



## **Background**

[3] Mr Lakatani has a 20% shareholding in BBBB, with Jacqueline Scott owning the remaining 80%. Ms Scott is the company's director. Both shareholders also worked as full time employees in the company's business of providing other businesses with training in sales, customer service, leadership, and teambuilding.

[4] At or about the time they commenced in business in 2005 the shareholders agreed they would both be paid salaries of \$90,000 from the company's pre-profit earnings. That arrangement distinguished their circumstances from those of shareholder-employees who do not receive regular payments throughout the year and do not make source deduction tax payments.

[5] The company began experiencing financial difficulties in 2008. Ms Scott mortgaged her personal property to provide funds for the business. Mr Lakatani was aware of the financial difficulties, and of Ms Scott's mortgage. Moreover the company's circumstances were such that in or about November 2008 Ms Scott and Mr Lakatani discussed whether to make the company's other employee redundant, with the redundancy being imposed on that employee in December 2008.

[6] There was no improvement during the first three months of 2009. Again, Mr Lakatani knew this. He and Ms Scott had regular discussions about the company's sales performance and the need to bring in more work so there would be money to pay their salaries. The company was unable to make payments of salary in full during those three months.

[7] It was common ground that on or about 30 March 2009 Mr Lakatani and Ms Scott discussed terminating their respective employment relationships, and contracting their services to the company instead. Ms Scott said she told Mr Lakatani at the time that the options were to make him redundant or to renegotiate a contract/retainer arrangement. She also says Mr Lakatani acknowledged the inevitability of his redundancy. In the circumstances, and with particular reference to the company's financial position and the parties' discussions about it, I accept Ms Scott's evidence on those matters.

[8] It was also common ground that during the 30 March conversation Ms Scott said something like ‘the best I could do [pay] is \$1,500 per month’ to which Mr Lakatani replied ‘ok’. Ms Scott was referring to interim payment pending completion of the ‘contract/retainer’ arrangement. Mr Lakatani says he did not agree to the payment instead of his salary, rather he agreed to the payment on an interim basis as he felt he had no choice.

[9] By email message to Mr Lakatani dated 1 April 2009 Ms Scott confirmed her understanding of the conversation and attached a draft contract for services. Remuneration was to be commission-based. The email message recorded: “... I note that you clearly understand that the business can no longer sustain your position and that you have accepted that we will have to look at making your position redundant.”

[10] Mr Lakatani did not sign the draft contract. Ms Scott raised the matter in an email message dated 13 May 2009, saying: “We also need to finalise what to do with you in the business. Redundancy or retainer/contract or what other options...” At or about the same time the company’s annual accounts were being prepared, were made available to Mr Lakatani, and made the company’s position plain. In an email message to Mr Lakatani dated 25 May 2009 Ms Scott referred to the way in which Mr Lakatani would need to set up his business, mentioning again the need to finalise commission arrangements and commenting on the \$1,500 payment as follows:

“The \$1,500 retainer will need to be an interim until we have all of that finalised and we need to confirm how many training days that includes already.”

[11] The material filed indicates the matter was raised another four weeks later, with Ms Scott referring again on 26 June to her intentions in respect of the retainer. This time Mr Lakatani replied by message dated 28 June, saying he had agreed only to consider the overall proposal. He said further that he had: ‘suffered this \$1500 as I thought we had a severe cashflow issue’.

[12] The reply prompted a detailed statement of her position from Ms Scott in a message dated 29 June 2009. The message included a statement that the retainer was offered in March as an alternative to making Mr Lakatani redundant at that time, and pending Mr Lakatani’s establishment of his own business and finalising the parties’ contract. It referred to Ms Scott’s attempts to earn money to pay salary owed to her,

and suggested Mr Lakatani do the same. Ms Scott said in evidence that a reference to salary owed to Mr Lakatani was to salary owed in the period to 30 March 2009. Since there had been discussions about salary owed as at that date, and the continued indebtedness was not disputed, I accept Ms Scott's evidence.

[13] Mr Lakatani replied by message dated 8 July, saying he had never agreed to a salary reduction or to being made redundant.

[14] On 20 July Ms Scott and Mr Lakatani met at a café to discuss these emails. They argued about whether the \$1,500 was a temporary reduction in salary or a retainer being paid until Mr Lakatani's business had been set up and further arrangements finalised. There were also exchanges about the link between the company's financial performance and Mr Lakatani's failure to bring in business, and a debate about how Mr Lakatani could be paid if no business was brought in. The discussion became so heated that Mr Lakatani walked out.

