had on him. Mr Patel seeks payment of \$5,000 under this heading and I am of the view that this is an appropriate level of award in the circumstances.

[39] S & G Plus Auto Electrical Limited is ordered to pay to Mr Patel compensation in the amount of \$5,000 without deduction within 28 days of the date of this determination.

Breaches of good faith

[40] Mr Patel says that when S & G required him to pay his own PAYE S & G breached its statutory obligations of good faith.

[41] There is no doubt that requiring an employee to pay PAYE to the Inland Revenue when no wages have been paid is a breach of an employers' duty of good faith. The Act allows the Authority to impose a penalty for breach of good faith but one has not been sought by Mr Patel.

Costs

[42] At the investigation meeting Mr Patel confirmed that he was seeking only the reimbursement of the filing fee on this application and no other costs. It is appropriate that Mr Patel be reimbursed and S & G Plus Auto Electrical Limited is ordered to reimburse to Mr Patel the filing fee of \$71.56 within 28 days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority