

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 168
5553203

BETWEEN	MOLENI VALAAU Applicant
A N D	NIMAHLIS PAINTING LIMITED First Respondent
AND	SULUTAILEPAPA TAUILIILI Second Respondent

Member of Authority: Helen Doyle

Representatives: Jessica Setu, Advocate for the Applicant
Elisa and Sulutailepapa Tauiliili, Advocates for the first
Respondent
Sulutailepapa Tauiliili in person

Investigation Meeting: 15 September 2015 at Christchurch

Submissions Received: On the day

Date of Determination: 5 November 2015

DETERMINATION OF THE AUTHORITY

- A Moleni Valaau was employed by Sulutailepapa Tauiliili and Nimahlis Painting Limited for different periods between 13 January 2015 and 2 April 2015.**
- B I have found that Moleni Valaau is owed money for arrears of wages, holiday pay, working on a statutory day, an alternative day in lieu and for wages paid to another person without his consent. I have made orders as below:**

(a) Sulutailepapa Tauiliili is to pay Moleni Valaau the sum of \$480 gross being reimbursement of 3 days unpaid wages and Nimahlis Painting Limited is to pay to Moleni Valaau the sum of \$2720.00 gross being reimbursement of 17 days unpaid wages.

(b) I order Nimahlis Painting Limited to pay to Moleni Valaau the sum of \$240 gross being payment of time and a half for working on Good Friday and for an alternative day in lieu.

(c) I order Nimahlis Painting Limited to pay to Moleni Valaau the sum of \$945.60 in accordance with the payslip for work undertaken from 27 March to 2 April 2015 and holiday pay which was paid without his consent to his wife.

(d) I order Nimahlis Painting Limited and/or Sulutailepapa Tauiliili to pay to Moleni Valaau the sum of \$337.60 gross being additional holiday pay.

C I have not found that Moleni Valaau was unjustifiably dismissed from his employment and he is not entitled to lost wages or compensation.

D Moleni Valaau is entitled to reimbursement of his filing fee of \$71.56. If there are other issues of costs then I have timetabled for submissions.

Employment relationship problem

[1] Moleni Valaau says that he was employed by the first respondent Nimahlis Painting Limited (Nimahlis) and/or the second respondent Sulutailepapa Tauiliili from on or about 13 January 2015 as a painter and plasterer.

[2] The sole director of Nimahlis is Mr Valaau's cousin Mr Tauiliili.

[3] Mr Tauiliili was joined to the proceedings as second respondent by consent during a telephone conference with the Authority. Nimahlis was incorporated on 21 January 2015 but Mr Valaau says that he was employed before that time from 13 January 2015.

[4] Prior to working at Nimahlis or for Mr Tauiliili Mr Valaau was employed by another painting company Masta-Dec. He said that he was told by Mr Tauiliili that he was now working for him and later Nimahlis. Masta-Dec subcontracts work to Nimahlis. Mr Valaau said that Masta-Dec did not formally at that stage terminate his employment but I am satisfied that he did no further work for that company after 13 January 2015 with his final pay of \$228.67 deposited into his bank account on 14 January 2015.

[5] During the period he was working for either Mr Tauiliili or Nimahlis Mr Valaau resided at Mr Tauiliili's home. Mr Valaau was not provided with a written employment agreement from Nimahlis or Mr Tauiliili. In his written evidence Mr Valaau seeks:

- Four weeks unpaid wages for an average of 40 hours per week worked at \$20 per hour in the sum of \$3,200;
- Unpaid taxes as Inland Revenue Department (IRD) has no record of PAYE being paid;
- Monies sent by way of money transfer to Samoa that should have been paid to him.
- Mr Valaau recorded that he was prepared to waive the Kiwisaver deductions as he wanted the matter resolved;
- Holiday pay together with payment for statutory holidays and a day in lieu for working Good Friday and Easter Monday;
- Lost wages of 19 weeks during which period he has been out of work in the sum of \$15,200;
- Compensation.

[6] Nimahlis and Mr Tauiliili do not accept that Mr Valaau is owed money for unpaid wages or for any other sum. They say that he was paid for all the hours that he worked and then after an argument about an unrelated matter over the Easter weekend asked to be dropped off at the airport on the understanding that he was to travel to Auckland. Subsequent communication with Mr Valaau they say did not make it clear that he wanted to continue to work for Nimahlis and had not resigned.

[7] The Authority was assisted in this matter by a Samoan interpreter. Mr Valaau and some of the other witnesses spoke only limited English.

The issues

[8] The Authority needs to determine the following issues:

- (a) Are there four weeks unpaid wages owing to Mr Valaau?
- (b) Did Mr Valaau work on statutory days and is there an entitlement to payment at time and a half and days in lieu?
- (c) Should the wages for the final pay which were paid to Mr Valaau's wife in Samoa without his consent be reimbursed?
- (d) Is Mr Valaau owed holiday pay?
- (e) What is the situation with PAYE?
- (f) How did the employment relationship end?
- (g) Has Mr Valaau got a personal grievance of unjustified dismissal that entitles him to reimbursement of lost wages and payment of compensation?

[9] Originally there was an issue about reimbursement of board Mr Valaau had deducted from his bank account when he stayed at Mr and Mrs Tauiliili's home. Mr Valaau stated in his evidence at the investigation meeting that he wanted that matter left to the police who have some involvement so I will not deal with issues about board in this determination.

[10] It is clear that the relationship has deteriorated quite significantly between Mr Valaau and the Tauiliili's. Some things said in the written evidence reflect that

but are not strictly relevant to the matters I am required to determine and these will not be referred to.

[11] It was intended that the parties attend mediation but apparently there was some confusion by the respondents about the date. That is unfortunate because at the investigation meeting there was some indication that Mr Tauiliili and Mr Valaau may be able to resolve matters by talking. A short adjournment was taken so that discussion could occur but the matter was not resolved.

Are there four weeks unpaid wages owing to Mr Valaau?

[12] There are no wage and time records for the period of employment. I gave Mr Tauiliili an opportunity to provide these after the investigation meeting but they have not been provided. I find that Mr Valaau initially undertook work as an employee for Mr Tauiliili and then for Nimahlis after its incorporation on 21 January 2015. That he was employed is not in dispute in this matter.

[13] The Authority does have Mr Valaau's bank statements for the material period that he worked showing one deposit of wages from Mr Tauiliili and the balance from Nimahlis. I was also provided with five payslips, the first four of which were attached to the statement of problem and all five attached to the statement in reply. I shall come to whether these match with the amounts deposited into Mr Valaau's bank account. The pay periods and amount to be paid on the pay slips are as follows:

- (a) 26 February - 5 March 2015 - \$1104 net
- (b) 9 March - 19 March 2015 - \$956 net
- (c) 9 March - 23 March 2015 - \$640 net
- (d) 26 March - 27 March 2015 - \$30 net
- (e) 27 March to 2 April 2015 - \$945.60 net (stated to include holiday pay)
paid to Mr Valaau's wife in Samoa.

[14] From the payslips it is evident that the periods over which payments are made are inconsistent. Some weeks show weekly pay and others are for a shorter or longer period. Some pays seem to duplicate part of the same period. Mr Valaau said that some weeks he got payslips and some weeks he did not get payslips. The payment

made into his bank account on 2 February 2015 for \$650 does not have a corresponding payslip.

[15] Mr Tauiliili said that Mr Valaau knew Nimahlis only got paid by Masta-Dec when a job was completed. Mr Valaau did not accept this was the way he should, as an employee, be paid and said he expected regular payments although it may be that this explains some of the irregular pay periods. Mr Tauiliili said that he recalled Mr Valaau starting on 16 January 2015 which is a Friday not on 13 January 2015.

