

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 150  
3020693

BETWEEN PANKAJ SHARMA  
Applicant

AND DIRECT AUTO IMPORTERS  
(NZ) LIMITED FORMERLY  
KNOWN AS ENTERPRISE  
TRADERS (NZ) LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person  
No appearance for the Respondent

Investigation Meeting: 4 May 2018

Date of Determination: 8 May 2018

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**DETERMINATION OF THE AUTHORITY**

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**A. Direct Auto Importers (NZ) Limited is ordered to pay Pankaj Sharma the following sums within 14 days of the date of this determination:**

- (a) \$2,221.92 gross as holiday pay;**
- (b) \$5,000.00, being the amount Pankaj Sharma paid as a premium for employment; and**
- (c) \$71.56 for the Authority's filing fee.**

**Employment relationship problem**

[1] Pankaj Sharma worked for Enterprise Traders (NZ) Limited, now called Direct Auto Importers (NZ) Limited. I will refer to the employer as Direct Auto or the

company. Pankaj Sharma was employed as an assistant manager at the company's car yard in Hamilton. He started work on 30 July 2012. His last day of employment was 30 June 2013.

[2] Pankaj Sharma claims that he was not paid any holiday pay by Direct Auto and seeks payment for that as well as repayment of a premium of \$5,000 which he says he paid to the company whilst working there.

[3] The company had some involvement in the proceedings through its sole director and shareholder Vishaal Kumar Sharma.<sup>1</sup> The statement in reply denies that Direct Auto received any money from Pankaj Sharma as he had described. Vishaal Sharma says that this is the first time that he has heard about a bond being required in order to secure employment with his company. The prospect of some holiday pay being owed is left open in the statement in reply.

[4] By agreement, an investigation meeting was set down for 4 May 2018 in Hamilton. On 3 May 2018 Vishaal Sharma informed the Authority in writing that Direct Auto had ceased trading, was insolvent and given that, would not be defending this proceeding. He confirmed that he would not be attending the investigation meeting. As a result, given that Pankaj Sharma now lives away from Hamilton, the Authority proceeded to take Pankaj Sharma's evidence under affirmation by Skype video call.<sup>2</sup>

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **The history of Direct Auto**

[6] Direct Auto has been in existence, with several name changes, since 2009. Some details may be found in a previous Authority determination *Kaur v Direct Auto Importers (NZ) Ltd.*<sup>3</sup> Other than for a brief period in 2011, Prem Kumar, Vishaal

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<sup>1</sup> Seemingly no relation to the Applicant

<sup>2</sup> Clause 7 of Schedule 2 of the Employment Relations Act 2000 provides for evidence to be obtained at a distance

<sup>3</sup> [2016] NZERA Auckland 306

Kumar Sharma's father, was a director of Direct Auto from its inception until 8 June 2012, when Vishaal Sharma took over as director.<sup>4</sup>

### **Employment agreement**

[7] Pankaj Sharma's employment agreement is signed by Prem Kumar, who was described as general manager of, as it then was, Enterprise Traders (NZ) Ltd. Both men are noted to have signed on 9 July 2012.

### **Limitation period and pursuit of payment**

[8] Pankaj Sharma's employment finished on 30 June 2013. His claim was filed in the Authority in October 2017. In the statement of reply the company raises an issue about the length of time which Pankaj Sharma took before raising his claim.

[9] Under s 142 of the Act no action may be commenced in the Authority, that is not a personal grievance, more than six years after the date on which the cause of action arose. There is a three year limitation period for commencing personal grievance claims, from the date the personal grievance claim was raised.<sup>5</sup>

[10] Pankaj Sharma's claim concerning a premium relates to events beginning in September 2012. His holiday pay claim relates to non-payment of holiday pay on his termination of employment in June 2013. Not being personal grievance claims, the six year limitation period applies. I am satisfied that Pankaj Sharma has filed both his claims within the six year limitation period.

[11] In terms of an explanation, Pankaj Sharma says that he did not pursue payment straight away as he returned to India for some time. He was then in contact with Vishaal Sharma in late 2016 seeking a copy of his payslips and payment of his holiday pay.

[12] In 2017 Pankaj Sharma was also in contact with the Labour Standards Early Resolution team, which is part of the Labour Inspectorate at the Ministry of Business, Innovation and Employment, regarding his claims.

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<sup>4</sup> Companies Office records, 4 May 2018

<sup>5</sup> S 114(6) of the Act

[13] In April 2017 an employment consultant working on behalf of Pankaj Sharma wrote to Direct Auto seeking payment of outstanding holiday pay. I am told that no reply was received.

### **Premium**

[14] Under s 12A(1) of the Wages Protection Act 1983 employers and those engaged on their behalf must not seek or receive any premium in respect of the employment of any person.

[15] Pankaj Sharma says that in about September 2012 Prem Kumar, general manager of the company, told him that he would have to pay \$5,000 in order to keep his job with Direct Auto. Sometime later Vishaal Sharma followed up on that as Pankaj Sharma had not paid, and required payment to continue Pankaj Sharma's employment. Pankaj Sharma then sought to borrow money from friends in order to pay. There were some entries in his bank account statement of payments being made to him from several people a few days before withdrawals from the same bank branch of five amounts ranging between \$100 and \$800 on the same day. These amounts total \$2,500.

[16] Pankaj Sharma says that he paid the \$2,500 to Prem Kumar and that Vishaal Sharma allowed him to pay that remaining \$2,500 by instalments, with father and son each taking receipt of some. Prem Kumar was the general manager at the relevant time and Vishaal Sharma was director and owner of Direct Auto.

[17] The evidence which was provided to me by Pankaj Sharma is consistent with that which he provided to the Labour Inspectorate by email.

[18] Although Direct Auto decided shortly before the investigation meeting not to defend the proceeding, there was some information available about its position.

[19] Vishaal Sharma stated in a 13 February 2017 email to Pankaj Sharma:

The Accountant wanted some information with regard to Cash Back that you paid back which he has advised me that will need to be deducted from your Gross Earnings. Our Records show that you paid regular amounts back to the Company. Can you please urgently provide us the amounts that you paid back to the Company to

enable us to reconcile your figures with ours. Once we have received these figures we can provide you with the payslips and work out your entitlements.

[20] Pankaj Sharma says that this is an admission that he was paying money to the company. Payments of cash are certainly acknowledged by Direct Auto. However, the question is then, what was that money for? There are possible explanations which may not put the company in breach of s 12A of the Wages Protection Act.

[21] In September 2017 Vishaal Sharma provided an explanation regarding the February 2017 email to the labour standards administrator. This was that, although Pankaj Sharma was originally an assistant manager and paid wages under his employment agreement, that situation later changed. From January 2013 Pankaj Sharma was said to have moved to sales consultancy with a retainer of \$250 (presumably per week) plus commission. However, the explanation continues, Pankaj Sharma asked to continue to be paid the same amount as his previous wages, and agreement was reached that he would pay money back to the company if there was a resulting overpayment. Overpayments were said to explain Pankaj Sharma's cash payments to the company. No explanation was offered as to why these payments were in cash, rather than, for example, by bank transfer.

[22] Pankaj Sharma denies this explanation. He says that his job remained the same and there was no agreement regarding a change to a retainer and commission arrangement.

[23] Vishaal Sharma did not make himself available for questioning. Direct Auto has not filed any records, referred to in the 13 February 2017 email, showing the payments made by Pankaj Sharma to it. It did not file any new employment agreement or correspondence evidencing a new arrangement. The amounts paid were said in the 13 February 2017 email to be regular. It seems unlikely that if Pankaj Sharma was earning commission on sales, the overpayment amounts would not vary, as greater or fewer cars were sold.

[24] I did not find Direct Auto's explanation credible. I prefer Pankaj Sharma's evidence and accept that he was required by Direct Auto representatives to pay a premium of \$5,000 for his work continuing, which he paid.

[25] Under s 12A(2) of the Wages Protection Act money paid as a premium may be received from the employer as a debt by the person who paid the money, in proceedings in the Authority.

[26] I order Direct Auto Importers (NZ) Limited to pay Pankaj Sharma, within 14 days of the date of this determination, the sum of \$5,000 for the premium which he previously paid.

### **Annual leave and payslips**

[27] Pankaj Sharma says that he did not take any annual leave when working for Direct Auto and was not paid any holiday pay on his departure from the company.

[28] Direct Auto filed payslips which appear to show that Pankaj Sharma did take some paid annual leave. It is not clear whether Direct Auto asserts that these payslips were prepared at the time of Pankaj Sharma's employment with it. A comment in the 13 February 2017 email<sup>6</sup> suggests they were not, as the company appears to have been going to provide payslips only once information regarding cash backs was supplied by Pankaj Sharma.

[29] Pankaj Sharma filed one payslip in a somewhat different format which he says was given to him in about April 2013, when he questioned what was happening about his pay and leave. He says that he did not receive any other payslips whilst he was at Direct Auto. The payslip which he filed refers to being prepared by using MYOB Payroll, and is in a format which the Authority is familiar with.

[30] Comparing the two payslips for what appears to be the same April 2013 pay period, the form filed by Pankaj Sharma shows him entitled to 16.5 days' annual leave, whereas the one filed by Direct Auto shows him to be entitled to 6 days' leave.

### **Holiday pay**

[31] Even according to the payslips filed on behalf of Direct Auto, Pankaj Sharma was owed 6.20 days of annual leave, worth \$843.20, on his departure. The explanation which Vishaal Sharma gave to the Labour Inspectorate was that he thought the company could deduct an amount in lieu of notice from the holiday pay

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<sup>6</sup> Referred to at [19]

owing, due to Pankaj Sharma's inadequate notice of termination. He offered no basis for that view and I am unable to identify any provision in the employment agreement to that effect.

[32] In the absence of any witness on behalf of Direct Auto, I am not satisfied of the legitimacy of the payslips filed by the company. I accept Pankaj Sharma's evidence that he did not take any paid annual leave whilst at Direct Auto. He is therefore entitled to 8% of his gross earnings as holiday pay.<sup>7</sup> I order that Direct Auto Importers (NZ) Limited pay Pankaj Sharma, within 14 days of the date of this determination, the sum of \$2,221.92 gross as holiday pay.

### **Costs**

[33] Pankaj Sharma was not represented during this proceeding, but I order Direct Auto Importers (NZ) Limited to pay him \$71.56 as the Authority's filing fee within 14 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority

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<sup>7</sup> Section 23 of the Holidays Act 2003