IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 13
3024918

	BETWEEN	KAZUYA TAKAHASHI Applicant
	AND	MY DO NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Annie Talakai, Counsel for the Applicant Nicholas Eketone-Te Kanawa, Counsel for the Respondent
Investigation Meeting:	7 and 8 November 2018
Determination:	11 January 2019

DETERMINATION OF THE AUTHORITY

A. By no later than 28 days after the date of this determination My Do New Zealand Limited (MDNZL) must pay Kazuya Takahashi $12,929 as wage arrears with an additional sum of $566 as interest on that amount.

B. Mr Takahashi's application for a finding that his resignation from his employment by MDNZL was really a constructive dismissal is declined.

C. Costs are reserved. If an Authority determination of costs is necessary, a timetable has been set for memoranda to be lodged.

Employment Relationship Problem

[1] Kazuya Takahashi worked as a driver and guide for My Do New Zealand Limited from February 2016 to December 2017. MDNZL operates a tour guide business for tourists from Japan.

[2] For most of this 22-month period Mr Takahashi's work was in Auckland but for the months from September 2016 to April 2017 he was relocated to Queenstown. His work mostly involved picking up and dropping off tourists at the airport and driving them to their accommodation, restaurants and tourist spots. While in Queenstown Mr Takahashi's duties included some additional administrative work liaising with the company's Auckland office and with travel agents about client arrangements. He often carried out that administrative work in the flat he rented in Queenstown as MDNZL did not, at that time, have office premises there.

[3] Mr Takahashi's application to the Authority said he gave notice of resignation on 14 December 2017 because MDNZL director Tadashi Yasue had not paid wages, annual leave and public holiday entitlements due to him. In a text he sent later on 14 December Mr Takahashi told Mr Yasue he would not work after 18 December if he was not paid some money owed to him. Mr Takahashi said he had intended working to the end of December but went to work on 15 December and found Mr Yasue doing Mr Takahashi's usual tasks. He said Mr Yasue did not answer phone calls or reply to text messages over the following days to sort out the situation. As a result Mr Takahashi said the end of his employment was really a constructive dismissal because he had resigned out of frustration over not getting money MDNZL should have paid him.

[4] MDNZL denied its actions caused Mr Takahashi's resignation. It denied withholding any pay entitlements he was due at the time. Instead it said Mr Takahashi had decided to resign in October 2017 because of difficulties at that time in his personal relationship with his wife, Asuka Senoo, who also worked for the company. Mr Takahashi told Mr Yasue he wanted to resign then but Mr Yasue persuaded him to stay. By 14 December 2017 Mr Takahashi decided he wanted to return to Japan and called Mr Yasue, asking to be permitted to resign from the end of December. While there was then a dispute about how much Mr Takahashi was owed, MDNZL said this was not the cause of his resignation.

Issues and investigation

[5] The following issues arose for investigation:

(i) Was Mr Takahashi owed arrears for wages, holidays and work on public holidays?

(ii) Should an order for interest, from 14 December 2017, be made for any arrears found to be owed to Mr Takahashi?

(iii) Did Mr Takahashi's employment end by his own free choice to resign or was he dismissed, either directly or constructively as a result of a dispute over wages owed to him?

(iv) If Mr Takahashi was constructively dismissed, what remedies should be awarded, considering:

(a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

(b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?

(v) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Takahashi that contributed to the situation giving rise to his grievance?

(vi) Should either party contribute to the costs of representation of the other party?

[6] For investigation of those issues written witness statements were lodged from Mr Takahashi, Ms Senoo, Mr Yasue, MDNZL's accountants Rika Yamamoto and Yau Min Chan and from three MDNZL employees who had also worked for the company as drivers and tour guides: Isao Shitanishi, Hanae No and Aya Okabe. Mr Shitanishi had taken over the Queenstown job when Mr Takahashi returned to Auckland. He gave his oral evidence by telephone conference from Queenstown.

[7] Each witness, under oath or affirmation, affirmed their own statement and answered questions from me and the parties' representatives. The witnesses were assisted by an interpreter of Japanese provided by the Authority. The representatives also gave closing submissions on the issues for determination.

[8] As permitted by s 174E of 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. It has not recorded all evidence and submissions received.

The wage arrears claim

[9] Mr Takahashi's wage arrears claim comprised two partially overlapping components. Firstly he sought an order requiring MDNZL to pay him $50,472 for additional hours worked, annual leave and public holiday entitlements not paid to him during his employment. Secondly, regardless of the outcome on the larger claim, he said he was owed the amount of $12,929 Mr Yasue had agreed to pay him in recognition of additional administrative duties carried out while he worked in Queenstown.

The $50,472 wage arrears claim

[10] Prior to the end of his employment Mr Takahashi had pressed Mr Yasue about payment of an extra amount for his work in Queenstown. However, after the end of the employment, with the assistance of his legal representative, Mr Takahashi had developed a more detailed wage claim after analysing time and pay records received from the company.

[11] He identified additional hours on particular days he said he had worked but not been paid for, additional days he said he had worked but were not listed in the company records, and public holidays on which he had worked but had not been paid. From this Mr Takahashi calculated the actual hours he worked in 2016 and 2017, either in Auckland or in Queenstown, totalled 6639. At his hourly rate of $17.30, Mr Takahashi said he should have been paid a total of $114,854 for his work.

[12] However the company had paid him only a total of $73,570 over that period. This comprised $34,066 for 2016, $26,658 for 2017 and a further $12,846 that the company paid him on 16 April 2018. MDNZL said the latter amount was for all outstanding holiday and leave entitlements and any additional hours he had worked, including anything he might be owed for additional duties carried out in Queenstown. Mr Takahashi did not accept that was the full amount due to him. He said he was owed the difference between the total amount MDNZL had paid him for his work and his calculation of what he was owed. This difference amounted to $41,283. With the

addition of holiday pay on that amount, calculated at eight percent, the total was the $50,472 he claimed.

[13] Considerable time was taken during the investigation meeting going through Mr Takahashi's calculations and the basis for the additional hours he claimed he had worked and should be paid for. Although those details have been carefully reviewed in preparing this determination, it was not necessary to set out all the examples, dates and figures canvassed in questions asked and answers given. Rather Mr Takahashi's claim for such a large amount of additional wages has not succeeded for the following three broad reasons.

[14] Firstly, Mr Takahashi was employed on the basis of a salary which covered some of the additional hours or days he said he had worked. He was paid the same amount each month. This included payment for days on which he accepted he had worked fewer than eight hours. In his calculation he allowed for eight hours pay on those days because he said his written employment agreement provided for 40 hours a week. However his most recent employment agreement, signed on 23 November 2016, described his "normal hours of work" as being 40 a week from 9.30am to 5.30pm on Monday to Friday. Use of the word 'normal' indicated his hours were not necessarily limited to 40. A further clause headed "Wages/Salary/Allowances" said his salary was $36,000 a year to be paid monthly on the tenth day of each month into his nominated bank account.

[15] In that written agreement there was no provision for additional pay for any additional hours worked outside that time. Mr Takahashi however relied on the previous agreement, dated 11 December 2015. It included an hours of work clause that had a heading: "Full time hours with an obligation to perform overtime as necessary with an entitlement to extra pay". It had the same hours and day span as in the later November 2016 agreement but included the following words:

> The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to an overtime payment as set out in the wages clause below.

[16] The difficulty with applying that provision was that the "wages clause" that followed only provided for an annual salary of $36,000. It made no reference to overtime payment or an hourly amount for any such work. Mr Yasue, however, fairly

conceded during the Authority investigation meeting that the November 2016 agreement was not intended to change any of Mr Takahashi's terms of employment and if an obligation to pay overtime was in the older agreement, that term would continue to apply. Both documents, written in English, were prepared by an immigration consultant and both men appeared to regard them as background paperwork for that purpose rather than anything to which they had paid close attention to at the time of signing. Both relied more instead on what they said was verbally agreed and understood between them about the work and pay arrangements.

[17] Against that background there was no evidence sufficient for a finding in favour of Mr Takahashi's assertion that he had verbally agreed with Mr Yasue that overtime hours would be paid but the money for such hours would be kept in a 'pool' and be paid to him on a six-monthly basis. Rather Mr Yasue's evidence was more likely. He said such an arrangement had been made only for employees who were on a working holiday visa. Employees such as Mr Takahashi, employed under a work visa and on a salary, were paid the same amount each month. Around September 2016 the company had changed from a system where it paid employees on the basis on a set rate for driving or guide assignments. Following concerns raised by employees that a set rate was sometimes inadequate for the time taken, the company moved to a system based on the hours taken for each assignment, but with the hours allocated intended to be within those provided for by the salary. While there were times when those employees might work longer hours, there were other days when they worked fewer hours. They were also free to do other things during gaps in driving or guiding assignments, with those gaps most often being during the middle of the day. This was consistent with the evidence of Ms No and Ms Okabe who were also employed on a salary basis in driver and guide roles in Auckland. Such an arrangement was not inconsistent with Mr Takahashi's written employment agreements or statutory minimum employment standards unless employees ended up working such long hours that their effective hourly rates had fallen below the minimum wage. An assessment of the evidence of all the witness did not, on balance, support such a finding.

[18] There were references in communication between Mr Takahashi and Mr Yasue to "pooled money" but that, in the context it was made, referred to the specific

circumstances of Mr Takahashi's claim for extra pay for additional duties carried in Queenstown. It is discussed further and later in this determination.

[19] Secondly, Mr Takahashi's evidence established there may have been some relatively minor instances where the company records had not accurately recorded some hours or days on which he worked, but this did not support the extent to which he claimed he was systematically and extensively underpaid. In one example given for a day in April 2016 Mr Takahashi said he should have been paid for 17 hours from his first job at 5.30am, a hotel pick-up, until 10.30pm when he arrived home after dropping a customer off at the airport. However his account include a period from 10.50am when he had arrived home from his morning's work until he left home again at 8.20pm to carry out driving duties until 10.30pm. Explaining why he should be paid for that intervening time of more than nine hours, Mr Takahashi that his assigned jobs could have been changed at short notice. As a result he considered himself to be "on standby" and believed he could claim payment for those hours. In another example Mr Takahashi said, if he worked only 1.5 hours in a day, he regarded himself as being on standby for the remainder of the day, so calculated he was due to be paid eight hours for that day. If he worked nine or ten hours on a subsequent day he calculated he was due one or two extra hours pay for that day. That approach was clearly inconsistent with the salaried basis on which he was employed. It resulted in inflated calculations of entitlement which could not be relied on for the findings Mr Takahashi wanted the Authority to make in his favour.

[20] Thirdly, Mr Takahashi was entitled to his holiday pay entitlement at the end of his employment and for some public holiday entitlements that were not correctly paid to him during the course of his employment. He had not established however that the company had intended not to pay him his accumulated annual leave entitlements due to him at the end of his employment. It appeared that he had neither applied for nor took any paid holidays while employed. The company accountants, in closely reviewing payments made and due, had omitted one day from his alternative holiday entitlement for work done on public holidays but this was corrected in the final payment made to him in April 2018.

[21] Some criticism could be fairly levelled at the company for the delay in making that payment, which included his holiday pay entitlement, from the end of his employment until just before the parties attended mediation over his application to the

Authority. The excuse that a careful review was needed by its accountants did not really warrant such a long delay or not paying him at least whatever holiday pay was due on the company's initial account of his overall earnings. It was a failure to meet the employment standard requiring payment of holiday pay at the end of the employment. However, for present purposes, the point was that those arrears due were eventually paid.

The $12,929 wage arrears claim for Queenstown work

[22] If Mr Takahashi's wage arrears claim for the time he spent in Queenstown relied solely on the methodology he followed in calculating his larger wage arrears claim, it would not succeed. For example he claimed he was entitled to 13 hours pay for a day on which company records showed he worked from 11.30am to 3.30pm. Mr Takahashi said he was entitled to be paid for the following nine hours because he had carried out "office work" between 3.30pm and 0.43am in the early hours of the following morning. He did so because he identified four emails he had sent – at 6.16pm, 8.13pm, 9.49pm and 12.43am. In that case, and other examples canvassed during the Authority investigation meeting, those emails did not necessarily require answers that night and could have been answered by Mr Takahashi the following morning. Some email replies he sent were nothing more than an acknowledgement of having received an email. He accepted Mr Yasue would not have authorised him to work then or would have restricted the work to fewer hours if Mr Yasue had known Mr Takahashi was expecting to be paid for all the additional time he claimed in the calculations he provided to the Authority.

[23] However Mr Takahashi's claim regarding additional wages for the Queenstown had substance for a different reason. He gave credible evidence that he discussed this topic with Mr Yasue in June 2017. Mr Takahashi had calculated a sum of $14,596 in extra pay that he sought for additional duties he carried out as MDNZL's Queenstown branch manager. These included the time spent on communication with head office and travel agents about the arrangements for specific clients or tour groups. It also included responsibility for what Mr Takahashi called "holding the phones". This referred to three mobile phones – one supplied by the company and two by travel agents – that he kept with him at all times to take urgent calls about changes to client arrangements. Although Mr Takahashi estimated that he received only one or two calls a month on each of the three phones – that is total calls

of between three and six a month – he sought the payment for being available to answer those calls during extended hours.

[24] Mr Takahashi said that Mr Yasue had not agreed to pay the amount he sought but did promise to pay him $12,929 as back pay for that period. His evidence on this point was substantiated by Mr Yasue's own oral evidence. Asked if, as Mr Takahashi said, Mr Yasue had agreed on 30 June 2017 to pay 412,929 Mr Yasue answered: "Yes, I think I said it." Asked why the amount had not been paid then or before Mr Takahashi's employment ended Mr Yasue said he had not promised the amount would be paid as a lump sum then. Instead he said his thinking was that he would include the amount in future salary.

[25] Mr Yasue said the payment for additional duties carried out in Queenstown was subsequently included in the company's calculations that led to the sum of $12,846 ($10,420 net) paid in April 2018. However that was not a compelling explanation. The agreed Queenstown amount could not have been fully satisfied by what was paid in April 2018 as that payment included substantial sums for annual leave and alternative holiday entitlements. There was an amount of $5,474 in the April 2018 calculations labelled as being for "gross wage underpay". However that was for a smaller amount than the agreed $12,929 figure and it was not clear whether that smaller sum applied only to hours worked while Mr Takahashi was in Queenstown or for other months when he was working in Auckland.

[26] Accordingly MDNZL had not satisfied the oral agreement Mr Yasue made on the company's behalf in June 2017 to pay Mr Takahashi $12,929 in wage arrears for his work in Queenstown. Mr Takahashi was entitled to an order for payment of that amount now. Interest is to apply on that sum for the period from 26 February 2018, being the date Mr Takahashi's application to the Authority was lodged, until the date on which this determination was issued. However as the interest applies to money that this determination has found was due to be paid to Mr Takahashi before 1 January 2018, interest has been calculated by the mechanism applicable prior to that date.[1] The rate of five per cent interest applies to that amount for that period of 320 days so that interest of $566 is to be paid on it.

[1] Employment Relations Act 2000, Schedule 2 clause 12 and Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177) clause 4.

The constructive dismissal claim

[27] Mr Takahashi claimed his resignation on 14 December was really caused by his dissatisfaction with delays in being paid money (and specifically the arrears for his Queenstown work) to which, as this determination has concluded, he was entitled and MDNZL had not paid. If this were so, the end of the employment was a constructive dismissal. For reasons that follow his claim has failed.

Applicable legal principles

[28] The doctrine of constructive dismissal considers whether Mr Takahashi's resignation was compelled by some unjustified act of the employer rather than being freely chosen for his own reasons. The actual facts of his particular case need to be examined to see if MDNZL's conduct could fairly and clearly be said to have crossed the line from being inconsiderate conduct, causing him some unhappiness or resentment, to having become such dismissive or repudiatory conduct that Mr Takahashi reasonably decided to terminate the employment relationship by resigning. If MDNZL's conduct had really caused him to take the step of resigning, his employment had ended by constructive dismissal.[2]

[29] As a breach of duty by MDNZL was said to have caused the resignation, the circumstances of the resignation had to be examined, including what Mr Takahashi communicated in tendering his resignation. If that causation question were answered in the affirmative, the next question was whether MDNZL's breach of duty was sufficiently serious that Mr Takahashi was unlikely to be prepared to keep working for it in that situation.[3] Evaluating such a breach, and its seriousness, is an assessment of fact and degree.[4]

What happened?

[30] The best evidence of Mr Takahashi's motivation for his resignation was found in an email he sent to MDNZL staff on 16 December 2017. Written in Japanese, an English translation covering two A4 typed pages was available for the Authority investigation. It began with an apology to his colleagues for any inconvenience caused to them over the previous days and continued with some background about

[2] *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.
[3] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.
[4] *Spotless Facility Services NZ Limited v Mackay* [2016] NZEmpC 153 at [71].

how Mr Takahashi came to work for MDNZL. Two paragraphs that then followed in that email were highly relevant to an assessment of Mr Takahashi's constructive dismissal claim. They are set out below, as translated, with the addition of some surnames in square brackets to better identify who is referred to:

> The relationship with Asuka [Senoo] ended on 28 October 2017. The reason I stayed in NZ was because I wanted to marry Asuka and stay with her. But now, there is no reason for me to remain in NZ after the end of the relationship with Asuka. Rather, in order to redesign my life plan, I wanted to go back to Japan as soon as possible, and make recovery, so I had contact with Mr Tadashi [Yasue]. I told him "I want to resign and go back to Japan". He, however, told me "Too bad if I am told suddenly. Can't run if we lose Kazuya [Takahashi]. Not now."
>
> Until 14 December 2017, I had tried to find my way through various possibilities. I, however, reached the conclusion in my mind that I should go back to Japan. Thus, at 21:39, I called Mr Tadashi and told him "After all, I cannot stay in NZ. Let me resign at the end of December". But, I was told by him "Not acceptable. Don't want to continue." And, only in 16 seconds, I was hung up on. He didn't listen to me, and hung up the call on. I thought his attitude was not acceptable and sent a text saying "Considering Mr Tadashi's attitude like that, I will not be able to provide service after 18th [December] if you do not deposit the unpaid salary by 18th". After that, Mr Tadashi called me and said "That's enough. Don't be silly." I was not fooling, and just wanted to have a serious discussion about my resignation. But he did not listen, and also said "Do not bring the relationship with Asuka into work". In the first place, I had been working for MYDO because of the relationship with Asuka disappeared, there is no base. I said "Let me resign at the end of December". But [Mr Yasue] said "Fine. Go home" and disconnected it again after one minute and 16 seconds.

[31] The text Mr Takahashi referred to sending after the end of his call to Mr Yasue at 21:39 was also included in a copy of his call history and texts provided for Authority investigation with a slightly different translation, referring to "pooled money" rather than "unpaid salary".

[32] In his evidence to the Authority investigation meeting, Mr Takahashi said the problems in his relationship with Ms Senoo "was just a trigger" but insisted that was not the main reason for his resignation. However the account given in his own email of 16 December, written so close to the events of 14 December, show it was those relationship issues that initiated his resignation, not the conduct of his employer.

[33] Mr Yasue had previously, in October, dissuaded Mr Takahashi from carrying out his earlier wish to resign, again expressed to be for reasons related to his personal relationship not his employment with MDNZL. And it was not until Mr Yasue

brusquely terminated the first 14 December call, saying in effect that he did not want to hear about Mr Takahashi resigning, that the question of money was raised.

[34] In his evidence to the Authority Mr Yasue confirmed that when he had called Mr Takahashi back later in the evening of 14 December, he had said Mr Takahashi could "go home". Asked what that phrase meant, Mr Yasue said he meant Mr Takahashi could go back to Japan. Mr Takahashi's own oral evidence confirmed he understood Mr Yasue meant he could return to Japan, as Mr Takahashi had said he wanted to do. It was agreement to Mr Takahashi's request, with the effect of accepting his resignation. There was no suggestion Mr Yasue was dismissing Mr Takahashi.

[35] Rather, by the end of 14 December, Mr Yasue had agreed to Mr Takahashi's resignation, even though Mr Yasue was unhappy about getting short notice during a busy time of year for the company. Mr Takahashi's employment agreements of 2015 and 2016 set four weeks as the notice period so, technically at least, Mr Takahashi did need Mr Yasue to agree to the shorter notice period he wanted. Mr Yasue's handling of subsequent events, including acting in a way that made Mr Takahashi feel excluded from work from 15 December onwards and not responding to his requests to talk more about the mechanics of his notice period and payment of outstanding money, was less than ideal. However those later actions did not cause Mr Takahashi to resign.

Outcome

[36] As a result the evidence did not disclose the causative step necessary for Mr Takahashi to establish his resignation was caused by a dispute over money rather than his personal relationship difficulties. At worst the delay and uncertainty about payment of the extra money for Queenstown work caused him some unhappiness and resentment but was not dismissive or repudiatory conduct that reasonably led to him deciding to resign rather than put up with that situation.

[37] Because Mr Takahashi did not establish his employment ended by constructive dismissal, he did not have a personal grievance. No consideration of remedies was needed.

Costs

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[39] If they are not able to do so and an Authority determination on costs is needed Mr Takahashi may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MDNZL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[40] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[5] The outcome in this case has been that each party has succeeded on one of the two major issues. In that situation, the following preliminary view may assist the parties. Unless there were other relevant factors to consider, such as what effect any settlement offers made might have on the costs assessment, and subject to what the parties might say in any memoranda lodged, this is likely a matter where costs could fairly lie where they fall.

Robin Arthur
Member of the Employment Relations Authority

[5] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].