[16] In the absence of any records as to the days and times Mr Valaau worked it is difficult, in fact impossible, for him to make an accurate claim under s 131 of the Employment Relations Act 2000 (the Act). He is asking to be reimbursed for four weeks he says he worked without pay. Section 132 of the Act provides that where the employer has failed to keep or produce wages and time records and that has prejudiced the employee's ability to bring an accurate claim then the Authority may, unless these claims are proven to be incorrect, accept as proved all claims made by the employee about wages actually paid and hours, days and time worked by the employee.

[17] Mr Valaau received some ACC payments in January and February 2015. I asked for information from ACC and it has been provided.

[18] Mr Valaau confirmed that he had sustained a non-work injury being a broken ankle on 2 January 2015. This accords with the date of injury in the ACC correspondence. I asked Mr Valaau when he was able to work again and he said 13 January 2015. A letter from ACC states that it considered Mr Valaau fit to return to full time work as of the time of the latest medical certificate on 11 February 2015.

[19] Mr Valaau confirmed he only had one bank account. His records for the material period show that he received the following payments from Nimahlis. The first payment was shown as being paid by Mr Tauiliili:

2 February 2015 payment showing as payment from Mr Tauiliili \$650.00

9 March 2015 \$1110.00 paid by Nimahlis

20 March 2015 \$956.00 paid by Nimahlis

30 March 2015 \$670.00 paid by Nimahlis

[20] Mr Valaau in his evidence described the first payment from Mr Tauiliili as payment for a period of two weeks work. That means that Mr Valaau was paid for two weeks from about 19 January 2015 leaving the issue as to whether Mr Valaau started on 13 or 16 January 2015 and whether there is money owing for that period. The focus for the claim for four weeks unpaid wages is for the month of February 2015.

[21] There was no payment from 2 February 2015 until \$1110 was deposited into Mr Valaau's bank account on 9 March 2015. The pay slip shows that there was a payment to be made of \$1104 to Mr Valaau's account on 7 March for the pay period 26 February to 5 March 2015. The amount deposited was for a few dollars more than shown on the pay slip but I accept that it was for that pay period, 26 February to 5 March 2015.

[22] The main issue for the Authority is what happened for the period of almost four weeks from Monday 2 February 2015 to Thursday 26 February with Mr Valaau's employment. Mr Valaau said that he worked every week from 13 January 2015 until his last day on 2 April 2015. I asked Mr and Mrs Tauiliili to explain to me why there was no payment to him for the month of February until the payment described in [24] above was received. Mr Tauiliili said that sometimes work was not available and Mr Valaau did not work. There was also reference to Mr Valaau being injured. In some of the correspondence on the Authority file there is reference to Mr Valaau being a casual employee but there was no evidence provided by way of wage and time records to support that.

[23] I accept Mr Valaau was not working elsewhere in February 2015. In terms of the injury preventing him working I find that unlikely because Mr Valaau had been working up to 2 February 2015. I also find it unlikely that there was no work for this period. There are no records to assist.

[24] Mr Valaau said that sometime he worked extended hours although not all the time and thought he usually undertook about 40 hours work per week. Mr Valaau also said he had not been paid at all for two jobs and that he was not paid for all hours worked. Those matters all fall I find within the claim for four weeks arrears of wages or for the claim related to the payment made to Mr Valaau's wife in Samoa without his consent.

[25] I find that the absence of wage and time records has disadvantaged Mr Valaau in his claim for reimbursement of arrears of wages and his ability to bring an accurate claim. The Authority has been left in the difficult position of trying to assess whether payments have been made correctly to him over the duration of his employment. In all the circumstances under s 132 of the Act I intend to accept Mr Valaau's claim that he commenced employment with Mr Tauiliili on 13 January and that he has not been paid in full and is therefore owed wages for periods between his start day 13 January and 26 February for Nimahlis. There are three days from commencement of employment with Mr Tauiliili for which there is no evidence of payment. In the absence of records I accept that claim for 40 hours work per week as reasonable. There is no evidence of payment for the period worked in February 2015 by Mr Valaau between 2 February and 26 February 2015 when Mr Valaau was employed by Nimahlis. This is a period three days short of four weeks. I find that the claim for this period again of 40 hours per week is reasonable.

[26] Part of the period relates to one where it appears Mr Valaau was receiving accident compensation payments up to 11 February 2015.

[27] The Employment Court in its judgment in *Scissor Platforms (1997) v Brien*¹ set out the approach to be taken if there was ACC earnings related compensation paid during the period for which reimbursement of wages was being considered. In line with *Scissor Platforms* liability for any repayment is a matter between Mr Valaau and ACC and I do not deduct any earning related compensation from the amount I shall go on to award for reimbursement of unpaid wages.

[28] I order Sulutailepapa Tauiliili to pay to Moleni Valaau the sum of \$480 gross being reimbursement of three days unpaid wages between 13 and 16 January 2015. I order Nimahlis Painting Limited to pay to Moleni Valaau the sum of \$2720.00 gross being reimbursement of 17 days unpaid wages between 3 February and 25 February both days inclusive.

Did Mr Valaau work on statutory days and is there an entitlement to payment at time and a half and days in lieu?

[29] The last day that Mr Valaau undertook work for Nimahlis was 2 April 2015 which is Easter Saturday. There is a claim for payment for working on Good Friday

¹ [1999] ERNZ 672 at pg 681- 682

and for Easter Monday. I accept that Mr Valaau worked on Good Friday and that he should have been paid time and a half for work that day. In the absence of any records I have treated the day worked as a full day and the relevant daily pay under s 50 of the Holidays Act 2003 as \$160 which is eight hours at \$20 per hour. Payment of an additional \$80 should have been made for working on that day.

[30] Mr Valaau was also entitled to an alternative holiday for working that day and as the relationship ended after Easter Saturday 2 April 2015 he should have been paid \$160 for that alternative holiday in lieu. I do not in the circumstances make any orders in respect of Easter Monday. For completeness Easter Saturday is not a public holiday.

[31] I order Nimahlis Painting Limited to pay to Moleni Valaau the sum of \$240 gross being payment of time and a half for working on Good Friday and for an alternative day in lieu.

Should the money transferred to Samoa to Mr Valaau's wife be reimbursed to him?

[32] Mr and Mrs Tauiliili accept that they should not have transferred money payable to Mr Valaau in his final pay for wages and holiday pay to his wife in Samoa. The fact that they did not want anything more to do with Mr Valaau is not a satisfactory explanation because depositing that amount into his bank account in the same way as the other payments did not require any contact with him and may have gone some way to resolving matters instead of inflaming them. Mr Valaau needed that money and he did not give written consent for payment of his wages to be to someone other than him. That money is therefore in effect still due and owing to Mr Valaau and I make an order for Mr Valaau to be reimbursed that sum.

[33] I order Nimahlis Painting Limited to pay to Moleni Valaau the sum of \$945.60 net in accordance with the payslip for work undertaken from 27 March to 2 April 2015 and holiday pay.

Is Mr Valaau owed additional holiday pay?

[34] I have ordered the reimbursement to Mr Valaau of \$945.60 net. A component of that sum is holiday pay which was calculated at 8% of gross earnings in accordance with the payslips.

[35] Holiday pay will also be payable on the additional payment of \$650 net for which there is no pay slip, four weeks wages I have found owing in the total sum of \$3200 gross and the sums I have ordered for working on the public holiday and for an alternative day of \$240 gross. It appears Mr Valaau was taxed at 20% so the gross pay for the additional period for which Mr Valaau was paid \$650 net is \$780 gross. I calculate additional holiday pay on the gross sums of \$780, \$3200 and \$240 to be \$4220 which multiplied by 8% is \$337.60 gross for additional holiday pay.

[36] I order Nimahlis Painting Limited and/or Sulutailepapa Tauiliili to pay to Moleni Valaau the sum \$337.60 gross being additional holiday pay.

What is the situation with PAYE?

[37] PAYE was deducted from payments made to Mr Valaau as shown on the payslips but was not paid for some time. Mr Tauiliili says that this was because the company had only recently been incorporated. In any event the liability for payment of PAYE which has been deducted for all of the payments Mr Valaau received except for one is the responsibility of Mr Tauiliili or Nimahlis. PAYE will have to be deducted and paid from the gross amounts I have ordered are payable. Mr Valaau can, if issues about PAYE arise, show this determination to the IRD.

How did the employment relationship end?

[38] There was some agreement about what occurred leading up to the end of the relationship following Easter Saturday 2 April 2015. An issue arose it appears after Friday night church games resulting in some argument between Mr Valaau and Mr Tauiliili about matters unrelated to work. Mr Valaau said he decided that he did not want to stay in the Tauiliili home after that and although he did go to work on Saturday he later asked Mr Tauiliili to take him to the airport with his packed bags. Mr Tauiliili took Mr Valaau to the airport but Mr Valaau then contacted Jessica and Lofi Setu who he knew from church who live in Christchurch and he went to live with them.

[39] I heard from another witness Michael Tauiliili who also worked for Nimahlis. He gave evidence in support of Mr Valaau and said that Mr Valaau did not work a full day on 2 April. He thought Mr Valaau was going to Auckland and would not be coming back and understood from comments made that Mr Valaau wanted to go back to Samoa to be with his family.

[40] Mr Valaau said that on Easter Monday he tried to telephone Mr Tauiliili and spoke to Mrs Tauiliili about some payments but Mr Tauiliili would not talk to him. There is some dispute about the exact date Mr Valaau made contact with Mrs Tauiliili. I could not be satisfied that during those calls Mr Valaau made it clear that he wanted to return to work. Rather I find it more likely that his discussions focussed on payment for money he said that he was owed. On 13 April 2015 Mr Valaau received a text message from 2 degrees saying that his number had been reported as a nuisance and he was not allowed to text the Tauiliili's number any more. On 17 April 2015 Mr Valaau confronted Mr Tauiliili at Church about money he was owed.

[41] Following that Mr Valaau sent a letter dated 20 April 2015 to Mr Tauiliili asking for mediation. The letter did not set out that he wanted his job back. There was a rather unhelpful response to that from Mr Tauiliili then proceedings were lodged on 23 April 2015.

[42] I find that Mr Valaau left his employment on 2 April 2015 giving Mr Tauiliili the impression that he was leaving Christchurch. The evidence does not support that he was dismissed or sent away from his employment that day. He left in circumstances I find that entitled Nimahlis and Mr Tauiliili to believe that he had resigned from his employment and was intending to leave Christchurch. Although there had been a heated exchange on the Friday night Mr Valaau had gone to work as usual on Saturday 2 April 2015 and then requested a ride to the airport.

[43] There are some cases where the communication by an employee about resignation is not clear, is unwitting or unintended. If that is the case then the onus falls on the employee to make it clear within a reasonable time that the communication/actions were not intended to be a resignation. The difficulty I find in this case is that Mr Valaau did not promptly make it known that he was not intending to resign and that he wanted to return to work. When he did communicate it was to the effect that he wanted payment of money he believed was owed to him not that he did not intend to resign and wanted to come back to work. I acknowledge Mr Tauiliili did not respond to Mr Valaau appropriately after 2 April but there was the option of Mr Valaau communicating in writing that he wanted to go back to work.

[44] I do not find that Mr Valaau was dismissed from his employment but rather I find that the relationship ended when he asked to be taken to the airport which

resulted in Mr Tauiliili concluding he was resigning. This is not a case where I am satisfied that there were actions or words on the part of Mr Tauiliili that induced Mr Valaau to leave on 2 April 2015.

[45] I do not find that Mr Valaau has a personal grievance that he was unjustifiably dismissed and he is not entitled therefore to reimbursement of lost wages or compensation.

Costs

[46] I reserve the issue of costs. Mr Valaau is entitled to reimbursement of his filing fee of \$71.56. It may be that there are no further issues of costs but if there are then submissions are to be lodged and served by 18 November 2015 by Ms Setu and Nimahlis and Mr Tauiliili have until 2 December 2015 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority