

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 75
5435487

BETWEEN JOHAN DIRK VOLSCHENK
Applicant

AND MY GROUP LIMITED
(PREVIOUSLY NAMED
IMAGE WEB AND MEDIA
DESIGN LIMITED)
Respondent

Member of Authority: Robin Arthur
Representatives: Applicant in person
No attendance for Respondent
Investigation Meeting: 3 March 2014 by telephone conference
Determination: 4 March 2014

DETERMINATION OF THE AUTHORITY

- A. Under sections 131(1A), 137 and 138 of the Employment Relations Act 2000 (the Act) My Group Limited must pay Johan Dirk Volschenk the following amounts within 14 days of the date of this determination:**
- (i) \$1753.50 for three weeks' wages; and**
 - (ii) \$1169.00 for a further two weeks wages as notice; and**
 - (iii) \$537.74 as holiday pay; and**
 - (iv) A further \$0.47 per day (from 18 September 2013 until the amounts due are paid) as interest on the total wages and holiday pay owed.**
- B. MGL must also reimburse Mr Volschenk the Authority application filing fee of \$71.56.**

Employment relationship problem

[1] My Group Limited (MGL) did not reply to Johan Dirk Volschenk's application to the Authority for orders that he be paid wages and notice owed to him.

[2] The Authority sent a copy of Mr Volschenk's statement of problem to MGL's address for service in Mt Albert, as recorded in the Companies Office, but the copy was returned undelivered by the courier on 6 December 2013. Mr Volschenk also provided the Authority with a Parnell business address for MGL. Courier records showed that a copy of the statement sent to MGL at that address was delivered on 4 December 2013 and signed for by "*MGL Mohamed*". That address was also referred to as the "*head office*" on the *imageweb.co.nz* website which used MGL's previous company name of Image Web and Media Design Limited. Courier records showed a further copy of the statement delivered to the Parnell address on 6 January 2014 was signed for by "*Russell MGL*".

[3] In the absence of a statement in reply and any other communication from MGL the Authority proceeded with arrangements to investigate and determine Mr Volschenk's application. An investigation meeting by telephone conference was notified to the parties. The Notice of Investigation Meeting was sent to MGL at the info@imageweb.co.nz email address and by courier to the Parnell address which had MGL signage and appeared to be occupied at the time. Courier records showed the notice was delivered on 12 February 2014 and signed for by "*MGL Paul*". The Parnell premises have since been vacated. The Mt Albert address which remained the registered address for service for MGL (and four other companies of which MGL's sole director, Dennis Ralph Heath, is also director) was also vacant.

[4] A Member's Minute accompanying the Notice advised MGL that it could participate by telephone conference if it wished to do so. The Minute included the email address of an Authority support officer to whom telephone contact details could be provided. MGL did not contact the Authority support officer.

[5] Following those efforts to contact and involve MGL I went ahead with the notified investigation meeting, exercising the Authority's power to proceed where,

without good cause shown, a party fails to attend or be represented.¹

Mr Volschenk's evidence

[6] Mr Volschenk's oral evidence, given under affirmation, confirmed the following details:

- (i) He was employed by MGL (under its previous company name) in June 2013 with a written employment agreement providing for weekly salary payments; and
- (ii) In the period from 21 June to 13 September 2013 he received one weekly payment in cash and eight weekly payments to his bank account but no other payments from MGL; and
- (iii) Those net weekly payments were for \$584.50 each; and
- (iv) He was due to be paid a further three weeks' wages in that period; and
- (v) Mr Heath promised on at least three occasions to ensure outstanding wages were paid but they were not; and
- (vi) He told Mr Heath in the week beginning 10 September 2013 that he could no longer keep working for the company unless he was paid for the weeks still owed to him; and
- (vii) He told Mr Heath on 16 September that he was resigning and left work the following day; and
- (viii) He had taken one day's leave during his employment and had received no holiday pay on leaving work.

Wages due

[7] The wages owed to Mr Volschenk by his last day of work totalled \$1753.50 net. Mr Heath had not disputed the amounts were owed but failed to honour promises to settle that debt to Mr Volschenk.

[8] Mr Volschenk was entitled to an order for the wages due and for interest on the amount owed. The prescribed annual interest rate is 5 per cent.²

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

² Clause 11 of Schedule 2 of the Act; s87(3) of the Judicature Act 1908 and clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177)

Payment for the notice period

[9] MGL's failure to abide by its employment agreement to pay wages weekly and its failure to honour repeated promises to remedy the situation were breaches of duty. It was reasonably foreseeable Mr Volschenk could not keep working in those circumstances (because Mr Volschenk told Mr Heath that he could not afford to keep working for MGL if he was not paid properly). At law Mr Volschenk's resignation resulted from his employer's action (or inaction) and amounted to termination at the MGL's initiative.

[10] As a result Mr Volschenk was also entitled to be paid for the two week notice period provided as a term in his employment agreement. He was also entitled to interest on that amount.

Entitlement to holiday pay

[11] Mr Volschenk also had a statutory entitlement to holiday pay on the termination of his employment (calculated at eight per cent of his total earnings, less any leave taken).³

[12] For the purpose of that calculation his total net earnings comprised nine weeks actually paid to him, three weeks owed but not paid, and two weeks of notice also due but not paid. The total due for those 14 weeks was \$8,183 so the holiday pay entitlement at eight per cent was \$654.64. The sum of \$116.90 must be deducted from that amount for the one day's leave he took, leaving a total of \$537.74. He was entitled to an order for payment of that remaining total, with interest until paid.

Interest

[13] The amounts on which interest was due (\$1753.50 for three weeks wages, \$1169.00 for two weeks' notice and \$537.74 as holiday pay) totalled \$3460.24. Applying the prescribed rate to that amount gave a daily interest entitlement of 47 cents. Mr Volschenk was entitled to that interest amount on a daily basis from 18

³ Section 23(2) of the Holidays Act 2003.

September 2013 to the date that the amounts due to him are paid. For the 167 days from that date to the date of this determination interest of \$78.49 has already accrued.

No instalments

[14] As a result of MGL's non-participation in the investigation there was no information before the Authority on whether the financial position of the employer required that any order for the money due should provide for payment by instalments.⁴ Accordingly the orders made have required payment in full within the specified period.

Robin Arthur
Member of the Employment Relations Authority

⁴ Section 138(4A) of the Act.