

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 584
3211339

BETWEEN

GREGORY VENTER
Applicant

AND

INDUSTRIAL
TECHNOLOGIES LIMITED
(IN LIQUIDATION)
First Respondent

LEWIS WOODWARD
Second Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
Matt Belesky, counsel for the Second Respondent

Investigation Meeting: 11 August 2023 in Auckland

Further information and submissions received: 18 and 23 August 2023 from Applicant
11 and 23 August 2023 from the Respondent

Determination: 9 October 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Venter was employed by Industrial Technologies Limited (ITL) in a business development role from May 2018 until October 2022. He brings a range of claims before the Authority including personal grievances for unjustified action and unjustified dismissal for which remedies are sought, a claim for severance pay and car allowance and an order for interest on arrears of employment standards paid by Mr Woodward to Mr Venter on or about 16 June 2023. Mr Venter also seeks an award of penalties against Mr Woodward.

[2] On 26 October 2022 ITL was placed into liquidation by special resolution of the shareholder. The liquidator consents to this proceeding against ITL in liquidation continuing and has not otherwise participated.¹

[3] Mr Woodward is the sole director and shareholder of ITL and was Mr Venter's manager. He paid the arrears ITL owed Mr Venter in his capacity as its director because he accepts these payments fall within the category of employment standards.² He says he cannot be liable for any awards made in Mr Venter's favour to settle any established personal grievances because they are claims between Mr Venter and ITL.

[4] Mr Venter and Mr Woodward attended mediation in an attempt to resolve these matters.

The Authority's investigation

[5] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Venter, Jackie Venter, Mr Venter's wife, Robert Jones, a former co-worker of Mr Venter's during his employment at ITL and Mr Woodward.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

Issues

[7] The issues identified for investigation and determination are:

- a) Is Mr Venter entitled to severance pay and/or car allowance?
- b) Should interest be awarded on the employment standard arrears paid to date?
- c) Was Mr Venter unjustifiably disadvantaged in his employment?

¹ The liquidator wrote to the Authority on 7 February 2023 consenting to the proceedings continuing.

² Employment Relations Act 2000, s 5.

- d) Does the Authority have jurisdiction to hear a claim of unjustified dismissal?
- e) If so, was Mr Venter unjustifiably dismissed?
- f) If Mr Venter was unjustifiably disadvantaged in his employment and/or unjustifiably dismissed is he entitled to a consideration of remedies including:
 - i. reimbursement of lost remuneration under s123(1)(b) and 128 of the Act; and
 - ii. compensation under s123(1)(c)(i) of the Act.
- g) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Venter which contributed to the circumstances which gave rise to his grievance?
- h) Mr Woodward liable for a penalty?
- i) Should either party contribute to the costs of representation of the other party?

Discussion

(i) Is Mr Venter entitled to severance pay?

[8] Mr Venter seeks an order for severance pay of \$6,666.67. The parties' employment agreement does not provide for 'severance pay' and at clause 6.13 expressly provides "No compensation is payable in the event of redundancy". This is re-stated at clause 8.8 of the employment agreement. The parties' agreement as to the issue of compensation on redundancy is recorded in this document and there is no suggestion in the evidence that that agreement was subsequently varied to include severance pay. There is no statutory requirement for payment to be made in the event of redundancy.

[9] The Authority understands Mr Venter did not receive a month's pay in lieu of notice when his employment ended. He has not brought a claim for arrears of wages

arising from a breach of his employment agreement which required notice to be paid out if it was not worked.³ This may be an issue he can raise with the liquidator.

(ii) *Is Mr Venter entitled to be reimbursed car allowance?*

[10] Mr Venter seeks an order for reimbursement of \$63,310.00 in car allowance based on an average of 22,000 kilometres he drove every year for the four and a half years of his employment with ITL. He does not have a logbook or other record of the mileage he travelled in his vehicle for work purposes. The employment agreement is silent on payment of a car allowance. The relevant policy document, incorporated into the employment agreement, provides for reimbursement of mileage where an employee's personal vehicle is used for business use. The mechanism for mileage reimbursement set out in the policy refers to the applicable Inland Revenue Department reimbursement rate applied to kilometres incurred above and beyond a normal commute to work.

[11] Mr Venter used his personal vehicle for ITL business. He did not claim mileage reimbursements during his employment. In his evidence to the Authority, Mr Venter said he did not make the claims because he was hoping to conclude negotiations with Mr Woodward as to a car allowance. Those negotiations did not conclude before Mr Venter's employment ended.

[12] While it is accepted Mr Venter and Mr Woodward discussed his having a car allowance on a number of occasions, there is insufficient evidence the parties agreed how any car allowance would be calculated and paid. The Authority is unable to fix terms and conditions of employment except in very limited circumstances none of which have been advanced in this matter.⁴

[13] The information in support of a mileage reimbursement claim is too uncertain as to establish a claim under the parties' employment agreement. Mr Venter did not take the opportunity to claim the mileage allowance during his employment and given the nature of such a claim, in the absence of precise evidence as to the travel undertaken such as logbook it is unable to now be established.

³ Mr Venter's individual employment agreement, clause 6.

⁴ Employment Relations Act 2000, s 161(2) of the Act.

(iii) Should interest be awarded on the paid employment standard arrears?

[14] On or about 16 June 2023, after Mr Venter lodged his claim in the Authority, Mr Woodward paid Mr Venter \$22,356.95 (net) being outstanding arrears in employment standards – deductions made from Mr Venter's wages relating to periods of COVID-19 lockdown, annual leave due and owing when Mr Venter's employment ended and Kiwisaver contributions. Mr Venter accepts the arrears claim is satisfied by this payment. He seeks an interest award on the arrears.

[15] There is no dispute Mr Venter has been denied for some months money to which he was entitled. Mr Woodward has met that obligation in his capacity as a director of the entity with whom Mr Venter was in an employment relationship and which, subsequent to its liquidation, cannot meet that obligation.

[16] The Authority has power to award interest "In any matter involving the recovery of money...in the sum for which judgment is given...".⁵ There is no ability to award interest on a sum for which judgment has not been given. This is the situation here. The Authority is unable to make the order sought.

(iv) Was Mr Venter was unjustifiably disadvantaged in his employment?

[17] On 26 August 2022 Mr Venter wrote to Mr Woodward raising a personal grievance regarding an incident which occurred on 2 June 2022 when Mr Woodward challenged Mr Venter for removing items from his (Mr Woodward's) work bag. The items were novelty stress balls given to Mr Venter by a neighbouring exhibitor at a trade show the parties were at that day. Mr Woodward heard about this from someone else, decided he wanted the stress balls and removed them from Mr Venter's work bag. Later, Mr Venter removed the stress balls from Mr Woodward's bag. Mr Woodward, on hearing of the removal of the stress balls sought out Mr Venter and challenged him on this in the exhibition hall. In his evidence to the Authority Mr Woodward described his behaviour towards Mr Venter as something of which he was 'not entirely proud'. In the 26 August letter Mr Venter said Mr Woodward's conduct towards him caused him distress and embarrassment because other people could hear and see how his employer was speaking to him and the incident had had a detrimental effect on him because he felt Mr Woodward was challenging his honesty and integrity.

⁵ Employment Relations Act 2000, clause 11(1).

[18] The situation was poorly handled by Mr Woodward. If he had a concern about Mr Venter's behaviour, he should have raised the matter privately with him and given him a fair opportunity to respond.

[19] It is accepted Mr Woodward's actions were not those a fair and reasonable employer could have engaged in and that those actions undermined Mr Venter's confidence that his employer would treat him fairly and reasonably. Mr Venter has established a personal grievance for unjustified action.

[20] The Authority is satisfied Mr Venter has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$8,000 under section 123(1)(c)(i) is appropriate.

[21] 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. There was no action of Mr Venter's which contribute din a blameworthy manner to the situation for which a personal grievance has been established.

(v) Does the Authority have jurisdiction to hear a claim of unjustified dismissal?

[22] This issue concerns a jurisdictional question of whether Mr Venter raised a personal grievance for unjustified dismissal within time. Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[23] The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer

aware that the employee alleges a personal grievance the employee wants the employer to address.⁶

[24] Mr Venter's employment ended on 31 October 2022. At the investigation meeting Mr Venter accepted the first time he raised this grievance was when he filed his witness statement on 27 July 2023 and that this is outside the statutory 90-day time frame. He asks the Authority to consider whether he can bring this claim out of time.

[25] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) considers it just to do so.

[26] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[27] It is accepted Mr Venter has been significantly negatively impacted by his employment ending with ITL. He raised a personal grievance (dealt with above), the parties attended mediation and shortly thereafter he learnt from a third party he was no

⁶ Employment Relations Act 2000, section 114(2).

longer employed by ITL, that the company was no longer trading and had been placed into liquidation. He has spent time and resources pursuing arrears of employment standards, to which he was entitled. Even though it is accepted this was a very difficult time and the impact has been ongoing it does not necessarily follow that Mr Venter was so affected and traumatised by his dismissal that he was unable to properly consider raising a personal grievance within the 90-day statutory period.

[28] There is no suggestion in the information before the Authority that this is situation where Mr Venter made reasonable arrangements with an agent who failed on his behalf to raise a personal grievance for unjustified dismissal.

[29] Clause 9 of the employment agreement sets out a compliant dispute resolution process including at clause 9.2 the 90-day period in which personal grievances must be raised.

[30] No grounds for exceptional circumstances have been established that would justify the Authority exercising its discretion for Mr Venter to raise a personal grievance for unjustified dismissal with ITL.

[31] A further hurdle faced by Mr Venter's attempt to challenge his dismissal is there is no information before the Authority that ITL (in liq) consents to such a claim proceeding let alone consents to the raising of the personal grievance out of time.

[32] For completeness, at the investigation meeting Mr Venter suggested that he was unclear if he had in fact been dismissed because the fact of his dismissal was not clearly communicated to him at the time his employment ended. The circumstances of how his employment had come to an end, including the failure of ITL to communicate with him are very unfortunate. However, looking at the situation objectively, there is no doubt his employment ended subsequent to ITL being placed into liquidation – he did not receive his usual pay or perform his duties, the business was no longer trading and third parties, who had been advised his employment had ended, alerted him to this.

(vi) Is Mr Woodward liable for a penalty?

[33] Mr Venter seeks an award of a penalty against Mr Woodward. The type of penalty sought has not been specified.

[34] As set out above Mr Woodward was not in an employment relationship with Mr Venter.⁷ Only a labour inspector may bring a penalty claim against a person involved in a breach of employment standards.⁸ No such claim is before the Authority. There is no basis to award a penalty against Mr Woodward.

Summary

[35] Industrial Technologies Limited (in liquidation) is ordered to pay Gregory Venter the following amounts within 21 days of the date of determination:

- (i) \$8,000.00 under 123(1)(c)(i).

[36] The claims against Mr Woodward do not succeed.

Costs

[37] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. This may be a matter where a just costs outcome is that costs lie where they fall but for the filing fee Mr Venter has incurred.

[38] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Venter may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ITL (in liq) and Mr Woodward 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.

[39] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

⁷ Employment Relations Act 2000, s 4(2).

⁸ Employment Relations Act 2000, s 142X.

[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.⁹

Marija Urlich
Member of the Employment Relations Authority

⁹ See www.era.govt.nz/determinations/awarding-costs-remedies.