

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 184
3027831**

BETWEEN VADIM VOITENKO
Applicant

AND NANOSHINE LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Aidan McDougall & Sofiya Stelmakh, representing the
Respondent

Investigation Meeting: 25 May 2018 at Auckland

Date of further information: 27 May 2018

Date of determination 11 June 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Vadim Voitenko, the Applicant, is claiming unpaid wages in respect of overtime hours worked on 11 Saturdays, unpaid holiday pay entitlement and unpaid expenses from the Respondent, Nanoshine Limited (Nanoshine).

[2] Nanoshine claims that it has paid Mr Voitenko all the monies due to him and an additional \$500.00 in good faith to resolve matters.

[3] Specifically Nanoshine denies that Mr Voitenko is entitled to any monies in respect of overtime hours worked without request or authorisation, or has any outstanding holiday entitlement for which payment is due. It claims that it is willing to pay Mr Voitenko any expenses due upon receipt of tax invoices.

Issues

[4] The issue for determination is whether or not Mr Voitenko is owed any monies by Nanoshine.

Background Facts

Overtime working

[5] Nanoshine manufactures a series of automotive protective coatings for automotive surfaces.

[6] Mr Voitenko was employed as a Mechanic by Nanoshine on 24 November 2015. He was provided with an individual employment agreement (the Employment Agreement) which contained the following clauses:

7.1 Remuneration: \$25.00 per hour.

6.1 Hours of work: 40 per week, 8.00 a.m. to 5.00 p.m.

7.3 Overtime Payment: \$35.00 per hour

12.2 Notice period: 4 weeks in writing

[7] Mr Voitenko claimed that he had worked 11 Saturdays in 2017. The hours he had worked were done so at the request of Ms Stelmakh and had been from 9.00 a.m. to 3.00 p.m. with a one hour lunch break, on

- 25 March
- 1 April
- 15 April
- 22 April
- 29 April
- 13 May
- 20 May
- 3 June
- 17 June
- 24 June, and
- 5 August 2017

[8] Mr Voitenko had requested payment in August 2017 but not been paid for the hours he had worked. He also requested payment by email dated 27 October 2017.

[9] During the hours he had been at work Mr Voitenko said he had completed his usual duties polishing vehicles. Ms Stelmakh, Director and shareholder, had been present some of the time he had been working, and occasionally Mr McDougall, Director.

[10] Ms Stelmakh said she had seen Mr Voitenko in the workplace on a number of Saturdays; however she had understood him to be carrying out work on his own account.

[11] Mr McDougall said he had rarely been present in the workplace on a Saturday, and added that Mr Voitenko would not have been able to complete Nanoshine work during the Saturdays as the machines necessary for carrying out that work had not been in use and there had not been sufficient work to perform any work during the periods claimed.

[12] He had not observed the machinery having been used the Monday after the weekend.

[13] Ms Olga Sifun, Mr Voitenko's wife, said that she could confirm that Mr Voitenko had been working at Nanoshine on Saturday as she would arrive, sit and wait for him to finish the work. During the periods she had been in the workplace, Mr Voitenko had been working with machinery.

[14] Mr Jeongho Park, ex-employee of Nanoshine said he had worked with Mr Voitenko on various Saturday dates in 2017, although he could not recall the exact dates.

[15] He said he had not received payment for the Saturday work because he had understood from Nanoshine that his visa restrictions would be adversely affected if he claimed payment. During the Saturdays he worked, the work consisted of his normal duties involving applying product to the vehicles and polishing them.

[16] On or about March 2017 Mr Voitenko said he had been requested to sign a revised employment agreement which omitted the clause relating to overtime payment and as a result he refused to sign it.

[17] Mr Voitenko said he had not completed timesheets recording the hours he had worked on the Saturdays he had worked although he had kept his own record. He said Nanoshine had not requested that timesheets be completed until 2 October 2017.

[18] Mr Voitenko resigned his employment in writing on 17 October 2017 providing the 4 weeks contractual notice. He again requested payment for the Saturdays he had worked on 24 November 2017, but had not received payment.

Annual Leave

[19] Mr Voitenko has claimed unpaid annual leave in respect of leave accrued and outstanding at the date his employment with Nanoshine ended.

[20] Nanoshine claims that Mr Voitenko has no outstanding annual leave.

[21] During the Investigation Meeting Mr Voitenko confirmed that he took 25 days annual leave in July and August 2017.

[22] He also agreed with Ms Stelmakh that he had taken annual leave during Nanoshine's closedown periods in the Christmas/New Year periods 2015 – 2016 and 2016 -2017.

Expenses

[23] During 2016 Mr Voitenko and Nanoshine came to an arrangement whereby in exchange for forgoing wages for an eight week period, Mr Voitenko accepted a BMW motor car (the Car).

[24] This arrangement came to an end when Mr Voitenko returned the Car to Nanoshine after it had failed to transfer ownership to him and he learned that it was under a finance arrangement which had more than 2 years to run.

[25] The outstanding eight weeks wages have since be paid to Mr Voitenko, but he claims that he is owed monies associated with the car whilst it was in his possession. The costs which he incurred were for the registration in the sum of \$88.00, WOF in

the sum of \$45.00, insurance cover for 6 months in the sum of \$600.00, and various expenses and improvements in the sum of \$768.00.

[26] During the Investigation Meeting Mr Voitenko provided evidence that he had paid the car registration and WOF costs and based on the invoices provided Nanoshine accepted the claims in respect of the car registration in the sum of \$85.59 and the WOF charge in the sum of \$40.00.

[27] Nanoshine has by email dated 27 May 2018 confirmed that it has paid these amounts to Mr Voitenko following the Investigation Meeting.

[28] Mr Voitenko said that he had paid the insurance costs by remitting payment by cash to Nanoshine.

[29] Ms Stelmakh and Mr McDougall denied that Nanoshine had received cash payments in respect of insurance from Mr Voitenko and Mr McDougall said he had made payments through the insurers.

[30] Mr Voitenko produced invoices and documentations of the Repairs and improvements to the Car he had carried out.

[31] Mr McDougall said that the repairs had not been necessary or carried out to the Car specifications and did not accept that Nanoshine should be responsible for any improvements.

Determination

[32] Nanoshine has filed wage and time records and copies of the IRD documents filed with the IRD in respect of Mr Voitenko. The Wages and Time Record documentation filed by Nanoshine does not record any hours being worked by Mr Voitenko on a Saturday during 2017.

[33] Mr Voitenko has claimed that the Wage and Time records are not accurate because he had worked on the Saturdays on the dates he has submitted.

[34] I have examined the Wage and Time Records and have noted irregularities recorded in regard to the leave entitlements recorded. These are the failure to record overtime pay on the dates when overtime is recorded as having been worked, and

discrepancies relating the holiday and statutory leave recording as noted in the paragraphs addressing Mr Voitenko's annual holiday entitlement claim below.

[35] Accordingly I am not wholly satisfied that the Wage and Time Records can be regarded as fully reliable.

[36] The Authority is under a duty to act in equity and good conscience and to comply with the principles of natural justice.¹ I therefore intend to take into consideration other evidence as presented in determining this issue.

[37] I find it relevant that Mr Voitenko had been provided with the Employment Agreement which provided at clause 7.3 for overtime with a payment rate of \$35.00. However he was presented with a revised individual employment in March 2017 which contained no overtime clause.

[38] I also note the evidence of the parties as follows:

- Ms Stelmakh confirmed seeing Mr Voitenko in the workplace on a Saturday, and that he was working, although she believed him to be working on his own account. However there is no evidence that Ms Stelmakh objected to Mr Voitenko using the Nanoshine premises and equipment for his own purposes;
- Mr McDougall's evidence was that Mr Voitenko could not have been working on Nanoshine's account as there was no work to be carried out and he did not notice machinery having been in use when he returned to work at the beginning of the following week;
- Mr Park's evidence that he had worked on a Saturday during his employment at Nanoshine, also without payment. He had been engaged on his normal work which involved applying product and polishing the cars; and

¹ S 157(3) of the Employment Relations Act 2000

- Ms Sifun's evidence that she had been present and waiting at Nanoshine on various Saturdays whilst Mr Voitenko finished the work he was carrying out, and that such work involved him using machinery.

[39] Mr Voitenko had requested payment on more than one occasion during his employment and after it ended.

[40] It is clear from the parties' evidence that Nanoshine was a small business and at times faced cash flow difficulty. This was the reason why it and Mr Voitenko entered in to an agreement in 2016 under which Mr Voitenko would be provided, in breach of the statutory requirements, with a BWM car instead of his wages pay entitlement.

[41] Taking all the evidence into consideration, I find that the evidence supports Mr Voitenko having worked on the Saturdays as claimed during 2017 and I determine that he is entitled to payment in respect of those dates.

[42] I order that Nanoshine pay Mr Voitenko the sum of \$2,310.00 gross in respect of unpaid wages pursuant to s 131 of the Act.

Holiday pay

[43] Nanoshine has filed Wage and Time Records, but Mr Voitenko disputes that the records are accurate.

2015 - 2016

[44] Examining the Wage and Time records, these record Mr Voitenko having taken 10 days as annual leave in the weeks ending 25 December 2015 and week ending 1 January 2016.

[45] During the Investigation Meeting Mr Voitenko agreed that there had been a closedown period during the Christmas/New period.

[46] During that period there were 3 days of statutory leave, namely Christmas Day 25 December 2015, Boxing Day Observed on Monday 28 December 2015 and New

Year's Day 01 January 2016. These statutory leave days have not been recorded as such on the Wage and Time records, but recorded as annual leave days.

[47] I therefore determine that there were 7 days annual leave taken in the period 21 December 2015 to 1 January 2016 rather than 10 days annual leave as provided in the Wage and Time records.

2016

[48] The Wage and Time Records record 5 days annual leave being taken in the week ending 30 December 2016. However there were 2 statutory leave days in that week, namely Monday 26 December, Boxing Day, and 27 December Christmas Day Observed which have been recorded as annual leave days.

[49] I therefore determine that there were 3 days annual leave taken in the period 26 December to 30 December 2016 rather than 3 days annual leave as provided in the Wage and Time records.

2017

[50] During 2017 Mr Voitenko said he took 25 days annual leave in July 2017.

[51] The Wage and Time Records record that Mr Voitenko took 5 days annual leave in the weeks ending 7 July, 14 July, 21 July and 28 July 2017. I note that these days are a Thursday whereas the earlier records were for week ending on a Friday. This may be an error. The records also record Mr Voitenko working 8 hours on Friday 29 July 2017, but this may be an error.

[52] I find that Mr Voitenko took 25 days annual leave in 2017.

[53] I find that Mr Voitenko took 10 days annual leave during 2015 and 2016.

[54] In total I find that Mr Voitenko took 35 days annual leave during his employment with Nanoshine.

[55] Mr Voitenko was employed by Nanoshine from 24 November 2015 until his last day of work on 14 November 2017.

[56] An employee is entitled to not less than 4 weeks' paid annual holidays after the end of each completed 12 months of continuous employment.²

[57] At the date Mr Voitenko's employment ended, he had completed less than 24 months service, and his entitlement was 39.8 days at the date his employment ended. Mr Voitenko had taken 35 Days annual leave during his period of employment.

[58] I determine that Mr Voitenko was therefore entitled to 4.8 days annual leave entitlement at his date his employment with Nanoshine ended.

[59] I order that Nanoshine pay the sum of \$1002.62 gross (calculated as Mr Voitenko's employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment \$1044.40 per week = \$208.88 per day x4.8)³

Expenses

[60] Sitting aside the breach of s 7 of the Wages Protection Act 1983 pursuant to which employees shall be paid in money only Mr Voitenko is claiming costs he incurred during the period when he had use of the Car. These are the registration, WOF, insurance and repairs and improvements.

[61] The costs for the registration and WOF have now been paid.

[62] Mr Voitenko said he had paid Nanoshine an amount in cash in respect of the insurance cover, for the Car, however he had no evidence of this as he did not obtain receipts for the cash.

[63] Mr McDougall said he had paid the insurance cover as per the State Insurance Policy and he would provide confirmation of the insurance cover following the Investigation Meeting, however he has not done so.

[64] Even if Mr McDougall provided details of the insurance cover, this would not answer the question of whether or not Mr Voitenko had remitted a cash contribution to the insurance cost to Nanoshine.

² s 16 Holidays Act 2003

³ S 24(2)(b) Holidays Act 2003

[65] That would be a more logical approach rather than Mr Voitenko taking out his own insurance cover, but only on the basis that the intention between the parties was that he would have ownership of the Car permanently. Conversely if Nanoshine were proceeding on the basis that it retained possession then it could have continued insurance cover for the Car.

[66] There is no correspondence between the parties which might help in determining this issue, but I find that the following is consistent with Mr Voitenko believing the car would be transferred by Nanoshine to him, namely his paying for the registration and WOF and effecting repairs and improvements without obtaining permission for them from Nanoshine first.

[67] On that basis I find that it was in his interest to remit a payment to Nanoshine to ensure that insurance cover was maintained until ownership was transferred to him.

[68] **I order that Nanoshine pay Mr Voitenko the sum of \$600.00 in respect of insurance cover for the vehicle.**

[69] Proceeding on the same basis that Mr Voitenko believed the Car was to be transferred to him, it was acceptable for him to undertake repairs and improvements, and acting consistently with this understanding, Mr Voitenko did not seek permission to undertake the work from Nanoshine.

[70] There is a dispute between the parties over whether or not the repairs were necessary. The improvements were for Mr Voitenko's benefit.

[71] I find there no independent evidence regarding the repairs, and I do not think it appropriate that Nanoshine should pay for improvements it did not authorise, especially in circumstances in which the Car was returned to it and Mr Voitenko has been paid the wages to which he was entitled.

[72] **Accordingly I make no order for payment in respect of the repairs and improvements.**

Costs

[73] While costs are reserved, I note here that, subject to his submissions, Mr Voitenko was not legally represented and, unless he incurred legal costs, it is therefore unlikely he will have grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority