

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 266  
5302117

BETWEEN RAMESH NAIDU  
Applicant

AND SAVE N SAFE LTD  
TRADING AS KEITH WEIR  
MOTORS  
Respondent

Member of Authority: Vicki Campbell

Representatives: Cor Speksnijder for Applicant  
Javin Dhammi for Respondent

Investigation Meeting: 28 March 2011

Submissions Received: 8 April 2011 from Applicant  
26 April 2011 from Respondent

Determination: 20 June 2011

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**DETERMINATION OF THE AUTHORITY**

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- A Mr Naidu has established a claim for arrears of wages and outstanding holiday pay in the sum of \$14,717.56. Interest on this sum is payable at the rate of 8.4% and is to be calculated from the date of this determination until the sum is paid in full.**
- B Mr Naidu's claim for unjustified disadvantage has not been established.**
- C Mr Naidu was unjustifiably dismissed from his employment and is entitled to remedies as follows:**
- reimbursement of lost wages - \$10,500.00;
  - compensation for hurt, humiliation and distress - \$5,000.

- D Save N Safe Limited trading as Keith Weir Motors is ordered to pay a penalty in the sum of \$1,000 for its breaches of good faith. The penalty is to be paid to the crown.**
- E Save N Safe Limited trading as Keith Weir Motors is ordered to pay to Mr Naidu the sum of \$2,000 as a reasonable contribution to his costs.**
- F All sums are to be paid within 28 days of the date of this determination.**
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[1] Mr Ramesh Naidu was employed as a mechanic by Save N Safe Limited trading as Keith Weir Motors (Keith Weir Motors), on 20 October 2007. Mr Naidu was employed subject to a series of fixed term agreements. Mr Naidu's employment agreement required him to work 40 hours each week, however, it was common ground that Mr Naidu also worked on most Saturdays which meant he worked 46 hours each week.

[2] Mr Naidu is claiming he was unjustifiably disadvantaged in his employment and then unjustifiably dismissed. He also claims arrears of wages and holiday pay which he says remains outstanding. Keith Weir Motors denies the claims.

[3] The date and time for the investigation meeting was set down by agreement with the parties during a telephone conference call on 25 January 2011. At the commencement of the investigation meeting there was no appearance for the Respondent. Following telephone calls between the respondent and the Authority, Mr Javin Dhammi appeared one hour late, on behalf of the respondent. Although other witness statements had been provided to the Authority, Mr Dhammi was the only witness available to answer questions at the investigation meeting. I have therefore given no weight to the unsworn evidence contained in the witness statements for Mr Paul Entwistle, Mr Johnathon Johnson or Mr Navneil Raj.

#### **Arrears of wages**

[4] Mr Naidu claims Keith Weir Motors has not paid him in accordance with his employment agreement which provided for the payment of \$15.00 per hour for each hour worked.

[5] Initially Mr Naidu made a complaint to the Hamilton office of the Department of Labour claiming he had not been paid the correct holiday pay during his employment and complaining that unauthorised deductions had been made from his

pay. After investigating Mr Naidu's claims the Labour Inspector reached the conclusion that Keith Weir Motors owed Mr Naidu \$4,712.57 gross which I find included deductions and additions some of which were challenged by Mr Naidu and others which were reflected as nett figures rather than gross. In reliance on the Labour Inspectors opinion Mr Naidu claims payment of \$4,712.57.

[6] Mr Naidu also says he was not paid for all hours he worked for Keith Weir Motors and seeks payment for the difference between the amount he received and his contracted hourly rate. He says that amounts to \$11,115.00 gross.

*Arrears if wages*

[7] Mr Naidu says he has not received payment for all hours worked. After receiving the documents provided to the Labour Inspector Mr Naidu calculated that he was paid for only 40 hours each week instead of 46. A review of the wage and time records show that Mr Naidu was not paid for any Saturdays worked.

[8] As already mentioned, it was common ground at the investigation meeting that Mr Naidu would work up to 46 hours each week when he worked on a Saturday. Mr Naidu gave evidence that he worked 6.5 hours per week over and above that for which he received payment throughout the duration of his employment. This evidence was not contested by Keith Weir Motors.

[9] Mr Naidu claims a total of 114 weeks at 6.5 hours per week @ \$15.00 per hour. **I am satisfied Mr Naidu is entitled to arrears of wages in the amount of \$11,115.00.**

*Holiday pay*

[10] Mr Naidu claims he was not paid holiday pay during his employment or at the end of it. He says he took holidays during the Christmas closedown but that these periods were unpaid. He claims the amount of \$4,399.36.

[11] Keith Weir Motors produced a wage and time record for Mr Naidu at the investigation meeting. The record shows a payment of \$2,636.80 gross being holiday pay up to December 2008 being made to Mr Naidu 21 September 2009. The record also shows a number of deductions being made from the holiday pay calculation as follows:

PAYE	\$510.22
Purchases	\$680.45

Shed	\$200.00
<b>TOTAL</b>	<b>\$1,390.45 nett</b>

[12] The wages record shows the total nett amount to be paid to Mr Naidu is \$1246.13 nett. The record then shows a total payment of \$623.06 with some further deductions amounting to \$63.00 and a final payment recorded of \$560.07. Keith Weir Motors says Mr Naidu was paid this holiday pay in two lump sums, one on 21 September 2009 in the amount of \$623.06 and the next on 29 October 2009 in the amount of \$560.07.

[13] That is the only record of holiday pay in the wage and time records. The Labour Inspector's calculations which have not been challenged by Keith Weir Motors, shows a total outstanding holiday payment of \$5,879.36 gross before any deductions were taken into account. Taking into account the payments received by Mr Naidu totalling \$2,636.80 (less the deductions) the total amount of holiday pay outstanding is \$3,242.56 gross.

[14] Mr Naidu acknowledged at the investigation meeting that he agreed to the deduction for the shed to be made from his pay. He disputes the right of Keith Weir Motors to make deductions for his purchases, however, I am satisfied it is more likely than not that Mr Naidu purchased goods to the amount of \$680.00 and had agreed to pay for these purchases. **Mr Naidu is entitled to the payment of his outstanding holiday pay in the amount of \$3242.56 gross.**

*Bereavement Leave*

[15] Mr Naidu had to travel to Canada in March 2010 to attend his father's funeral. The evidence shows he was not paid his entitlement for bereavement leave. The Holidays Act provides for a period of 3 days paid bereavement leave after working continuously for an employer for six months. Mr Naidu had worked for Keith Weir Motors continuously since October 2007. He was therefore entitled to receive payment for 3 days bereavement leave to attend his father's funeral.

[16] Mr Naidu's was entitled to receive payment when he took 3 days bereavement leave. I have calculated that payment as being \$360.00 gross (3 days x 8 hours x \$15.00 per hour). **Mr Naidu is entitled to receive bereavement leave in the amount of \$360.00 gross.**

**Unjustified disadvantage**

[17] In early 2010 Mr Naidu was advised that his father, who lived in Canada, was very ill. He wanted to visit his father while he was still alive and requested leave from Mr Singh. Mr Naidu supported his application for leave by producing a letter from his father's doctor which advised that Mr Naidu's father was in a very serious condition and that the prognosis was poor.

[18] The request for leave was never acknowledged formally by Keith Weir Motors. However, I accept the evidence from Keith Weir Motors that Mr Naidu was told that it required 2 weeks notice to take leave. On 4 March 2010 Mr Naidu, who had been awaiting notification of a visa to enter Canada formally applied for emergency leave to visit his dying father. The requested leave dates were 9 – 26 March 2010. The response to this request was to again advise Mr Naidu that 2 weeks notice was required. Mr Naidu's father passed away on 7 March 2010. On 8 March 2010 Mr Naidu travelled to Canada to attend his fathers' funeral.

[19] Mr Naidu claims that the lack of positive response by Keith Weir Motors resulted in one or more terms of employment being affected to his disadvantage by an unjustified action on the part of his employer. The test is that contained in section 103A of the Employment Relations Act which is whether the actions of Keith Weir Motors were those of an employer acting fairly and reasonably in all the circumstances of this case.

[20] I am satisfied that Mr Naidu was never advised whether his leave was approved or not. However, given Mr Naidu's application was for the period 9 – 26 March 2010 and as events transpired, even if he had received approval for the leave, he would not have made it back to Canada in time to say his farewell's to his father.

[21] Disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.<sup>1</sup>

[22] Mr Naidu has not established to my satisfaction that the consequences of the failure of Keith Weir Motors constructively respond to his leave request were

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<sup>1</sup> *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

disadvantageous to him. While I am sympathetic to Mr Naidu's circumstances I am unable to assist him further with this claim.

### **Unjustified dismissal**

[23] Mr Naidu claims he was unjustifiably dismissed on 29 March 2010. On 8 March 2010 Mr Naidu asked Mr Singh for leave to attend his father's funeral in Canada. Mr Singh told Mr Naidu that if he had to go, he had to go.

[24] Mr Naidu travelled to Canada to attend his father's funeral and returned to work on 29 March 2010. He did not receive any bereavement and/or holiday pay during his absence.

[25] On his return to work on 29 March 2010 Mr Singh handed Mr Naidu a pre-prepared letter terminating his employment and told him to go home. Mr Naidu was dismissed because of allegations that he had been grossly negligent, that he was guilty of unspecified serious misconduct, had performed unsatisfactorily and had caused harm to the company's reputation.

[26] At the investigation meeting Mr Dhammi's evidence focused on mistakes Mr Naidu had made to vehicles being serviced by Keith Weir Motors. The letter of dismissal also made mention of two warnings issued to Mr Naidu during his employment. Both warnings were issued more than 12 months before Mr Naidu's dismissal.

[27] I find that in dismissing Mr Naidu, Keith Weir Motors did not act as a fair and reasonable employer would have in all the circumstances of this case. By way of example a fair and reasonable employer would have advised Mr Naidu of the specific allegations, the likely consequences and provided with an opportunity to respond or refute the allegations. The failure to follow this process means Keith Weir Motors could not give consideration to Mr Naidu's explanations and the decision to dismiss was pre-determined.

[28] I find that the departure from these basic requirements was so fundamental as to render the dismissal of Mr Naidu an unjustifiable dismissal. It follows that Mr Naidu is entitled to a consideration of remedies.

## Remedies

### *Lost wages*

[29] Mr Naidu claims reimbursement of lost wages for a period of four months following his dismissal. This claim is based on the assertion of Keith Weir Motors that Mr Naidu was, at all times during his employment, subject to a fixed term employment agreement. In his written evidence Mr Naidu also refers to the fixed term nature of the employment.

[30] I have not been asked to make a declaration about the validity of the fixed term agreements, however, having scrutinised the documents I find they do not meet the requirements of section 66 of the Act.

[31] Mr Dhammi told the Authority that the reason for the fixed term agreements was so that they would not have to make Mr Naidu redundant if the work did not continue. He then told the Authority that even though Mr Naidu was not performing well in his employment and had received two written warnings, he was offered a further fixed term agreement because there were no other suitable mechanics in the market. There was no documentary evidence to support Mr Dhammi's assertions. On the basis of the evidence before the Authority, I am satisfied Keith Weir Motors did not have genuine reasons based on reasonable grounds, for specifying the employment would end at a particular point in time.

[32] However, the parties are not disputing the fixed term nature of the employment and Mr Naidu's claim for lost wages has been limited to the four months following his dismissal which he says he would have worked under the last fixed term agreement had he not been dismissed.

**Save N Safe Limited trading as Keith Weir Motors is ordered to pay to Mr Naidu the sum of \$10,400 pursuant to section 123(1)(b) of the Act within 28 days of the date of this determination.**

### *Compensation*

[33] Mr Naidu seeks payment of \$10,000 for his unjustified dismissal. Mr Naidu's evidence as to the hurt, humiliation and distress he suffered as a result of his dismissal was compelling. Mr Naidu told the Authority that as a result of the stress of being unemployed and not having enough money to feed his family, he suffered from chest pains and had to be hospitalised. He was then required to pay for the ambulance which was called to attend to his medical emergency.

[34] Mr Naidu is entitled to compensation which I set at \$5,000.

