

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROA ROHE**

[2023] NZERA 524
3119432

BETWEEN AMIR SHAMGUNOV
 Applicant

AND ULTIMATE INTERIOR
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person
 Igor Temnyuk and Ilona Mazurova, for the Respondent

Investigation Meeting: 30 June 2023 at Auckland

Submissions Received: At the investigation meeting

Date of Determination: 14 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Amir Shamgunov, has raised a number of claims regarding unpaid money he says he is owed by the respondent, Ultimate Interior Solutions Limited (Ultimate). He also claims to have been unjustifiably dismissed.

[2] Ultimate denies Mr Shamgunov is due anything and says he resigned his employment to work for another employer with whom he might have started prior to his final day with Ultimate.

[3] There was also a claim regarding money Mr Shamgunov says Ultimate deducted when he was engaged on a pre work trial and failed to forward to the Inland Revenue. For

two reasons this will not be considered. The first is that it was not pursued at the investigation meeting. The second is that Mr Shamgunov conceded this was before he was employed, that the arrangement attracted withholding tax and he was engaged as a contractor. In other words it is beyond the Authority's jurisdiction. Similarly claims for reimbursement for a doctor's visitation and an interpreter's costs were not pursued.

[4] Ultimate also lodged a counterclaim concerning an email Mr Shamgunov had sent a client who then reduced the amount of work it offered Ultimate by some \$50,000. That amount was sought as damages but while Mr Shamgunov admitted sending the email in question Ultimate conceded it could not pursue the claim. That was because it could not establish a direct link between the email and the loss, with the client in question offering a plausible and unrelated explanation. This will also be considered no further.

Background

[5] Mr Shamgunov was primarily employed by Ultimate, a firm owned by Igor Temnyuk, to apply and fix plasterboard and worked under an Essential Skills Work Visa. The two entered into a written employment agreement signed on 2 May 2019 and which stipulated a start date of 20 May.

[6] Contained in the employment agreement are the following clauses that have relevance to these claims:

- (a) The employee's legal right to work in New Zealand is temporary and the role conditional on his being able to work legally for the employer. If, after following a fair process, the employer decides this condition is not met, the employee's job will automatically end without notice or pay instead of notice. The employee must tell the employer about any changes to, or information that may change, their right to work legally for the employer. The employee must not work if he is not legally able to do so.
- (b) The employer will roster the employee on for 40 hours each week with the work to be performed between 7am – 5 pm, Monday to Saturday. The timing of actual hours will be set out in a roster.

The employer may offer more hours, and the employee can decide whether or not to accept the offer.

The employer will let the employee know at least one week in advance of a new roster unless there are exceptional circumstances. The employer will make sure the employee has 2 consecutive days off within a reasonable period when the roster is set.

(c) Shift cancellation.

The employer will give the employee reasonable notice, being at least 12 hours before their shift starts, if they are no longer required to work. If the employer does not give this notice, but notifies the employee before the shift starts, the employee will receive reasonable compensation, being half pay for the cancelled shift.

If the employer cancels the shift without telling the employee before the start of the shift, or cuts it short, the employee will be paid as if they had worked the entire shift.

(d) Breaks.

The employee is entitled to unpaid rest breaks and unpaid meal breaks. Breaks will be a suitable length to give the employee time out, eg: for food, drink, rest or personal errands. Breaks will be taken at suitable times during the working day and the employer will offer reasonable compensation if breaks cannot reasonably be given.

(e) The employee will be paid \$33.65 (gross) an hour.

(f) The employee agrees that his hourly rate includes all compulsory employer contributions to their Kiwisaver and the employer's contribution will be deducted from the pay.

(g) Paying back expenses.

The employer will repay any reasonable and authorised work-related expenses the employee has to cover while doing their job. The employee must advise the employer of the expenses before purchasing. The employee must provide proof of purchase and follow the employer's expenses policy.

(h) Public holidays can only be worked if the employer asks and the employee agrees. If the employee doesn't work on a public holiday he will get a paid

day off if the public holiday falls on a day that would otherwise have been a working day.

(i) Annual leave.

The employee will get annual leave of 4 weeks each year once he has worked for the employer for 12 months.

...

Leave will be taken at times the employee and employer agree. If they cannot agree the employer will decide the dates and give the employee at least 14 days notice.

[7] That said Ultimate claims the agreement was, at least initially, a sham designed for the purpose of satisfying Immigration New Zealand and that it was set aside in favour of an oral agreement under which Mr Shamgunov would work when required and be paid on a piece rate basis at \$5 per square metre. Ultimate claims it was however accepted there were some tasks Mr Shamgunov performed to which the piece rate could not be applied and he would then be paid at the agreed hourly rate. Thereafter the amount due was divided by the contracted hourly rate and the resulting hours were recorded on the payslip irrespective of what was actually worked.

[8] Here it should be noted this arrangement does not give rise to the sort of issue normally seen by the Authority when discussing migrant labour and that is inadequate wages. The evidence is the agreed rate was designed to reflect an annual salary of \$70,000 and under the piece rate methodology Mr Shamgunov earned considerably more.

[9] Ultimate's evidence is that the piece rate arrangement was the result of an original request by Mr Shamgunov that he be paid for the work he produced rather than at an hourly rate. Ultimate says the original proposal, contained in a contract prepared by Mr Shamgunov, saw a guarantee of at least forty hours work with the piece rate calculated from a base salary of \$55,000. Ultimate says further discussion occurred with Mr Shamgunov asking the piece rate calculation be based on the higher salary of \$70,000 and this was agreed on the proviso the rate would be deemed to include an allowance covering sick and holiday pay and that he would be required to cover expenses and ACC. Ultimate states the only reason Mr Shamgunov was an employee and not a contractor is that the latter was precluded by his visa.

[10] Mr Shamgunov denies there was any such conversation or that the alleged variation was agreed, though he accepts he provided the contractual documentation and subsequently prepared timesheets which included the data Ultimate used to calculate piece rate payments. Mr Shamgunov accepts there was a discussion about his salary but denies discussing other aspects of the arrangement as described by Ultimate. He also claims the timesheets had nothing to do with his pay but were used by Ultimate to produce client invoices.

[11] That said Mr Shamgunov accepts he was aware of how Ultimate was paying him and did not raise any objection or concern. He says he simply accepted it.

[12] In November Mr Shamgunov prepared a timesheet where he noted higher piece rates of \$6 and \$8 per square meter which Ultimate then used as the basis of his payment for that period. It was paid but then Ms Mazurova, Ultimate's office administrator, wrote to Mr Shamgunov on 11 November advising \$200 would be deducted from his next pay given the overpayment that had resulted. That led to further correspondence and in particular an email from Mr Shamgunov which records itself as being sent on 14 November at 9.49. In it he challenged the deduction and made mention of the written contracts obligations. He specifically mentions the requirement work be offered five days work a week and states:

I have entered into an official contract with your company, which indicates all the rights and obligations of the parties that are binding. I intend to demand from you the fulfilment of all your obligations toward me in accordance with the contract.

[13] The e-mail of 14 November then goes on to state:

All verbal agreements concerned specific aspects of calculating wages for the amount of work performed. The amount of work performed was translated into the number of hours worked. You also violate these agreements by trying to retrospectively reduce the cost of previously established prices and not providing me with the amount of work necessary for daily loading during working hours.

[14] The email finally advises that henceforth Mr Shamgunov would "... calculate all the downtime caused by the fault of the employer and present them to you for payment."

[15] Ultimate replied late that day and, amidst other things, advised that as of the next week they considered Mr Shamgunov would be engaged "strictly" under the terms of the written agreement and this is what then occurred with effect 16 November 2019. The hourly rate appears to have remained unchanged but as the hours became fixed at 40

Mr Shamgunov's earnings decreased. Ultimate says the change was discussed and agreed. Mr Shamgunov's reply to questions about this was inevitably to refer to his contract and state "it was my contract" or words to that effect.

[16] Here and as an aside I note a number of the exchanges between the parties were written in Russian and I have used translations provided by Mr Shamgunov.

[17] Albeit uneasily Mr Shamgunov continued to work for Ultimate with the latter expressing concerns he was no longer performing well. Things then escalated in May when Mr Shamgunov was sent a warning letter. It refers to Ultimate having discovered Mr Shamgunov was performing casual work during weekends and challenged this as being contrary to his obligations to his primary employer. Concerns were also raised that Mr Shamgunov had failed to follow his employer's requests asked he improve his performance.

[18] On 25 May 2020 Mr Shamgunov wrote to Ultimate and asked he be allowed 4 weeks leave commencing on 8 June. Give a belief Mr Shamgunov had only accrued some two weeks leave since his return to the employment agreement and the cessation of the all inclusive rate Ultimate approved two weeks leave. Also part of their consideration was a need to recover from the impact of covid, along with the fact Mr Temnyuk was then ill.

[19] On 4 June Mr Shamgunov replied that he was going to take four weeks and he also advised that the visa under which he worked for Ultimate was in fact expiring on 13 June. He advised he needed the leave to "*resolve all issues related to my visa status*" before adding "*[this] means that our contract is coming to an end. So this is a vacation from subsequent resigning.*" The letter also complained about Ultimate's reaction to the leave application.

[20] Ultimate interpreted this as a resignation and replied on 12 June asking for a written resignation in English. Mr Shamgunov replied on 14 June stating "*Once again I inform you that since June 8 I have been on vacation. Pay for my vacation in accordance with the applicable laws of the NZ*".

[21] On 17 June Ultimate replied. Amidst other things it stated:

Your letter to us says that after your annual leave in four weeks you would like to resign ... In light of this statement and your clear intent to leave, we will be considering this a notice of your resignation. Following this your last day with our company will be 06/07/2020.

[22] The letter also replied to the claim for paid leave by asserting Ultimate was happy to pay all amounts accrued since November when Mr Shamgunov returned to employment pursuant to his agreement. Ultimately two weeks were paid and two were not.

[23] There were no further exchanges till early July and as it transpired Ultimate believed Mr Shamgunov worked for another plasterer to whom he subsequently went after termination during his leave. He denies this but accepts he did three or four days work for yet another firm.

[24] On 3 July Mr Shamgunov wrote stating he took a vacation and had not resigned and nor had Ultimate fired him. All he says he did was advise Ultimate about his visa status. He advised the visa, still tied to Ultimate, had now been renewed and he felt Ultimate was compelled to offer work.

[25] Ultimate relied stating unauthorised leave had been taken and in its view that equated to an automatic redundancy. That was followed some 6 minutes later with:

Your employment with our company is over and I don't know how you have yourself continue the contract with us and used it in immigration but if I have to call immigration and explain them that's exactly what I will do at the moment we are in dispute and I think its happening on 16th of July so up till then there will be no discussion regarding any work or anything else.

[26] There were further exchanges over the following couple of days which finished with a letter from Ultimate that opened with:

Thank you for the information you have provided. We are satisfied you are able to work with us for your last day, being tomorrow 6 July 2020. To that extent, we note we do not have any individual work for you to do tomorrow. However, please note that we will pay you for tomorrow, and all of your remaining pay entitlements, as per the employment agreement...

[27] That was the way things remained with Mr Temnyuk saying "Given Amir had told me in writing that the visa was expiring, and his employment would end, the business treated his employment as ending on 6 July 2020".

Discussion

[28] As already said, there are two parts to Mr Shamgunov's claims. He seeks monetary arrears and claims to have been unjustifiably dismissed.

Arrears claimed

[29] Essentially the monetary claims rely upon a black letter interpretation of the employment agreement and, by and large, will be payable should that approach be taken. The defence is that this was not, in fact, the agreement with it having been superseded, at least until mid November 2019, by the alternate verbal piece rate arrangement. Should this approach be accepted the bulk of the claims will fail.

[30] In other words the key issue is what was the agreement in force till mid November? Mr Shamgunov states it was the written agreement while Ultimate says the orally amended one applied.

[31] On this I agree with Ultimate. I primarily do so given the content of Mr Shamgunov's email of 14 November 2019 and, in particular, the paragraph quoted in [13] above. Notwithstanding Mr Shamgunov's denial there was a verbal agreement it clearly states there was and it affected "... specific aspects of calculating wages for the amount of work performed".

[32] To this I add the fact Mr Shamgunov's evidence he knew how his wages were being calculated and paid yet failed to challenge it. Indeed his evidence was that he accepted it.

[33] There is then the fact the written agreement does not contain an "entire agreement" clause or something similar which means variation is permitted. The only issue is that it was not reduced to writing which means there is a breach of s 65(1(a) of the Act. That does not, however, mean the agreement is unenforceable and nor is there a request for remedies in respect to this breach. Similarly there is no challenge or claim regarding the agreement's reinstatement in November.

[34] Having concluded the agreement was orally amended the question becomes under what terms? Here I again accept Ultimate's evidence which was clear and consistent. On the other hand Mr Shamgunov offered no evidence, though this may perhaps be because he was backed into a corner by asserting his written agreement applied throughout.

[35] The above conclusion leaves a consideration of its application to the specific claims.

[36] Mr Shamgunov claimed two days sick leave which were not paid on 27 and 28 November 2019. Ultimate accepts the days were not paid and explained this by saying the

requirement Mr Shamgunov cover his ACC levies allowed a deduction to cover this. The problem with this is by then the oral agreement had been rescinded and Mr Shamgunov was once again an employee guaranteed 40 hours a week on an hourly rate. To that I add the fact he had by then earned a sick leave entitlement due to his service. Add, further, that I know of nothing that allows an employer to subsume the sick leave entitlement in the hourly rate, this must be payable. Two days, \$538.40, is therefore payable.

[37] There is then a claim Mr Shamgunov was improperly denied pay by virtue of not being offered work, though 13 of the 15 days claimed fell while the oral agreement was in force. Given Mr Shamgunov was, as required by the arrangement, still being offered at least 40 hours in each of those weeks, these claims fail.

[38] The remaining two days were claimed as half days given Mr Shamgunov received less than 12 hours notice there would be no work. Both occurred after the written agreement was reinstated and Ultimate conceded they are due. A further days pay of \$269.20 is therefore payable.

[39] There is then a series of claims totalling \$314.85 cents for underpayments which Ultimate again conceded.

[40] Next was a group of claims where Mr Shamgunov claimed he was not provided eight hours work on a given day. All but one, however, occurred before 16 November during which period the requirement was forty hours a week and that was complied with. Those claims therefore fail.

[41] The remaining claim is for \$117.77 which not paid on 10 February 2020 and the wage records provided confirm this is due.

[42] Mr Shamgunov also claims the two weeks unpaid leave he took prior to cessation. The evidence is clear this was not paid. To this I add the fact he had completed a years service and was due a leave entitlement according to the Holidays Act which cannot be included in the hourly rate.¹ Two weeks pay is \$2,692 and this is also payable.

[43] Finally Mr Shamgunov claimed \$67.50 as reimbursement of expenses but was unable to explain or substantiate the claims. These claims therefore fail.

¹ Section 28 of the Holidays Act 2003

[44] The claims which have been substantiated total \$3,932.22 and orders will be made accordingly.

The unjustified dismissal claim

[45] Again, and as already said, Mr Shamgunov claims he was unjustifiably dismissed.

[46] Ultimate denies this on two grounds. The first is that Mr Shamgunov resigned, with the second being if that is not the case his employment ceased when his visa expired and cessation was mandated by the employment agreement.

[47] Reliance on the employment agreement cannot succeed. The clause states that for the employer to decide the visa condition has not been met and apply the automatic cessation it must follow a fair process. There is no evidence of any process under which Ultimate enquired into Mr Shamgunov's visa status, let alone a fair one. The automatic cessation cannot therefore apply and even if there was an argument it could, Ultimate waived its right to apply it by acknowledging Mr Shamgunov's return on 6 July and by which time it was aware his visa was again current.

[48] That leaves the resignation argument. That must also fail as while the email of 14 June intimates the employment is likely to come to an end and resignation is likely once the full four weeks leave had been taken, it does not go so far as to say that has occurred. The intimation of a future event, and that is all this was, is not something that can normally be relied upon in this jurisdiction. Not only could that have been clarified had a proper process been followed as already discussed, it probably was when Mr Shamgunov failed to confirm the resignation in writing as requested.

[49] The act which ultimately brought the employment to an end was Ultimate's declaration 6 July was Mr Shamgunov's last day. An act of termination by the employer is a dismissal. A dismissal must then be justified and here both proffered justifications have failed. The dismissal is unjustified.

[50] As remedies Mr Shamgunov sought the contractual notice period of four week and "compensation for illegal dismissal" though this was never quantified.

[51] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. In this instance it is the lesser that will apply with

Mr Shamgunov starting with a new employer on 15 July on a higher wage and stating the only reason he did not start earlier is that he had been sick in the interim and needed to get his visa changed to allow the new employment.

[52] The period without work was 6 working days which is less than the contractual notice period of four weeks which was both claimed and must be payable. Nothing further is therefore due under this head.

[53] Turning to compensation, which though not expressly claimed can be deemed to have been by virtue of the phrase “compensation for illegal dismissal”. That said the evidence was sparse with the anger Mr Shamgunov exhibited and evidenced being directed toward his arrears claims. Reference to the hurt he felt at being dismissed was minimal and to that I add the fact he obtained new employment with ease. That said I accept some hurt must have been felt but the evidence can only justify an award at the lower end. Having regard to recent awards I consider \$5,000 appropriate.

[54] Finally the conclusion Mr Shamgunov has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.² The answer is no, with nothing in the evidence suggesting that is the case.

Costs

[55] Mr Shamgunov has been successful, completely so with his dismissal claim and partially so with the arrears. That said he was unrepresented which means recoverable costs are limited to the Authority’s filing fee. That is payable but otherwise costs shall lie where they fall.

Conclusion and Orders

[56] For the above reasons I conclude Mr Shamgunov is due unpaid wages but not to the extent claimed. I also conclude he has been unjustifiably dismissed. As a result I order Ultimate Interior Solutions Limited pay Amir Shamgunov:

- (a) \$3,932.22 (three thousand, nine hundred and thirty two dollars and twenty two cents) gross being the unpaid wages and holidays; and

² Section 124 of the Employment Relations Act 2000

- (b) \$5,384.00 (five thousand, three hundred and eighty four dollars) gross being the unpaid notice period; and
- (c) A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (d) A further \$71.56 (seventy one dollars and fifty six cents) being reimbursement of the Authority's filing fee.

Michael Loftus
Member of the Employment Relations Authority