IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAURAU ROHE

[2021] NZERA 57
3110232

	BETWEEN	DANNY LIUFOLUA Applicant
	AND	VIP SECURITY SOLUTIONS LIMITED First Respondent
	AND	KONISETI LIUTAI Second Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Robert Morgan, advocate for the Applicant No appearance for the Respondents	
Investigation Meeting:	11 February 2021 at Auckland	
Date of Determination:	16 February 2021	

DETERMINATION OF THE AUTHORITY

A. VIP Security Solutions Limited is to pay Danny Liufolua $7,720.06, pursuant to s 131(1) of the Employment Relations Act 2000.

B. VIP Security Solutions Limited is to pay the Crown $15,000.00, pursuant to s 134(1) of the Employment Relations Act 2000.

C. VIP Security Solutions Limited is to pay Danny Liufolua $10,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

D. VIP Security Solutions Limited is to pay Danny Liufolua $4,000.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

E. The claims against Koniseti Liutai are dismissed.

F. VIP Security Solutions Limited is to pay Danny Liufolua costs of $2,321.56.

Employment relationship problem

[1] Danny Liufolua worked for VIP Security Solutions Limited from January 2019 until he resigned, effective 23 December 2019.

[2] VIP Security Solutions provided security services to a large retail business. Koniseti Liutai is the sole director of the company.

[3] There is a signed employment agreement which set Mr Liufolua's weekly hours at 40, to be worked between 7.00am and 7.00pm Monday to Sunday. Mr Liufolua says he resigned after VIP Security frequently did not roster him to work and did not pay him for 40 hours per week. Some of the days on which Mr Liufolua did not work and was not paid were public holidays.

[4] Mr Liufolua says he has a personal grievance against his former employer as a result of his resignation. He seeks lost remuneration and compensation for humiliation, injured feelings and lost dignity as remedies for the grievance. Mr Liufolua seeks arrears of wages for when he was not paid 40 hours per week. This claim includes payment for the public holidays. Mr Liufolua also seeks a penalty for the breach of his employment agreement when he was not paid 40 hours per week. Costs are also sought.

[5] The respondents were represented and lodged a statement in reply. The company says it rostered Mr Liufolua to work five days per week, exclusive of public holidays. It then reduced Mr Liufolua's weekly hours due to issues with his punctuality and attendance. The company says there are no arrears owed to Mr Liufolua. It says that Mr Liufolua caused it financial losses. The company also says that public holidays were not ordinary working days for Mr Liufolua so he was not entitled to payment for those days.

[6] Despite mediation, these problems remained.

[7] Before the investigation meeting, counsel for the respondents advised the Authority that he was no longer instructed. His attendance at the meeting was excused. The

respondents did not lodge statements of evidence and did not appear. I am satisfied that they have had notice of the claims and the investigation meeting.

[8] The employment relationship problems are resolved by this determination.

[9] The following issues arise:

(a) Is Mr Liufolua entitled to payment for public holidays?

(b) Was there a default in payment of wages due to Mr Liufolua under the employment agreement?

(c) Is VIP Security Solutions liable for a penalty?

(d) Was Mr Liufolua constructively dismissed?

(e) If yes, what remedies arise?

Is Mr Liufolua entitled to payment for public holidays?

[10] Clause 15 of the agreement is headed "Public Holidays". It does not list the days to be observed as public holidays.

[11] The agreement specifies rates payable if the employee works on a public holiday. It makes provision for an alternative holiday, if the employee works on a public holiday that would otherwise be a work day. It requires the employee to work on a public holiday if it falls on a day the employee is due to work, if requested to do so by the employer. The request must be made with reasonable notice.

[12] Clause 15.3 declares:

> If the Employee does not work on a public holiday, and the Employee was not due to work that day, then the Employee is not entitled to any payment for that day and is not entitled to an alternative holiday.

[13] In its reply, the company says that its employees never work on public holidays (including Auckland Anniversary day). Its client did not require it to provide any security services on those days.

[14] The public holiday entitlements under the Holidays Act 2003 are statutory entitlements and apply even if an employment agreement excludes, restricts or reduces those entitlements.[1] Under that Act, during Mr Liufolua's employment, the following public holidays had to be observed: Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queen's Birthday and Labour Day. Mr Liufolua started employment the day after Auckland Anniversary Day in 2019, so he has no claim in respect of 28 January 2019. In 2019, Waitangi Day fell on Wednesday 6 February and ANZAC Day fell on Thursday 25 April. What amounts to compliance with the Holiday Act is set out at section 48. If any of these public holiday falls on a day that would not otherwise be a working day for Mr Liufolua, the Act is complied with if he does not work the day and is not paid for it. If any of these public holiday falls on a day that would otherwise be a working day for Mr Liufolua, the Act is complied with if he does not work but is paid for the day.