[15] This prompted Ms Scott to write a letter of the same date, repeating her view that the retainer had been offered and accepted in March as an alternative to redundancy. Ms Scott expressed disappointment at Mr Lakatani's 8 July message, and said:

“... given your indication that you wish to be strictly treated as an employee, and notwithstanding our earlier agreement, please take this letter as confirmation that your position is redundant.”

[16] The letter was silent on notice, but gave Mr Lakatani until 31 July 2009 to return company property.

### **Whether the dismissal was justified**

[17] I have accepted that the prospect of redundancy was discussed in March 2009 and that Mr Lakatani acknowledged its inevitability. At the time, Mr Lakatani was aware of the company's financial position and understood why this was so. Accordingly the parties went on to discuss alternatives, with particular reference to the negotiation of contracts for services instead of continuing the employment relationships. Such a path was agreed in principle, if not in the detail.

[18] I do not construe the March discussion as amounting to any agreement that the sum of \$1,500 be paid on a temporary basis on account of full salary which would remain owing. There was no express agreement to that effect. Instead the discussion amounted to an agreement that the sum of \$1,500 was a retainer to be paid pending entry into a more detailed contract for services, which Ms Scott envisaged would incorporate commission-based payments to be agreed. Mr Lakatani probably had reason to say he had no choice but to agree, but the alternative was to terminate his employment with the company there and then because the business was not in a financial position to continue as before. At the time, both parties understood that.

[19] It was some time before the death knell of the employment relationship sounded formally. Rather than pronouncing the employment relationship at an end on 30 March, as they could have, effectively the parties allowed the relationship to drift while the details of new contract remained incomplete. Matters came to a head when no contract was agreed, Ms Scott expressed concern about how little work Mr Lakatani was bringing in to the business, and Mr Lakatani sought to assert a continuing employment relationship together with an entitlement to full salary.

[20] Against that background, I find the letter of termination of employment dated 20 July was the culmination of a process which began on 30 March. Although unfortunate in tone the letter was more than simply a reaction to the disagreement at the café the same day.

[21] I find in turn that the redundancy was genuine and that the parties entered into a consultation process in respect of it. Unfortunately, having embarked on a path which was agreed on, they were unable to conclude any more detailed agreement. When the impossibility of further agreement became apparent, it was equally apparent that for financial reasons the employment relationship could not continue and it was formally ended.

[22] For these reasons I find the dismissal was justified.

## **Wages and holiday pay**

### 1. Unpaid wages

[23] Mr Lakatani quantified his claim for unpaid wages as \$22,835.05 (nett), in respect of the period 1 January 2009 to 31 July 2009. The sum represented the difference between the nett sum that should have been paid to 31 July based on a salary of \$90,000 pa (gross), and the payments of \$1,500 made from April to July.

[24] Ms Scott says Mr Lakatani is owed only \$7,083.34 nett for unpaid salary to the end of March.

[25] I have found that Mr Lakatani agreed to a retainer of \$1,500 on 30 March 2009 pending the finalising of a new contract, and not accepted that the agreement was to accept the payment as a part payment against salary that would continue to be owed.

[26] Accordingly I find no further salary is owed to Mr Lakatani from 30 March. BBBB is ordered to pay to Mr Lakatani the sum of \$7,083.34 nett if it has not already done so.

## 2. Unpaid holiday pay

[27] The claim for unpaid holiday pay covered a period from 22 November 2007 to 31 July 2009. Mr Lakatani said he had taken 3 days' annual leave between November 2007 and November 2008 and accepted he had taken 18 days' paid annual leave between November 2008 and July 2009.

[28] Beyond the company's comment that it was up to Mr Lakatani to manage his leave, in response to my express request for a response Mr Lakatani's dates were not disputed and no additional information was provided.

[29] As a full time employee Mr Lakatani was entitled to 20 days' paid annual leave per year. If he took 3 days' leave in 2007- 2008, an untaken accrued entitlement of 17 days' leave remained. He used those days in the last part year of employment, plus one additional day. Accordingly in the last part year of his employment he was entitled to 8% of his earnings to the date of termination, less the one day's leave taken in respect of that year.

[30] The calculation is:

YTD earnings = [4 x 90,000/12] + [4 x 1,500] x 8% =	\$2,880.00
Less one day's pay	\$ 346.15
Total owed	\$2,533.85

[31] Payment is ordered accordingly.

### **Summary of orders**

[32] BBBB is ordered to pay to Mr Lakatani:

- a. \$7,083.34 (nett) as unpaid salary; and
- b. \$2,533.85 (gross) as holiday pay.

[33] I further order that interest be paid on the above sums, calculated at 3.1 % pa from 31 July 2009 to the date of payment.

### **Costs**

[34] Costs are reserved.

[35] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority