

- C. ICOM Corporation (NZ) Limited breached the Holidays Act 2003 and the Employment Relations Act 2000 and is ordered to pay a penalty of \$1,000 into the Authority within 28 days of the date of this determination. On receipt \$500 is to be paid to Mr Li and the remaining \$500 to the Crown account.**
- D. ICOM Corporation (NZ) Limited's application for damages and a penalty are declined.**

Employment relationship problem

[1] ICOM Corporation (NZ) Ltd operates a business selling new and used cars. It advertised through TradeMe for a yard sales representative in October 2018. Following an interview on 12 October Mr Li was offered and accepted the advertised position. He started working for ICOM on 15 October.

[2] Mr Li's role as a sales assistant included accompanying test drivers, cleaning of vehicles and delivery of vehicles. Mr Li says he was dismissed on 29 October after he refused to undertake mechanical work on vehicles.

[3] ICOM denies Mr Li was dismissed and has raised claims against Mr Li seeking damages.

Issues

- [4] In order to resolve these applications I must determine the following issues:
- a) Was Mr Li unjustifiably dismissed and if so what if any remedies should be awarded?
 - b) Is Mr Li owed arrears of wages?
 - c) Did ICOM breach the Holidays Act 2003?
 - d) Did ICOM breach s 65 of the Employment Relations Act 2000 (the Act)?

- e) Did ICOM breach its statutory duties of good faith?
- f) What if any penalties should be imposed?
- g) Should ICOM's claim for damages against Mr Li succeed and if so what damages should be awarded?
- h) Did Mr Li breach his statutory duty of good faith and if so what if any penalties should be awarded?

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

Unjustified dismissal

[6] Mr Li says on 29 October he refused to work in the workshop undertaking mechanical work which he was not qualified to do and in response he was dismissed. ICOM denies Mr Li was dismissed and says Mr Li left the business on 29 October and has never returned.

[7] If I find Mr Li was dismissed I must objectively determine whether ICOM's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.¹

[8] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, ICOM sufficiently investigated issues, raised its concerns with Mr Li, gave him a reasonable opportunity to respond and genuinely considered his explanation prior making the decision to dismiss him.

[9] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Li being treated

¹ Employment Relations Act 2000, (the Act), s 103A.

unfairly.² A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[10] Mr Li undertook a one day trial on Saturday 13 October. At the end of that day he was offered employment which he started on Monday 15 October. On 17 October Mr Li did not attend work. In response to an inquiry from Mr Liang, Managing Director, Mr Li advised Mr Liang that he could not attend work as he had to hand over from his previous company and that it would take a couple of days. He told Mr Liang he was on annual leave from his previous employer.

[11] Mr Li returned to work on 19 October. The following week, on 24 October Mr Li asked to take 31 October as a day off work to attend a medical appointment he had scheduled.

[12] Monday 29 October 2018 was a wet day. Mr Li was unable to spend time outside but when the rain stopped at about 4 pm in the afternoon Mr Li was instructed to remove the sunscreen film off the windows of a vehicle. Mr Li told me he felt it was not safe to use the electrical hot air gun to remove the film and so did not complete the job.

[13] When he returned to the sales area Mr Li says Mr Liang raised his voice and told him the vehicle was to be settled the next day and the warrant of fitness still had to be sorted. Mr Li told Mr Liang he was a sales person and was not supposed to be working in the workshop.

[14] Mr Li says he reminded Mr Liang that during his interview he was told he was not required to do any mechanical work. Mr Li says Mr Liang responded by telling him that if he couldn't do mechanical work he would not have offered him the job.

[15] Mr Li says he told Mr Liang that he could not do mechanical work as he didn't know how to. At this point Mr Li says Mr Liang told him to "fuck off". This was then followed by a discussion about payment for wages and commissions owed to Mr Li.

Mr Li says that during that discussion Mr Liang asked why he was still there and why he had not yet left the workplace.

² The Act, s 103A(5).

[16] Mr Liang says he did not dismiss Mr Li, rather Mr Li abandoned his employment. Mr Liang told me that on 29 October he asked Mr Li to bring all of the cars that were parked outside, back inside the yard, replace the flat battery in a car parked in the indoor yard and wash and undertake basic maintenance on cars parked in the indoor yard.

[17] Mr Liang says Mr Li dropped the shop key off at his desk and told him he wanted to leave his employment because he did not want to do anything other than sell cars.

[18] Given the two divergent versions of events I have been required to assess each of the witnesses' credibility. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[19] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have preferred the evidence of Mr Liang as being, on balance, the most credible evidence.

[20] Mr Li told me after he left work Mr Liang blocked him from WeChat and he was unable to make contact with him. I have not accepted that evidence as plausible. Mr Liang told me he missed a call from Mr Li about 5.30 pm on 29 October and he tried to call him back but Mr Li did not answer his phone. Mr Liang has provided copies of the WeChat message he sent Mr Li which shows that at 5.41 pm he messaged Mr Li asking him "What's the matter? Did you call me? Why don't you answer the phone?"

[21] The logical conclusion is that Mr Liang was responding to missing a call from Mr Li and Mr Li did not answer his phone when Mr Liang returned his call.

[22] I also find it is more likely than not that Mr Li was not required to undertake mechanical work but was asked to remove sunscreen film from a vehicle in the indoor yard as a normal part of his duties to ready the vehicle for sale.

[23] Mr Li did not tell Mr Liang before starting work for him that he was still employed by his previous employer. At the investigation meeting Mr Li told me he worked for his mother as a hotel receptionist at night and that was the work he had to do when he took the two days off at the beginning of the employment relationship.

[24] I have not accepted that evidence as being credible. In a WeChat message to Mr Liang on 11 October 2018 Mr Li told Mr Liang he was working at Formosa as a purchasing and supply agent. Further, Mr Li told me he only worked at night (until 11 pm) for his mother. If that was the case, then he would not have needed to take time off work during the day to handover his duties.

[25] I find on balance that it is more likely than not that when Mr Li left the worksite on 29 October he did so on his own volition and did not intend returning to work.

[26] Mr Li has failed to establish he was dismissed and his application for remedies is declined.

Arrears of wages

[27] Mr Li claims he is owed holiday pay of \$123.20 net being an amount equivalent to eight percent of his gross earnings plus payment for a public holiday which fell on a day he would normally work but was not required to work amounting to \$132.00 gross.

Holiday pay

[28] Mr Li's hourly rate of pay was \$16.50 per hour plus he was to be paid a commission of \$200 for each vehicle he sold. It was common ground at the investigation meeting that Mr Li sold 8 vehicles during his employment.

[29] Section 23 of the Holidays Act 2003 required ICOM to calculate and pay holiday pay equivalent to eight percent of Mr Li's gross earnings because he had worked for less than 12 months. Section 27 of the Holidays Act requires payment to be made in the pay that relates to an employee's final pay.

[30] Mr Liang has provided the wages and time record for Mr Li which records:

- a) Mr Li worked a total of 71.5 hours during his employment;
- b) Mr Li was paid a total of \$1,179.75 gross for his hours worked;
- c) Mr Li was paid \$449.20 as commission;
- d) Mr Li was paid holiday pay in the amount of \$130.31 gross in the week ending 3 November 2018.

[31] Based on Mr Li's gross earnings including the commission payments he received Mr Li was paid his correct entitlement to holiday pay in the week ending 3 November 2018. No further amounts for holiday pay is owing and his claim is declined.

[32] During the course of the investigation meeting it became apparent that Mr Li may not have been paid his full commission payments for all vehicles sold by him. I have not been asked to address the point and accordingly make no orders about that.

Payment for a public holiday not worked

[33] Mr Li gave uncontested evidence that he was not required to work on Labour Day, 22 October 2018 and because it was a day that would otherwise be a working day he was entitled to be paid for the day.³

[34] The wages and time record confirm Mr Li's evidence that he did not receive payment for the public holiday on 22 October 2018. If Mr Li had worked on Monday 22 October he would have worked a maximum of 7 hours. Mr Li is entitled to payment

for the day based on his rate of \$16.50 per hour which equates to \$115.50 gross. Holiday Pay of \$9.24 is to be added to this amount.

[35] ICOM Corporation (NZ) Limited is ordered to pay to Mr Li the sum of \$124.74 gross under s 131 of the Act being payment for a public holiday not worked (plus holiday pay), within 28 days of the date of this determination.

³ Holidays Act 2003, s 49.

Employment Relations Act

[36] Mr Li says he never received a written employment agreement as required under s 65 of the Act despite asking for one on his first day of work. Mr Liang told me he intended to provide a written employment agreement but this was delayed due to Mr Li not providing his employee information and a lack of administrative resources in the business.

[37] Section 63A and 64 of the Act requires all employers to provide to an employee a copy of the intended employment agreement and for the employer to retain a copy of the agreement. Section 65 provides for a penalty to be imposed where an employer fails to provide the written employment agreement.

[38] There is no dispute that ICOM failed to meet its statutory obligations with respect to the provision of a written employment agreement. This leaves only the question of penalties which I have addressed below.

Penalties

[39] The Employment Court in *Borsboom v Preet PVT Limited* identified a framework for the assessment of penalties.⁴ This analysis has been supplemented by the enactment of s 133A of the Act and further decisions of the Court which I have followed in reaching my conclusions on the quantum of penalties to be imposed.⁵

[40] Mr Li has asked the Authority to impose penalties on ICOM under s 75 of the Holidays Act and s 65 of the Act. ICOM breached the Holidays Act when it failed to pay Mr Li for 22 October being a public holiday on which he would normally work but was not required to work, and the Act when it failed to provide him with an employment agreement.