[15] Mr Liufolua's evidence, which I accept, is that his working days were Friday – Monday. Tuesday to Thursday were the quiet days and he would ordinarily have two of those days off and work one of them, as rostered.

[16] Section 49 of the Holidays Act provides that if an employee does not work on a public holiday and that day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day. In 2019 Good Friday (19 April), Easter Monday (22 April), Queen's Birthday and Labour Day fell on days which would otherwise have been working days for Mr Liufolua. VIP Security Solutions failed to comply with the Holidays Act when it failed to pay Mr Liufolua for these four days.

[17] Prior to Waitangi Day 6 February, Wednesday could not be regarded as an "otherwise working day", in light of Mr Liufolua's employment agreement, the roster arrangements and his very short work history. However, Mr Liufolua worked every Thursday prior to 25 April. As at that time, Thursday was an otherwise working day. VIP Security Solutions failed to comply with the Holidays Act when it failed to pay Mr Liufolua for 25 April.

[18] Mr Liufolua started work on 29 January 2019[2] on $20.00 per hour. The rate increased to $22.00 per hour from 29 April 2019 and to $25.00 per hour from 1 July 2019. Mr Liufolua

[1] Holidays Act 2003, s 6(3).

worked 8 hours per day. Mr Liufolua is entitled to arrears for the five public holidays above. The first three should have been paid at $160.00 per day ($480.00), the fourth at $176.00 and the fifth at $200.00. Arrears in respect of public holidays totals $850.00.

[19] Calculations lodged show a claim of $1,400.00 for public holidays. The calculations wrongly include claims for Auckland Anniversary Day and Waitangi Day. They also wrongly claim payment for the all the public holidays at $25.00.

Was there a default in payment of wages due to Mr Liufolua under the employment agreement?

[20] The employment agreement declares that it is the whole and entire agreement and may only be varied by agreement between the parties in writing.[3]

[21] Clause 6 provides that the hours of work are detailed in schedule 1 of the agreement. Clause 9.2 provides that the details of the wage and salary calculations are in schedule 1. Schedule 1 under the heading "PAYMENT PROVISIONS" states "Hourly Rate: $20.00 …Weekly total hour: 40". I find that Mr Liufolua was employed to work and entitled to be paid for 40 hours each week.

[22] VIP Security Solutions did not lodge any statements of evidence and did not appear. There is no evidence to support the allegations set out in the statement in reply about Mr Liufolua's hours of work. Mr Liufolua's evidence is that he usually attended as required in accordance with the roster. He communicated with, sought and obtained the approval of his manager (Sione Sevele) whenever there was any variation. There is no reason to doubt that evidence, which I accept.

[23] Despite the absence of evidence supporting the company's assertions, I address some of them.

[24] VIP Security Solutions says its requirement was that there must be two guards at each store per day. If only one guard reported for duty and if no replacement could be found, "For safety and security purposes, the shift will be off". Mr Liufolua's evidence, which I accept, is that some of the weeks when he was paid less than 40 hours were weeks when he had reported for duty but the shift was called off and he was sent home. Despite the company's

[3] Clauses 1.3 and 1.4 of the agreement signed and dated 29 January 2019.

assertion it did this "For safety and security purposes", the failure to pay Mr Liufolua was a breach of the employment agreement.

[25] A letter dated 24 May 2019 to "Dear Danny Liufolua" was provided with the statement in reply. It is a form of warning letter in respect of timekeeping. An identical letter, except the above address line was to another worker, was included with the statement of problem. Mr Liufolua's evidence, which I accept, is that he received the latter letter by email, spoke to his manager and was told that it was for the other named worker, not him. Mr Liufolua also says that he first saw the letter containing his name after his employment ended. There is no reason to doubt that evidence. It is not necessary to speculate about why the letter attached to the statement in reply was created. It does not establish any default by Mr Liufolua.

[26] VIP Security Solutions says it suspended Mr Liufolua in September. There is provision in the agreement regarding suspension without pay "in exceptional circumstances after good faith consultation" if the employer is investigating an issue.[4] There is no evidence of "good faith consultation", of an "investigation" or even an allegation of misconduct. Mr Liufolua's evidence is that he was simply not rostered on. I accept that evidence. There was no default by Mr Liufolua.

[27] VIP Security Solutions says it reduced Mr Liufolua's rostered hours in September and assigned some hours to another staff member. Rostered work was also reduced because its client required fewer hours. The agreement includes the requirement for the employer to provide "information and an opportunity to comment on any proposal to reduce or adjust hours" where "business operations or economic conditions mean existing and any guaranteed hours of work cannot be sustained".[5] There was a contractual and statutory obligation to consult in good faith. There is no evidence that the company provided "information", "an opportunity to comment" or consulted in good faith with respect to the September reduced hours. There was no default by Mr Liufolua.

[28] Mr Liufolua by txt message on 9 December advised Mr Sevele that he was giving notice. The agreement stipulates notice in writing of two weeks. There is a letter from Mr Sevele to Mr Liufolua acknowledging and confirming acceptance of his resignation on

[4] Clause 27.
[5] Clause 6.3.

9 December, saying "Your resignation will be effective as from 23rd of December 2019." The letter includes a positive statement about Mr Liufolua's employment and sets out final pay arrangements. Despite the tone of the letter, Mr Liufolua's evidence is that Mr Sevele told him that he would not be paid for the previous week's work. That caused Mr Liufolua to txt Mr Sevele again, using profane language and threatening legal action. Mr Liufolua was not rostered to work or paid (except for two days) during the weeks starting 9 December and 16 December 2019. Mr Liufolua's txt might have given VIP Security Solutions grounds to allege some form of misconduct, but that did not happen. Neither the txt nor Mr Liufolua's resignation entitled VIP Security Solutions to breach its contractual obligation to employ and pay Mr Liufolua for 40 hours per week until the end of his notice period. That is reinforced by the agreement at clause 37 which authorises the employer to elect to pay wages in lieu but otherwise the employee must work out the notice period.

[29] In its statement in reply, VIP Security Solutions says that Mr Liufolua did not give proper notice and thereby breached his employment agreement. The letter of acknowledgement and acceptance would have created an impediment for the company, if it had appeared and argued that point. There was no default by Mr Liufolua in the period after he gave notice.

[30] The arrears claim, excluding payments for public holidays, totals $6,090.00. I find that VIP Security Solutions defaulted in payment of that amount due to Mr Liufolua under the employment agreement. To that amount, must be added $850.00 for the public holidays not worked which should have been paid. Arrears total $6,940.00.

[31] Mr Liufolua's employment ended within 12 months so he was entitled to 8% of his gross earnings since the commencement of the employment. The gross earnings figure used by VIP Security was $6,940.00 lower than it should have been. Mr Liufolua is also entitled to 8% on the arrears, taking the gross arrears due to $7,495.20.

[32] Mr Liufolua was also entitled to KiwiSaver contributions on his gross arrears at the rate of 3%, a total of $224.86. The total arrears, inclusive of public holidays, holiday pay and KiwiSaver is $7,720.06. There will be an order for that amount.

Is VIP Security Solutions liable for a penalty?

[33] Mr Morgan for Mr Liufolua confirmed that a penalty was only sought against VIP Security Solutions.

[34] The statement of problem seeks a penalty for failure to pay wage arrears. I treat this as a claim under s 134 of the Employment Relations Act 2000 for a penalty for breach of the employment agreement. In submissions, there was also reference to the breaches of the Holidays Act 2003. A separate claim for a penalty under that Act was not detailed in the statement of problem, so I do not deal with it separately.

[35] I find that VIP Security Solutions breached the employment agreement between it and Mr Liufolua by not paying him for 40 hours per week, contrary to clause 6.1 and schedule 1 of the agreement. The company is liable to a penalty.

[36] The breach was fundamental and extensive. There were at least 18 weeks when Mr Liufolua was rostered and paid for 4 days or fewer. Some of these short-paid weeks were the result of the company's approach to public holidays, so arose from a breach of minimum employment standards. Apart from the public holiday defaults, the failure to pay Mr Liufolua for 40 hours occurred in the second half of his employment, generally. The breach was intentional and the company did not change its conduct despite Mr Liufolua's queries and protestations. The resignation was followed by serious shortfalls in the weekly wages that should have been paid. Mr Liufolua trusted and relied on his employer to comply with the promised level of work and income so he could meet financial basic obligations. The breaches destroyed that trust. Mr Liufolua had limited bargaining power and a degree of vulnerability, as reflected in the low paid nature of the work. VIP Security Solutions has taken no steps to mitigate the effects of the breach. The best that could be said is that the company in the end offered no evidence to support its defence, but I do not treat that as a mitigating factor. The circumstances which have brought about the company's non-appearance are unknown.

[37] The company has not previously been found by the Authority to have engaged in any similar conduct. No other mitigating factors are apparent. The financial position of the company is unknown.

[38] I treat the multiple failures to pay Mr Liufolua as one breach. The statement of problem seeks a penalty for the failure to pay wage arrears. While a figure is not specified, the wording indicates a single penalty. Materially identical breaches of a regularly repeated nature against an employee give rise to a single breach.[6]

[39] VIP Security Solutions is liable to a maximum penalty of $20,000.00. The company may have ceased trading, but the level of penalty needs to deter VIP Security Solutions if it resumes trading and deter others from similar conduct.

[40] I assess the breach as of similar seriousness to that in the *Nicholson* case. In that case the Court set the penalty at 75% of the maximum penalty, $7,500.00. Taking that approach here, the penalty would be fixed at $15,000.00. I find a penalty at that level is warranted, bearing in mind the breach, so will fix the penalty at $15,000.00. I was not asked to order the penalty payable to Mr Liufolua. It will be payable to the Crown.

Was Mr Liufolua constructively dismissed?

[41] Constructive dismissal can include the situation where there has been a breach by the employer of a contractual term. It must be a breach of a sufficiently serious nature so that the employee reasonably concludes that the employer does not intend to be bound any longer by the contract and cannot be relied on to perform it in the future.[7]

[42] Mr Liufolua's resignation txt said:

> Today I'll be handing in my 2 weeks notice. I'm going back to bouncing full time so I can be home more often. Cheers Danny

[43] Mr Liufolua's evidence is that he did not at that stage have other work arranged. Although not expressed in the txt, Mr Liufolua's evidence is that he resigned because he needed certainty of his income week to week to support his family. He wanted the 40 hours work (and pay) that the contract promised. He left because of the reduced hours and pay. Mr Liufolua did not allude to the genuine reason for the resignation because he was concerned that Mr Sevele would give him no hours (and no pay) during the notice period. I accept Mr Liufolua's evidence above.

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[6] *Nicholson v Ford* [2018] ERNZ 393 at [20].
[7] *NZ Woollen Workers IUOW v Distinctive Knitwear Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

[44] The failure by VIP Security Solutions to honour the contractual promise of 40 hours work and pay was a very serious breach. Mr Liufolua concluded, as would any reasonable employee, that VIP Security Solutions did not intend to be bound by the contract and could not be relied on to perform it in the future.

[45] I find that Mr Liufolua was constructively dismissed by VIP Security Solutions.

[46] I find that the dismissal was unjustified. VIP Security Solutions' actions and how it acted were not what a fair and reasonable employer could have done in the circumstances at the time.

[47] Mr Liufolua has a personal grievance against VIP Security Solutions and is entitled to an assessment of remedies.

What remedies arise?

[48] Mr Liufolua's evidence is that he lost about a month's wages as a result of his resignation. He then started other work so the loss did not continue. In the absence of detailed information, I fix 4 weeks as the duration of the loss. I accept that Mr Liufolua had no other income from employment during that period. Applying s 128(2) of the Employment Relations Act 2000 Mr Liufolua is entitled to reimbursement of $4,000.00. There will be an order for that amount.

[49] Compensation for distress "starting at $12,000.00" is claimed. Mr Liufolua's evidence is that it took a financial and emotional toll on him. He struggled to pay his bills and fell behind in his rent. He has two young children and a partner. He struggled to look after and feed them. He says it was a really stressful time emotionally. I accept this evidence. There is no evidence that the effects meant that Mr Liufolua needed or sought medical or other professional help. The proven effects remain material for Mr Liufolua. I assess $12,000.00 as the sum required to remedy the humiliation, lost dignity and injury to his feelings caused by the personal grievance. There will be an order for that amount.

Claims against Koniseti Liutai

[50] Mr Liutai is the director of the company. An employee can only claim a personal grievance against their employer, so Mr Liutai is not liable for the personal grievance claim.

Since Mr Liutai personally was not the employer of Mr Liufolua, he cannot be directly liable for the arrears. The present proceedings do not include a claim that Mr Liutai was a person involved in any breach of employment standards. A penalty was not sought against Mr Liutai as a person who incited, instigated, aided or abetted the breach by the company of Mr Liufolua's employment agreement. As a result, the proceedings against Mr Liutai as second respondent must be dismissed.

Costs

[51] Mr Liufolua seeks and is entitled to a contribution to his costs. I am mindful that the undefended investigation meeting was brief, but beforehand Mr Liufolua's representative lodged a full statement of problem which included extensive material, was involved in a case management conference, lodged detailed calculations for the arrears claim and lodged a statement of evidence for Mr Liufolua. I treat this as entitling Mr Liufolua to a costs award of half the daily tariff for the first day with an additional amount to cover the lodgement fee. There will be a costs order of $2,321.56.

Philip Cheyne
Member of the Employment Relations Authority