**Save N Safe Limited trading as Keith Weir Motors is ordered to pay to Mr Naidu the sum of \$5,000 pursuant to section 123(1)(c)(i) of the Act within 28 days of the date of this determination.**

*Contribution*

[35] I have considered the matter of contribution pursuant to s 124 of the Act. While there were issues raised at the investigation meeting about Mr Naidu's performance he was never provided with a real opportunity to address these issues. The action giving rise to this personal grievance was the complete absence of any notion of procedural fairness on the part of Keith Weir Motors. In all the circumstances of this case I have concluded that it is not appropriate to reduce the remedies.

**Interest**

[36] Interest on the sum of \$14,717.56 established as being the outstanding arrears of wages is awarded at 8.4% per annum, the current rate prescribed at clause 11 of Schedule 2 of the Act. Interest will be calculated from the date of this determination until the sum has been paid in full.

[37] No interest is awarded on the reimbursement of lost wages.

**Breach of good faith**

[38] Mr Naidu claims Keith Weir Motors breached its obligations of good faith when it failed to respond to his requests for leave when his father was terminally ill and in dealing with him over concerns about his performance which led to his dismissal.

[39] The Employment Relations Act (the Act) requires, among other things, that parties to an employment relationship are active and constructive in maintaining a productive employment relationship.<sup>2</sup>

[40] I am satisfied that simply stating that 2 weeks notice is required when an employee is seeking urgent approval to attend to his dying father with no reasonable explanation was a breach of Keith Weir Motors' obligations of good faith.

[41] Further I find that the failure to adhere to the fundamental principals of procedural fairness when dismissing Mr Naidu was a breach of good faith.

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<sup>2</sup> Employment Relations Act, section 4(1A).

*Penalties*

[42] Mr Naidu claims a penalty against Keith Weir Motors for its breaches of good faith and a failure to produce wage and time records. I have found that the failure to be active and constructive in its communication with Mr Naidu during the time in which he was seeking to take leave to visit his terminally ill father was a breach of good faith and the failure to follow basic principles of procedural fairness to also be a breach of the employers' duty.

[43] The question for the authority then, is whether the breaches meet the standard set out in the Act, that is, were the breaches were deliberate, serious and sustained or intended to undermine the employment relationship<sup>3</sup>

[44] I am satisfied that in the circumstances of this case the evidence before the Authority demonstrates that the breaches were deliberate and serious with respect to their consequences. Keith Weir Motors response to Mr Naidu's applications for leave were deliberately non-committal. Likewise the failure to follow a proper process in the dismissal of Mr Naidu could only have been a deliberate action on the part of Keith Weir Motors.

[45] The consequences of the breaches of good faith with respect to the dismissal were serious, although, I have already found that even if Keith Weir Motors had granted Mr Naidu's leave when he applied on 4 March 2010 he would not have made it home to Canada in time to see his father.

[46] **In all the circumstances I am satisfied that a penalty of \$1,000 is appropriate.** In determining this amount I note that the breaches preceded the 1 April 2011 amendments to the Act which doubled fines for breaches of this type. The penalty is to be paid to the Crown.

[47] Mr Naidu also seeks a penalty for a failure to provide wage and time records. I am not satisfied that this claim has been established. Mr Naidu and the Department of Labour were provided with copies of wage and time records prior to this matter being lodged in the Authority. It was these records which the Labour Inspector relied on to calculate the amounts owed for unpaid holiday pay.

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<sup>3</sup> Employment Relations Act, section 4A.

**Costs**

[48] There is no reason in this case not to apply the usual rule that costs should follow the event. An award is sought on behalf of Mr Naidu in the amount of \$2,500.00. The investigation meeting took less than ½ a day. I accept, however, that the preparation for Mr Naidu, especially with respect to the financial claims for arrears of wages would have taken considerable time. Also, wasted time was spent in preparation for the cross examination of Keith Weir Motor's witnesses who then failed to attend the investigation meeting.

**Save N Safe Limited trading as Keith Weir Motors is ordered to pay to Mr Naidu the sum of \$2,000 as a reasonable contribution to his costs.**

Vicki Campbell  
Member of Employment Relations Authority