

**N THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 59
3063394

BETWEEN BERHAMPORE PELETI
Applicant

AND GENESIS 1 LTD
Respondent

Member of Authority: Nicola Craig

Representatives: Alex Kersjes for the Applicant
No appearance for the Respondent

Investigation Meeting: 16 September 2019

Submissions and Further From the Applicant at the investigation meeting and on
Information Received: 25 and 26 September 2019 and 31 January 2020
Nothing received from the Respondent

Date of Determination: 11 February 2020

DETERMINATION OF THE AUTHORITY

- A Berhampore Peleti was unjustifiably dismissed by Genesis 1 Limited.**
- B Genesis 1 Ltd is to pay Mr Peleti the following within 28 days of the date of this determination as remedies for his personal grievance:**
- (i) \$9,000.05 as lost wages; and**
 - (ii) \$22,000.00 as compensation.**
- C Genesis 1 Ltd is to pay Mr Peleti the following within 28 days of the date of this determination:**
- (i) \$17,307.75 gross as arrears of wages;**
 - (ii) \$6,461.54 gross as holiday pay;**
 - (iii) \$1,500.00 as a contribution to his costs; and**
 - (iv) \$71.56 for the Authority's filing fee.**
- D Genesis 1 Ltd is to pay \$8,000.00, as a penalty for failure to pay wages and provide wage and time records, into the Authority's account within 28**

days of the date of this determination. Of that, \$6,000.00 is to be forwarded to the Crown account and \$2,000.00 to Mr Peleti.

Employment Relationship Problem

[1] From 13 November 2017 Berhampore Peleti worked for Genesis 1 Limited (G1 or the company) as the Event, Creative Production and Auckland Operations Manager. G1 is a communications company, aimed at building relationships with government agencies regarding Pasifika issues.

[2] G1 last paid Mr Peleti's wages on 30 November 2018 and he regards his employment as having been terminated. He claims that he was unjustifiably dismissed by G1.

The Authority's process

[3] G1 has had no involvement in the Authority's process. I am satisfied that the statement of problem, as well as the notice of investigation meeting, have been properly served on the company. In addition those documents have been emailed to the director of G1 Michael Fitisemanu and another person (who I will refer to as Mr C) who was involved in running the company.

[4] There was no appearance for G1 at the investigation meeting on 16 September 2019. An attempt was made to contact Mr Fitisemanu but that was unsuccessful. I proceeded to investigate the matter in the absence of G1. Evidence was heard from Mr Peleti in person. At the close of the investigation meeting further documents were sought and later provided.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

Non-publication

[6] On Mr Peleti's behalf the prospect of a non-publication order or limitation on the evidence recorded in the determination was raised. The concern was based on personal matters which Mr Peleti referred to in his evidence which he did not wish to be published.

[7] The fundamental principle of open justice means that the standard for ordering non-publication is high with evidence of sufficient adverse consequences being required.¹ I am not satisfied that the test is met in this case. However, I have taken into account Mr Peleti's concerns by referring in a limited way to the impact of the dismissal on him.

Issues

[8] The issues for investigation are:

- (a) Was Mr Peleti unjustifiably dismissed by G1?
- (b) If so, what remedies, if any, should he receive?
- (c) Is Mr Peleti owed any arrears of wages and holiday pay by G1 and if so, how much?
- (d) Did G1 breach section 4 of the Wages Protection Act 1986 (the WP Act) and if so, should it be liable to a penalty?
- (e) Did G1 breach section 130 of the Employment Relations Act by failing to keep time and wage records and if so, should G1 be liable to a penalty?
- (f) Should either party be liable to contribute to the other party's costs?

[9] At the investigation meeting the prospect of a penalty for breach of the duty of good faith was mentioned by Mr Peleti's representative. However, given that there was no penalty for breach of the duty of good faith expressly mentioned in the statement of problem, nor at the case management conference and, being absent from the investigation meeting, G1 would not have been aware of that claim, I do not make any finding in that regard.

Employment history

[10] Mr Peleti was approached by his long term friend Mr Fitisemanu, to see if he was interested in a position with G1 which was a relatively new venture based in Wellington. Mr Peleti was appointed by G1 and signed an employment agreement dated 13 November 2017. Mr Peleti worked from his own house as G1 did not have Auckland office space. His hours of work were 37.5 per week although G1 did not require any time recording by Mr Peleti.

[11] The role was to be the face of the company in Auckland, focusing on events management. The work included talking to new clients, video production, media relations

¹ *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94 at [96]

and strategy. Most of the tasks were forwarded by Mr C, who along with Mr Fitisemanu, was based in Wellington.

[12] For about the first six months of Mr Peleti's employment he received regular salary payments. Then there was what he describes as a hiccup with his and others pay. He was given a heads up by the company that there were some difficulties but to hold on and it would be sorted. The holding period continued for about eight weeks.

[13] In around September 2018 G1 paid everything owing to Mr Peleti. He then received more salary payments although these were sometimes late. Mr Peleti would phone and speak to Mr C of G1 asking about payment. Different explanations were given.

[14] Then after a payment on 30 November 2018 Mr Peleti was not paid anything by G1. Although it may seem unusual, Mr Peleti kept working for a considerable period after payment stopped, because of his previous experience of the gap in payments. He had to seek assistance elsewhere to deal with the lack of income.

[15] On 19 December 2018 Mr C sent Mr Peleti an email saying that there was money coming from a radio station which he was chasing up. Mr C was also trying to get money quickly from another client for filming that had just been completed.

[16] Later the same day Mr C emailed Mr Peleti again saying that he had spoken with the filming client and he could not see the money being received before the end of January.

[17] Mr Peleti began looking for other work but the Christmas/New Year period was not an ideal time to find jobs.

[18] At one point Mr C told Mr Peleti that it was hard getting hold of Mr Fitisemanu. Mr Peleti's own attempts to get hold of Mr Fitisemanu by text and email were also unsuccessful. In the meantime Mr Peleti was receiving demands from the property manager for the family's rental property.

[19] On 12 January 2019 Mr Peleti emailed Mr C seeking payment and referring to his housing and other difficulties due to lack of money. Mr C replied that he was "really sorry about what's happening". He wished that he had better news and would give Mr Peleti some idea of what was going on but was "not completely clear" himself.

[20] Mr C indicated at one point that he had branched out into a new venture and there was the possibility of getting Mr Peleti on the payroll with that venture and he would talk to his partners. However, that prospect never eventuated.

[21] Mr C told Mr Peleti that if they could just finish work and invoice a client, they would be paid. He said that once a video invoice was paid that would cover all of Mr Peleti's wages which were owing. Mr Peleti undertook all the work on the video he was asked to do but does not know if G1 eventually completed the project.

[22] Mr Peleti was still undertaking work for G1 including meeting with clients or potential clients, as well as the video production work. As had been the case previously, the work was sometimes intermittent with very busy times, then quiet points.

[23] Mr Peleti says he was calling and texting Mr C a lot, sometimes daily. Sometimes there was no response but at others Mr C would answer. Mr Peleti was finding the situation very stressful but was trying to hold back expressing his full concerns to Mr C, so that he did not burn his bridges.

[24] Mr Peleti's impression was that Mr C eventually felt uncomfortable asking him to do things when he was not being paid. However, there were still instructions allocating tasks to Mr Peleti until the end of February 2019. Mr Peleti edited the video which Mr C said they would be paid for if it was completed. The client was a governmental organisation, so payment seemed likely.

[25] On 4 March 2019 Mr Peleti again emailed Mr C asking when he could expect payment. Mr C replied including:

... just working out how much is going in this afternoon to your account. I'll text you this afternoon and will have some more money into your account by 6pm. Won't be the full amount though, a few more things popped up I didn't know about. Now that I've been in charge of everything for a month, I should by now everything that goes on, on a monthly basis (*sic*).

[26] The following Monday, 11 March 2019, Mr Peleti emailed again following up on whether there was any money for him this week. Mr C replied on Thursday, 14 March saying that he was just waiting for funds to go through overnight and should be able to send Mr Peleti \$1,000.00 tomorrow afternoon. However, on the afternoon of 15 March Mr C

emailed saying that the funds had still not arrived and he would keep Mr Peleti posted. Mr Peleti still did not receive any money.

[27] Mr Peleti emailed Mr C and Mr Fitisemanu on 19 March 2019 attempting to clarify his employment situation as he considered himself legally still employed, up to that point. Mr Peleti indicated that he was now wanting to file a personal grievance case. He complained about not being paid, setting out the wages he was owed to 13 March. The email concluded that Mr C and Mr Fitisemanu had seven days to let him know their intentions regarding honouring payment of the arrears or he would pursue this matter through the employment courts. No response was received.

[28] At the time of the investigation meeting Mr Peleti understood that the G1 business was still operating in Wellington.

Dismissal

[29] Mr Peleti claims that he was dismissed. This is a case involving no explicit dismissal or resignation statement. There was no clear action by G1 in the nature of a sending away of Mr Peleti. Instructions for work continued despite payment having ceased. Mr Peleti himself did not explicitly state he was resigning.

[30] However, the payment of wages for work done is a fundamental employer obligation. A failure to pay is a breach of duty by the employer. This brings the case within the third category of constructive dismissal identified in *Auckland Shop Employees Union v Woolworths (NZ) Limited*.²

[31] There was a breach of duty by G1 in failing to pay wages. That failure was the cause of Mr Peleti's withdrawal of his labour from G1. The breach was sufficiently serious to justify that action.

[32] An instance of non-payment could be seen as a repudiatory breach which Mr Peleti chose to accept and insist on performance of the agreement. But each non-payment was another breach. Given the previous difficulty with non-payment running to eight weeks before remedy, it is credible that Mr Peleti would wait some time before deciding to take action. He was clearly seeking and being given assurances that payment would be forthcoming.

² [1985] 2 NZLR 372.

[33] I accept Mr Peleti's evidence that if he had been told earlier that there was no prospect of money coming through, that he would have looked for other work sooner.

[34] The Labour Court in *Salmond Smith Biolab Limited v NZ (with exceptions) Food and Chemical etc Union*³ considered that a period of four months was not fatal to the employee's right to accept the employer's repudiatory conduct. There the employee had been hoping to persuade the employer to observe its contractual obligations. When the employer failed to do so, the employee resigned.

[35] Although Mr Peleti's email of 19 March 2019 does not mention resignation as such, I am satisfied that a reasonable observer would consider that Mr Peleti was giving notice of his withdrawal from the employment agreement in seven days if no satisfactory indication regarding payment was received. As there was no response to the email Mr Peleti ceased employment and was constructively dismissed by G1.

[36] Mr Peleti's dismissal by G1 was unjustified. Mr Peleti had done nothing to justify a dismissal on the grounds of performance or misconduct. I cannot be satisfied in the absence of evidence from G1 that Mr Peleti's position was redundant. In fact the work continued for some time after payment ceased. The company failed to comply with its obligations of good faith to be active and constructive in maintaining the employment relationship. G1 did not take steps to adequately let Mr Peleti know what was going on.

Remedies

[37] Mr Peleti claims lost wages. Firstly, this is for a period of seven weeks after his dismissal, until he found work. At a weekly rate of \$1,153.85, that amounts to \$8,076.95. In addition, once he found a new job Mr Peleti claims for the difference between his G1 rate and new lower pay rate; six weeks at the \$153.85 difference, totalling \$923.10. His claims thus cover a three month period. He also seeks payment of wages prior to his dismissal but I will deal with below.

[38] I am satisfied that Mr Peleti made reasonable efforts to mitigate his loss.

[39] I order Genesis 1 Limited to pay Mr Peleti within 28 days of the date of this determination, the total lost wages of \$9,000.05 gross, as a remedy for his grievance.

³ [1989] 2 NZILR 393.

[40] Mr Peleti also seeks compensation under section 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. He describes the impact of not being paid as having a long lasting effect on himself and his family, although I am only able to compensate under this head for the impact on him. I take into account that the period of non-payment included the Christmas period.

[41] Mr Peleti gave detailed and compelling evidence regarding the effects on him. He was personally and financially pressured and embarrassed by what occurred. He attempted to keep the impact private. His Christian faith was sorely tested. These were difficult circumstances for a proud family man to find himself in. Mr Peleti expresses gratefulness for those who were able to help him.

[42] It is clear that Mr Peleti was deeply affected by what happened. I have considered where in the spectrum of cases his situation sits and what a fair and just award would be.

[43] I order Genesis 1 Limited to pay Mr Peleti the sum of \$22,000.00 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[44] I have considered whether Mr Peleti could be said to have contributed to his loss. He did remain undertaking work for G1 for a long period without payment. Others may have left rather sooner. However, Mr Peleti continued to be told about work to undertake and there were indications of attempts being made to arrange payment, even to the extent of a promise that payment would occur that day. He tried to look for work but was unable to find anything for some time. I do not consider that Mr Peleti's actions in these particular circumstances can be seen as blameworthy. I make no deduction for contribution.

Wage arrears

[45] Mr Peleti was without pay for a considerable period before his employment came to an end. He seeks 15 weeks' arrears of wages, which at \$1,153.85 gross per week is \$17,307.75. From December 2018 to March 2019 he continued to make himself available for work from G1 and undertook projects directed to him, as well as attempting on his own initiative to find more work for the company.

[46] I order Genesis 1 Limited to pay Mr Peleti the sum of \$17,307.75 gross as arrears of wages within 28 days of the date of this determination.

Holiday pay

[47] Mr Peleti claims that he did not take any holidays during his employment and is owed \$6,461.54 gross as holiday pay. In the absence of holiday and leave records or any other evidence to the contrary I accept that claim.

[48] I order Genesis 1 Ltd to pay Mr Peleti the sum of \$6,461.54 gross as holiday pay, within 28 days of the date of this determination.

Penalty for failure to pay wages and provide time and wage records

[49] Employers are required to pay employees their wages when they become payable.⁴ Under Mr Peleti's employment agreement he was to be paid weekly. Clearly that did not happen here. Even on the limited evidence available without G1's participation in the investigation meeting, G1's representative Mr S made commitments in December 2018, and January and March 2019 to pay Mr Peleti. Those payments were not made. G1 breached s 4 of the WP Act by failing to pay Mr Peleti his wages. Employers are liable to a penalty for failure to make payments of wages.⁵

[50] Mr Peleti also seeks a penalty be imposed on G1 for its failure to provide time and wage records which were requested by his representative on 10 April 2019. I am satisfied that those records were not provided.

[51] In deciding whether to impose a penalty in this case and if so, at what level, I am guided by the criteria set out in s 133A of the Act, as well as by case law.

[52] The objects of the WP Act can be seen as including ensuring employees are paid promptly and accurately for their work. The objects of the Act include the enforcement of employment standards⁶ and the requirement under s 130(2) of the Act to provide time and wage records when requested supports that enforcement. These factors support a penalty being imposed on G1.

⁴ S 4 of the WP Act.

⁵ S 13 of the WP Act.

⁶ S 3(ab) of the Act.

[53] G1 has breached two provisions, each with a maximum penalty of \$20,000 for a company. I treat the non-payment of wages as a single course of conduct. The provisional total is thus \$40,000.

[54] Given the messages from Mr S I am satisfied that the non-payment of wages was intentional. I have no information about whether the failure to provide time and wage records was intentional. Clearly the effect on Mr Peleti and his family of non-payment of wages was significant, resulting in much hardship and distress for himself and his family. G1 has done nothing to compensate or mitigate the effects of the breach on Mr Peleti. I make no reduction to the provisional total for these factors.

[55] I do make a reduction as regards the time and wage records, as Mr Peleti was paid a salary and the absence of records of payments was not as problematic in this case as it is in others. I also consider that a reduction is needed for the fact that this case did not involve the exploitation of migrants or other vulnerable employees. This is not to depreciate the substantial impact which the non-payment had on Mr Peleti. The provisional penalty goes down to \$30,000.

[56] There was no evidence of G1 being involved in similar practices with other employees at this time, although I do note the extended failure to pay wages earlier in 2018. I make a reduction of 40% to \$18,000.

[57] I have considered the need for deterrence. Although it is very important that all employers pay the wages due to their staff, there does not appear to be anything specific here which would suggest that this was a business model designed to exploit the vulnerable or gain a competitive advantage by the practice. It does appear from Mr S's messages that attempts were being made to seek payment from clients which could then be directed to Mr Peleti. I reduce for the level of culpability to \$12,000.

[58] Although the messages from Mr S suggest an inability to pay, without evidence to that effect I am not prepared to make a reduction for that factor. I have taken into account the level of penalty awarded in similar cases.

[59] I make a final check of the \$12,000 provisional penalty against the over \$23,000 in arrears outstanding and the \$40,000 of maximum possible penalty. I conclude that a reduction is needed, with a penalty of \$8,000 being appropriate.

[60] I consider that it is right for a modest proportion of that penalty to go to Mr Peleti for having to pursue this matter. The effects of non-payment on him have already been addressed by the compensation award. I order Genesis 1 Limited to pay \$8,000.00 into the Authority's account within 28 days of the date of this determination, with \$6,000.00 to be forwarded to the Crown account and \$2,000.00 to Mr Peleti.

Costs

[61] Mr Peleti seeks a contribution to the costs of bringing this proceeding. He was successful in his claims. The investigation meeting took about a third of a day. At the notional daily tariff rate of \$4,500.00 for the first day of an investigation meeting, Mr Peleti is entitled to a contribution of \$1,500.00.

[62] I order Genesis 1 Limited to pay Mr Peleti the following sums within 28 days of the date of this determination:

- (a) \$1,500.00 as a contribution to his costs;
- (b) \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority