

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 5/10
5153124

BETWEEN NAZAR YOUNIS
 Applicant

AND ACE LOCKSMITHS LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: N Younis in person
 J Cross, advocate for respondent

Investigation Meeting: 11 January 2010

Determination: 11 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nazar Younis says his former employer, Ace Locksmiths Limited (Ace Locksmiths), owes him four weeks payment in lieu of notice of the termination of his employment as well as unpaid holiday pay owed at the time of termination.

[2] Ace Locksmiths says Mr Younis was asked to take a month off work because of a diminished workload, with the intention that the matter be reviewed.

Background

[3] Ace Locksmiths employed Mr Younis commencing 14 July 2008. The parties' written employment agreement provided at clause 4.1:

“This agreement may be terminated by either party giving written notice ... to the other party of not less than four weeks, however where for the agreement is terminated by the company it

may elect, in lieu of notice, to pay the Employee at a rate equal to the employee's annual base salary for the four weeks."

[4] The business was quiet in December 2008, so that the company's working director, John Cross, allowed Mr Younis to go home at or about lunch time but remain on-call for the rest of the day.

[5] Mr Younis had a short break just after Christmas, and was to resume work on 30 December 2008. However early that morning he received a text message from Mr Cross saying there was no need to come to work as there was not enough work. The message went on to say: "I will see next month if better I will call you again. Sorry Nazar." Further exchanges clarified that Mr Cross meant he would reconsider the availability of work in a month's time, and that meanwhile Mr Younis would not be paid. Mr Cross was planning to start a new business, in which work might be available to Mr Younis. Mr Cross also believed Mr Younis was performing poorly at Ace Locksmiths, and was under qualified for the work, so planned to offer easier work to him.

[6] Mr Younis wrote an email message of 3 January 2009, followed up with a letter of 6 January 2009, seeking clarification of whether his employment was terminated. There was no written response other than a further text message repeating that work would be offered when it was available, but that Mr Younis would not be paid for doing nothing. Mr Cross said there were additional oral discussions about his plan to start a new business and offer Mr Younis work in that business.

Payment in lieu of notice

[7] Although Mr Cross says Mr Younis' employment was not terminated, his actions in not making work available at least until the end of January 2009 and not proposing to pay Mr Younis in the meantime, amount to fundamental breaches of the employer's obligations to make work available and provide payment. Since Mr Younis did not agree to the proposal, the breaches are sufficiently fundamental to amount to a termination of employment.

[8] Mr Younis has not raised a personal grievance, rather he simply seeks four weeks' payment in lieu of notice.

[9] At Mr Younis' salary of \$36,000 pa the calculation in gross figures is:

$$\$36,000/52 \times 4 = \$2,769.24 \text{ (gross)}$$

[10] The payment is owed and I order accordingly.

Holiday pay

[11] Mr Younis' employment ended before he had completed 12 months' service. Section 23 of the Holidays Act 2003 applies to those circumstances by saying the associated holiday pay entitlement is calculated as 8% of the gross earnings since employment began, less any amount already paid. Mr Younis had received 1.5 days' paid annual leave as at the date of termination.

[12] The calculation in gross figures is:

$$\$36,000/52 \times 23\text{weeks} \times 8\% = \$1,273.85$$

$$\text{Less 1.5 days pay} = \$ 207.69$$

$$\text{Total} = \$1,066.16$$

[13] The payment is owed and I order accordingly.

Summary of orders

[14] Ace Locksmiths is ordered to pay to Mr Younis:

- a. \$2,769.24 (gross) as payment in lieu of notice; and
- b. \$1,066.16 (gross) as holiday pay.

[15] Interest is payable on the above amounts, calculated at the rate of 4.8% from 30 December 2008 to the date of payment.

Costs

[16] Mr Younis is entitled to the reimbursement of the filing fee of \$70. I make a further order accordingly.

R A Monaghan

Member of the Employment Relations Authority