



## **Employment Relationship Problem**

[1] This is a claim for wage arrears and unjustified dismissal by Annura Annuraj, a work visa holder from India, against NZ Equipments and Construction Limited (NZECL), a fibre installation company. One of NZECL's company directors is Abdul Muneem.

## **The Authority's investigation**

[2] Mr Annuraj filed his statement of problem with the Authority on 17 April 2020 when New Zealand was at COVID-19 Alert Level 4. No statement in reply has been filed in response by NZECL.

[3] An in person investigation meeting was set down for 18 August 2021 in Hamilton, but the investigation meeting could not take place as scheduled because Auckland went into COVID-19 Alert Level 4 lockdown for the second time at 11.59 pm on 17 August 2021.

[4] As an alternative to an in person investigation meeting, arrangements for the meeting to take place by audio-visual link (AVL) via Zoom was organised on the morning of 18 August 2021 which Mr Annuraj attended. There was no appearance by Mr Muneem. Pursuant to clause 12 Schedule 2 of Employment Relations Act 2000 (the Act), the Authority proceeded with the investigation meeting in NZECL's absence as if the company had attended or been represented. However, unbeknownst to myself or the applicant, Mr Muneem had emailed during the investigation meeting that NZECL's documents were at the company's office in Hamilton which he was not able to access due to the lockdown. After becoming aware of Mr Muneem's email, it was necessary to reconvene the investigation meeting with all parties present.

[5] On 22 February 2022, Mr Annuraj and Mr Muneem attended the investigation meeting. That meeting however had to be adjourned because Mr Muneem claimed that NZECL had a copy of Mr Annuraj's wages and time and holiday and leave records which the company subsequently provided on 11 March 2022.

[6] On 31 March 2022, the Authority emailed the parties to confirm their availability for an investigation meeting via AVL on 29 April 2022. While the date

was suitable for Mr Annuraj, Mr Muneem advised that he would not be available until after 16 May 2022.

[7] The Authority subsequently offered 20 May 2022 as an alternative date for a resumption of the earlier investigation meeting. While Mr Annuraj confirmed his availability, there was no response from Mr Muneem. Eventually, the Authority set the matter down for an investigation meeting by AVL on 1 August 2022. Mr Annuraj confirmed his availability for that date but Mr Muneem did not respond despite reminder emails from the Authority of 21 and 26 July 2022.

[8] On 1 August 2022 at 11.39 am, the Authority commenced the investigation meeting which was attended by Mr Annuraj but not NZECL or Mr Muneem. In the company's absence, the Authority proceeded with the investigation meeting pursuant to clause 12 Schedule 2 of the Act.

[9] As permitted by s 174E, 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 issues**

[10] The issues requiring investigation and determination were:

- (a) Is Mr Annuraj owed wages by NZECL?
- (b) Was Mr Annuraj unjustifiably dismissed by NZECL?
- (c) If the respondent's actions were not justified what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours by the applicant to mitigate his loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Annuraj that contributed to the situation giving rise to his grievance?
- (e) Should either party contribute to the costs of representation of the other party.

## **Relevant facts**

[11] Before being employed by NZECL from 25 June 2018, Mr Annuraj worked for IT Support Staff Limited (ITSS), an IT recruitment company which held a supply of services agreement with NZECL from 1 April 2018 to 23 April 2018. At that time, Mr Annuraj held an employer-assisted work visa with ITSS. Under the agreement, ITSS agreed to provide NZECL with Mr Annuraj's IT services at the rate of \$21 per hour plus eight percent holiday pay and GST.

[12] On 29 May 2018, Mr Annuraj signed an individual employment agreement with NZECL. He was employed as a junior ICT software developer and he was guaranteed a minimum of 40 hours of work per week by the company. Mr Annuraj was to be paid \$25 per hour and his employment was to commence as of 25 June 2018, which coincided with the date Mr Annuraj obtained a work visa to lawfully work for NZECL.

[13] Part of Mr Annuraj's claim for unpaid wages covers a period (5 April 2018 to 24 June 2018) when he provided services to NZECL as an ITSS subcontractor for which neither he nor ITSS received payment. During this period, Mr Annuraj stated that he worked a total of 311.5 hours for NZECL but received payments of \$2,710 only which equates to approximately 129 hours of work. Mr Annuraj seeks payment of the remaining 182.5 hours of unpaid work which equates to \$3,832.50 (182.5 hours x \$21 per hour as an employee of ITSS).

[14] Mr Annuraj has provided three employee time sheets from ITSS (13 April 2018 to 3 May 2018) and a copy of an email from the director of ITSS stating that the company has received no payments from NZECL for the unpaid balance of Mr Annuraj's work hours.

[15] As stated above, Mr Annuraj later became an employee of NZECL on 25 June 2018. From 2 August 2018 until he was made redundant by the business on 21 March 2019, he was paid a weekly wage based on a 40 hour week. An additional component to Mr Annuraj's claim was that he was not paid for the overtime hours he worked for NZECL amounting to a total of 182 hours from 30 July 2018 to 11 January 2019. Mr Annuraj seeks wage arrears for overtime work of \$4,550 (182 hours x \$25 per hour as an employee of NZECL).

[16] In addition, Mr Annuraj stated that he was not paid his full wages by NZECL during the first five weeks of his employment (25 June 2018 to 29 July 2018). Of the 200 hours worked during this period, Mr Annuraj stated that was paid for 80 hours' work only. He seeks the payment of the remaining 120 hours which equates to \$3,000 (120 hours of unpaid work x \$25 per hour).

[17] In addition to unpaid wages, Mr Annuraj seeks KiwiSaver of \$270 and unpaid annual leave of \$1,423 (gross) from NZECL. In terms of the latter, Mr Annuraj acknowledges payment of \$1,119.40 in annual leave however there remains \$1,423 (gross) owing which is based on 8 percent of his gross taxable income of \$31,780.10 ( $\$31,780 \times 8 \text{ percent} = \$1,119.40$ ).

[18] Mr Annuraj departed New Zealand for India from 14 January 2019 to 25 February 2019 to attend his brother's wedding. During this time, he relied on his credit card to fund his trip and to contribute financially to his brother's wedding. Upon returning to New Zealand, Mr Annuraj had a Q card debt of \$5,000 and remitted approximately \$10,000 to his family for the wedding.

[19] Shortly after returning to New Zealand on 25 February 2019, Mr Annuraj learnt from a co-worker that he needed to speak to Mr Muneem about work which made Mr Annuraj feel very tense. NZECL provided him with no further work during this period. To financially support himself and pay rent, Mr Annuraj borrowed money from his friends which he is paying back by instalments.

[20] On 8 March 2019, Mr Annuraj attended a meeting with Mr Muneem at NZECL's work office in Hamilton. He was given a letter (7 March 2019) which informed him that the company would be ending his employment in two weeks' time on 21 March 2019. The reasons given for his termination was due to "reduced workload and change in processes" which meant that Mr Annuraj's position was no longer required.

[21] Mr Annuraj sought advice from his local Citizens Advice Bureau for employment and as a result of further discussions between him and Mr Muneem, NZECL agreed to pay Mr Annuraj what was owed to him in wages. However, in the end, only five payments of \$500 were made by the company.

## **Issue One: Is Mr Annuraj owed wages by NZECL**

[22] Clause 4.1 of Mr Annuraj's individual employment agreement with NZECL required him to be paid \$25 per hour for each hour worked. In addition to having a contractual entitlement to recover wages from his employer, s 131(1) of the Act states:

Where—

- (a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or
- (b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—

the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.

[23] Under section 131, the employer's duty to pay an employed person their wages arise from the employment agreement or a contract of apprenticeship. There are multiple components to Mr Annuraj's wage arrears claim the first of which covered a period where he was strictly not an employee of NZECL but a subcontractor for ITSS.

[24] The employment relationship between Mr Annuraj and NZECL did not come into effect until 25 June 2018. As such, he is not able to recover from the Authority the \$3,831.45 sought while he was an employee of ITSS. The Authority is a creature of statute and it does not have the jurisdiction to award wage arrears outside of Mr Annuraj's employment agreement with NZECL. He will have to either file a separate claim in the Authority against ITSS for payment of those wages or file a claim against NZECL in the Disputes Tribunal for unjust enrichment.

### *Overtime wages are owed*

[25] Mr Annuraj says that he was not paid for all the hours he worked for NZECL but was instead paid wages calculated on a 40-hour week. In support of that claim, the Authority was provided with a copy of Mr Annuraj's personal bank statements from 15 February 2018 to 14 June 2019. These show that he was regularly paid \$790.34 (net) per week from 2 August 2018 to 4 October 2018 when he received a modest pay increase to \$820.33 (net) per week.

[26] On its face, Mr Annuraj's bank statements support the view that he was paid on a 40-hour week. Such a finding is consistent also with Mr Annuraj's income summary from Inland Revenue which relies on salary and wage information provided by NZECL.

[27] In addition, Mr Annuraj provided the Authority with his own record of hours from 30 July 2018 to 11 January 2019 which showed that he had worked an additional 182 hours of overtime for NZECL for which he has not been compensated. He seeks \$4,550 from the company as a result (182 hours x \$25 per hour).

[28] Mr Muneem sought to impugn the claim of unpaid overtime by providing the Authority with a copy of NZECL's wages and time record. This purportedly showed that Mr Annuraj worked only 40 hours per week and no overtime. However, the wages and time record incorrectly recorded the income that was paid into Mr Annuraj's personal bank account from 2 August 2018 to 4 October 2018, a period of nine weeks. The bank statements show that Mr Annuraj received wages of \$790.34 (net) per week which did not reconcile with NZECL's wages and time record of net wage payments of \$820.33 per week. The company's wages and time record is plainly wrong.

[29] Further, Mr Annuraj provided a copy of NZECL's daily worksheets for five days in early January 2019 four of which were signed for by a member of staff, presumably the project manager, Farish Muneem, a family relative of Mr Muneem. The worksheets record Mr Annuraj having worked nine-and-half to 11-hour days for NZECL during this five-day period which does not accord with NZECL's time and wage records which showed Mr Annuraj having worked eight-hour days for the same time period. Given the contemporaneity of the daily worksheets, I prefer this evidence over NZECL's wages and time record which is incomplete in several respects.

[30] The wages and time did not record certain particulars which are required by s 130 of the Act namely Mr Annuraj's address (s 130(1)(c)), details of his occupation or employment (s 130(1)(d)) and the kind of employment agreement he held whether individual or collective (s 130(1)(e)). While I do not consider the absence of this information to be determinative of the overtime hours issue, it does cast doubt on the overall reliability and accuracy of NZECL's wages and time record.

[31] In proceedings under s 131 of the Act, the applicant has the responsibility of establishing their claim on the balance of probabilities. Mr Annuraj has provided the Authority with his own personal record of overtime hours worked which is consistent with NZECL's daily worksheet records. I have reservations about the company's wages and time record which I find inconsistent with its daily worksheets and Mr Annuraj's personal bank statements. Based on the information and evidence before me, I find that Mr Annuraj is owed \$4,550 in overtime work which NZECL is ordered to pay no later than 5 pm Friday 9 September 2022.

*Mr Annuraj owed wages for first month of employment with NZECL*

[32] A further component to Mr Annuraj's wage arrears claim relates to the first month of his employment with NZECL (25 June 2018 to 29 July 2018). It is noted that he had obtained a work visa from Immigration New Zealand on 25 June 2018 which enabled him to work for NZECL.

[33] The Authority observes that the non-payment of Mr Annuraj's wages for the first five weeks of his employment is consistent with his personal bank statements which show that his first wage payment from NZECL was received on 2 August 2018. Mr Annuraj's employment agreement with NZECL had a commencement date of employment of 25 June 2018. However, despite evidence of Mr Annuraj having worked for NZECL in July 2018, there are no wage deposits into his bank account until early August 2018.

[34] Mr Annuraj acknowledges that he has received some of the wages owed to him for the relevant period. However, there remains 120 hours of unpaid work which equates to \$3,000 (gross). In light of Mr Annuraj's bank statements, I find this part of his claim made out and order NZECL to pay Mr Annuraj \$3,000 no later than the above due date.

*Ineligible to join KiwiSaver contributions*

[35] Mr Annuraj seeks unpaid KiwiSaver employer contributions of \$270 against NZECL. However, temporary visa holders are not eligible to join KiwiSaver and, consequently, this part of Mr Annuraj's claim is dismissed.

### *Annual leave owed*

[36] Mr Annuraj's summary of earnings information as maintained by Inland Revenue record that he earned \$31,780.10 (gross) from NZECL. As an employee, Mr Annuraj is entitled to holiday pay upon the termination of his employment.<sup>2</sup> Eight percent of his earnings is \$2,542.40 of which NZECL has paid \$1,119.40 already. NZECL is ordered to pay Mr Annuraj the remaining balance of \$1,423 in annual leave entitlements no later than 5 pm Friday 9 September 2022.

### *Interest*

[37] Mr Annuraj is entitled to an award of interest on the wage arrears awarded including the annual leave component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[38] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. It is appropriate where a person has been deprived of the use of money to make an award for interest. NZECL is ordered to pay interest, using the civil debt interest calculator on the sum of \$8,973 calculated from 25 March 2019 until the date payment is made in full.

### *Unjustified dismissal*

[39] The final part of Mr Annuraj's claim was that he was unjustifiably dismissed by NZECL. He returned to New Zealand on 23 February 2019 after a six week visit to India for his brother's wedding. Mr Annuraj subsequently learnt from his project manager that he had been dismissed. It is understood that this was because he had left during a busy time for the company and that a replacement had been found.

[40] On 8 March 2109, Mr Annuraj met with Mr Muneem at NZECL's work office in Hamilton. He was given a termination of employment letter (7 March 2019) which stated that his role had been terminated due to "reduced workload and change in processes." Mr Annuraj was given two weeks' notice and his employment with NZECL ended on 21 March 2019.

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<sup>2</sup> Holidays Act 2003, s 27.

[41] Section 103A of the Act requires the Authority to assess on an objective basis whether an employer's dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>3</sup>

[42] It was Mr Annuraj's evidence that he had not been given a chance by his employer to save his job. While he had been away on holiday, Mr Annuraj was not made aware that this would impact his employment. There was no process, no consultation and no issues raised with him. The sudden termination was very stressful and affected Mr Annuraj's mental state and ability to sleep at the time. Fortunately for him, Immigration New Zealand changed its work visa instructions and he was granted an open work visa which enabled him to work for any employer. Moreover, he was able to secure full-time alternative employment with his now current employer who has been paying him wages since 18 March 2019 which predates the end date of his employment with NZECL.

[43] While Mr Annuraj was fortunate to find alternative employment in short order which means that he has mitigated his loss, NZECL's dismissal does not comply with s 103A of the Act and is not able to be justified on substantive and procedural grounds. I find that Mr Annuraj was unjustifiably dismissed and that he is entitled to compensation as a result.

#### *Compensation*

[44] The timing of Mr Annuraj's termination came at an inopportune time for him following an expensive visit to India which included a significant financial contribution towards his brother's wedding. However, it is acknowledged that NZECL cannot be held accountable for Mr Annuraj's financial decisions which is a matter for him. Compensation is for the effects the grievance has had on the employee. It is not intended to be a penalty imposed on the employer as an indication of the Authority's disapproval of their conduct. Having regard to the particular circumstances of this case, I consider an award of \$4,000 under s 123(1)(c)(i) is appropriate.

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<sup>3</sup> Employment Relations Act 2000, s 103A(2).

### *Contribution*

[45] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[46] It has not been demonstrated that Mr Annuraj has done anything wrong or contributed to his own disadvantage or dismissal. A reduction in remedies is not warranted.

### **Costs and expenses**

[47] Mr Annuraj is to be reimbursed the filing fee of \$71.56 by NZECL. Neither party was represented and so there is no issue as to costs.

Peter Fuiava  
Member of the Employment Relations Authority