[41] The Act's declared objectives include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.⁶ Those objects support

⁴ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].

⁵ See *A Labour Inspector v Pradh Limited* [2018] NZEmpC 110; *A Labour Inspector v Daleson Investments Limited* [2019] NZEmpC 12; and *Nicolson v Ford* [2018] NZEmpC 132.

⁶ Employment Relations Act 2000, s 3.

the need to impose a penalty on ICOM for its actions in failing to meet minimum standards.

[42] ICOM has breached basic employment standards by not paying Mr Li for 22 October and failing to provide him with a written employment agreement. This equates to two breaches. Each breach attracts a maximum penalty of \$20,000 amounting to potential total penalties of \$40,000.

[43] Because the breaches are not similar or breaches of the same legislation no globalisation of the breaches is appropriate.

[44] I am satisfied the breaches were intentional. ICOM is expected to understand and adhere to the minimum standards required of employers.

[45] Mr Li was deprived of payment for the public holiday. If he had received a written employment agreement setting out his entitlements both parties would have been aware of the need to pay for the holiday. The lack of an employment agreement means Mr Li did not know he had been paid incorrectly until he pursued his claim for unjustified dismissal. He has been put to the time and cost of bringing his application to enforce his minimum entitlements.

[46] ICOM benefited financially to the extent that it retained the \$124.74 instead of paying it to Mr Li. I have concluded it is more likely than not that ICOM did not set out to undermine Mr Li's rights or entitlements. There is no evidence that ICOM has been before the Authority previously and as a first offender is entitled to a reduction in the penalty.⁷

[47] The breaches in this case involve minimum standards. As such it is important that a penalty is set at a level where it sends a message to the wider community of employers as a deterrence from failing to provide a written employment agreement or to correctly paying holiday pay.

⁷ Followed *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].

[48] I have concluded that the degree of culpability is not high and is at the lower end of the scale. Consistency with other similar cases is desirable. I have considered a number of cases which are distinguishable on their facts. For example a number of cases include attempts to disguise non-compliance, evidence of very long hours worked, breaches occurring over extended periods of time and breaches affecting very vulnerable employees. These factors are not present in this case.

[49] There is no evidence that ICOM is unable to pay a penalty.

[50] Standing back I have concluded a reduction in the total potential penalties is warranted in this case. While the breaches were serious, they were not sustained over a long period of time. The payment for the public holiday should have been made in the week Mr Li left his employment. The harm caused to Mr Li was limited to \$124.74. Penalties should not be significantly disproportionate to the seriousness and the harm occasioned when all the circumstances are considered.

[51] I have concluded an appropriate penalty in this case is \$1,000. This reflects the seriousness with which the Authority views the type of breaches that are present in this case. It is also appropriate that fifty per cent of the penalty be paid to Mr Li to recognise the harm ICOM's breach has caused him.

[52] ICOM Corporation (NZ) Limited is ordered to pay a penalty of \$1,000 into the Authority within 28 days of the date of this determination. On receipt \$500 is to be paid to Mr Li and the remaining \$500 to the Crown account.

Counter-claims

[53] ICOM claims damages of \$32,000 which it says it incurred when Mr Li resigned abruptly without giving sufficient notice. The difficulty with ICOM's claim is that it failed to provide Mr Li with a written employment agreement setting out what it considered to be sufficient notice.

[54] At the investigation meeting Mr Liang told me Mr Li abandoned his employment. Apart from responding to a missed call from Li, Mr Liang took no steps to ascertain whether Mr Li was intending on returning to work. Given the lack of any follow up with Mr Li I have concluded Mr Li's departure on 29 October was by mutual agreement.

[55] ICOM's application for damages is declined.

[56] ICOM also claims Mr Li breached his statutory duty of good faith and seeks penalties against Mr Li. In support of its claim ICOM says Mr Li breached his duty of good faith by refusing to obey reasonable instructions to do work and working concurrently for another employer.

[57] I am not satisfied ICOM has established its claim to a standard to warrant the imposition of penalties against Mr Li. The refusal to obey reasonable instructions is a matter that would have been better dealt with as a disciplinary matter if Mr Liang had been of a mind to. Instead he accepted Mr Li's keys when he handed them to him on 29 October knowing Mr Li would not be returning to work.

[58] In respect of the conduct of Mr Li working for two employers at once, Mr Liang condoned this at the time. Mr Li had advised Mr Liang he was on leave from his previous employer when he asked to take time off for the handover. Mr Liang approved the time off and raised no concerns about it at the time.

[59] Mr Li told me he worked for his mother at night time after his usual working hours had finished. This is not an unlawful activity. Indeed the Act at s 67H deals with the issue of secondary employment including a requirement that it be specified in the employment agreement. I have concluded the absence of a written employment agreement is a barrier to ICOM now arguing Mr Li was acting in breach of the duty of good faith.

[60] ICOM's application for penalties is declined.

Costs

[61] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the parties shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority