

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 302
3209659

BETWEEN	DURGESH DURGESH Applicant
AND	PRO-AUTO CARS REFINISHING LIMITED First Respondent
AND	PRANESH KARAN Second Respondent

Member of Authority: Andrew Gane

Representatives: John Wood, advocate for the Applicant
Pranesh Karan, for the Respondent

Investigation Meeting: 20 February 2024

Submissions received and further information received: 26 February and 8 May 2024 from the Applicant
23 February 2024 from the Respondent

Determination: 22 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pro-Auto Cars Refinishing Limited (Pro-Auto Cars) is a company specialising in car repairs and refinishing. Pranesh Karan is the sole director of Pro-Auto Cars. On 5 January 2021 Durgesh Durgesh commenced employment with Pro-Auto Cars. Mr Durgesh's employment with Pro-Auto Cars was terminated on 23 March 2022.

[2] Mr Durgesh lodged a statement of problem in the Authority against Pro-Auto Cars seeking payment of wage arrears, and repayment of a business loan. Mr Durgesh

lodged an amended statement of problem with the Authority also seeking remedies for unjustified dismissal.

[3] Mr Durgesh also seeks leave to recover any arrears of wages from Mr Karan, the shareholder and director of Pro-Auto Cars, personally.¹

[4] Mr Karan lodged a statement in reply on behalf of Pro-Auto Cars opposing Mr Durgesh's claims. Pro-Auto Cars claims it did not owe Mr Durgesh arrears in wages and said he was overpaid wages.

[5] Pro-Auto Cars also raised a counterclaim against Mr Durgesh for damage caused to company vehicles by Mr Durgesh during the course of his work.

The Authority's investigation

[6] For the Authority's investigation a written witness statement and supporting documentation was lodged by Mr Durgesh. Mr Karan provided written documents on behalf of himself and Pro-Auto Cars. All witnesses answered questions under oath or affirmation from me and the parties. The parties also lodged written closing submissions.

[7] 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.

The issues

[8] The issues requiring investigation and determination are:

- (a) Whether Mr Durgesh raised a personal grievance against Pro-Auto Cars in accordance with s 114(2) of the Act?
- (b) If a personal grievance was raised, whether Mr Durgesh was unjustifiably dismissed by Pro-Auto Cars?
- (c) If Pro-Auto Cars's actions were found to be unjustified, what remedies should be awarded considering:

¹ Employment Relations Act 2000, ss 142W and 142Y.

- (i) Reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate Mr Durgesh's loss); and
 - (ii) 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 Durgesh that contributed to the situation giving rise to his grievance?
 - (e) Are there unpaid entitlements owing to Mr Durgesh for wage arrears and/or holiday pay?
 - (f) If there are unpaid entitlements, whether leave should be granted for monies owed by Pro-Auto Cars to be recovered from Mr Karan, if and to the extent that Pro-Auto Cars itself is unable to make payment?
 - (g) If a breach of employment standards by Pro-Auto Cars is established are penalties warranted?
 - (h) Did Mr Durgesh breach the terms of his individual employment agreement (IEA) by damaging company cars in a manner that caused losses to Pro-Auto Cars, and if so, what damages should be awarded to Pro-Auto Cars in respect of this?
 - (i) Should either party contribute the cost of representation of the other party?

Background

Mr Durgesh's initial employment.

[9] On 5 January 2021 Mr Durgesh commenced employment with Pro-Auto Cars as operations and relationship manager. He signed an employment agreement which stipulated a minimum of 40 hours a week at \$25.50 per hour, which was later increased to \$27 per hour, until the end of his employment.

[10] When Mr Durgesh first started work Pro-Auto Cars was facing some financial difficulties. To help address these difficulties, Mr Durgesh recommended to Mr Karan that work needed to be done to improve Pro-Auto Cars's record keeping practices. He also advised Mr Karan to request more time from the Inland Revenue Department (IRD) to allow Pro-Auto Cars to organise financial records and file late taxes.

[11] To assist the company Mr Durgesh collaborated with a business consultant, to confirm what documentation was required for filing tax returns. There was a significant

amount of documentation that was unable to be located due to a lack of filing procedures. Mr Durgesh liaised with the IRD and assured them that Pro-Auto Cars had put in place the necessary record keeping processes.

[12] In addition to addressing Pro-Auto Cars's financial issues Mr Durgesh also faced challenges relating to unpaid insurance claims due to missing invoices from suppliers and inadequate photographic evidence. Mr Durgesh said it was a difficult process, however he managed to resolve most of the outstanding invoices and assisted Pro-Auto Cars to become financially viable.

Pro-Auto Car's loan

[13] In February 2022 Pro-Auto Cars had to deal with a financial issue where an insurance payment was delayed causing a cash flow problem. As a result, Mr Karan asked Mr Durgesh for a \$4000 loan to help Pro-Auto Cars pay staff wages. He promised Pro-Auto Cars would repay the loan from the first lot of customer payments received that month.

[14] Mr Durgesh was initially reluctant to loan Pro-Auto Cars the money due to a previous loan experience with Pro-Auto Cars. He agreed to lend the money on the condition that his wife's car would be repaired as part payment. Mr Durgesh signed an agreement and transferred the money on 11 February 2022.

Termination of employment

[15] During February 2022 Mr Durgesh and his wife contracted COVID19. He was unable to attend work. On 22 March 2022 Mr Durgesh contacted Mr Karan advising he was still sick and unable to return to work. He assured Mr Karan he would be returning to work shortly.

[16] On 23 March 2022 Mr Karan informed Mr Durgesh through Facebook messenger that the company could no longer afford to employ him and was closing the business, effectively making Mr Durgesh redundant. Mr Karan assured Mr Durgesh that the company would still repay the loan and his outstanding wages, including the four week notice period in his final pay. In reply Mr Durgesh raised several issues with his pay, including the allocation of annual leave when he had sick leave available.

[17] Mr Karan claimed he had everything under control and he would process the payments. Mr Karan advised he had already paid some of the loan off and would soon pay the remaining amount.

[18] Although Mr Karan advised Mr Durgesh that he was being made redundant, Mr Durgesh never received a formal redundancy letter from Pro-Auto Cars or underwent any redundancy process.

[19] Mr Durgesh's work visa was tied to Pro-Auto Cars and after his employment was terminated, he was prevented from working elsewhere. Mr Durgesh said that for the following six months he was reliant on loans from relatives and friends to cover expenses. Eventually Mr Durgesh applied for a migrant exploitation protection visa and was granted an open visa.

Whether Mr Durgesh raised a personal grievance against Pro-Auto Cars in accordance with s 114(2) of the Act?

Raising a personal grievance

[20] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

(2) For the purposes of subsection (1), a grievance is raised with an 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 that the employee wants the employer to address

[21] Mr Durgesh's employment was terminated on 23 March 2022. There was no definitive evidence at the investigation meeting that Mr Durgesh had raised a personal grievance for unjustified dismissal prior to the lodging of his statement of problem (SOP) in the Authority.

Mr Durgesh's evidence

[22] Mr Durgesh's initial SOP was lodged with the Authority on 20 January 2023. In his initial SOP, Mr Durgesh raised claims against Pro-Auto Cars for wage arrears, unpaid redundancy notice period and unpaid loan payments. He also included an undertaking for interim reinstatement which stated he first raised the grievance with his employer on 20 January 2023, however he made no formal application for interim reinstatement.

[23] On 30 October 2023 Mr Durgesh's lodged an amended SOP in the Authority. In his amended SOP he added claims for breaches of the Holidays Act 2003 (HA) and failure to pay wage arrears and sought remedies for the same.

[24] On 2 November 2023 Mr Durgesh lodged a second amended SOP in the Authority. In this amended SOP he raised a claim against Pro-Auto Cars for an unfair dismissal. This is also the first time Mr Durgesh sought remedies for his personal grievance and the imposition of penalties against Pro-Auto Cars for breaches of good faith and the HA.

Conclusion

[25] At best Mr Durgesh raised his personal grievance for unjustified dismissal on 20 January 2023, this was 11 months after his employment was terminated. He has not raised his personal grievances in time in accordance with s 114 of the Act. Pro-Auto Cars has not consented to the personal grievances being raised out of time. Mr Durgesh's personal grievance claims cannot proceed.

Penalties

[26] In closing submissions Mr Durgesh accepted his claim for penalties were out of time. Accordingly, I make no determination in respect of Mr Durgesh's penalty claims against Pro-Auto Cars.²

Wage arrears claims

Notice period

[27] Mr Durgesh claimed he was owed wage arrears as a result of Pro-Auto Cars terminating his employment. Pro-Auto Cars has purported to make Mr Durgesh redundant. Pro-Auto Cars terminated his employment by the message of 23 March 2022. He was not given any notice prior to that.

[28] The IEA is silent on redundancy compensation, however the IEA has a notice provision that states:

Unless otherwise set out in this agreement, either the employer or the employee can end employment by giving 4 weeks' notice in writing.

²² Employment Relations Act 2000, s 135, Holidays Act 2003, s75.

[29] In accordance with the termination provision in his employment agreement Mr Durgesh was entitled to four weeks' notice of termination based on his contractual rate of 40 hours per week at \$27 per hour. This multiplied by four weeks is \$4,320.00. Mr Durgesh is owed \$4,320.00 for his notice period in line with his employment agreement.

Annual holiday pay

[30] Mr Durgesh's received a final pay slip at the end of his employment with Pro-Auto Cars. His final payslip shows that Mr Durgesh had an outstanding annual holiday pay balance of 57.11 hours. This was not paid to him at the end of his employment. He is entitled to payment of outstanding annual leave at the end of his employment.³ Taking into account his outstanding balance of 57.11 hours and multiplied by his hourly rate of \$27 per hour Mr Durgesh is owed \$1,541.97 in outstanding annual holiday pay.

Sick leave

[31] Although Mr Durgesh had outstanding sick leave, he was required to take one day annual leave while at home with COVID19. This was in breach of s 39(2)(a) HA. Mr Durgesh is entitled one day of sick pay being \$216.00. Mr Durgesh is owed \$216.00 in sick leave.

Interest

[32] Mr Durgesh can recover interest on his contractual entitlements as set out in paragraph [29] to [31] above, from 23 March 2020. The order for payment of interest is made under clause 11(1) of Schedule 2 of the Employment Relations Act 2000. Interest is to be calculated by using the Civil Debt Interest Calculator.⁴

What entitlements has Pro-Auto Cars failed to pay Mr Durgesh?

[33] Pro-Auto Cars has breached ss 25 and 65 Holidays Act 2003 by failing to pay Mr Durgesh the correct amount of his annual holiday pay and sick leave, the shortfall is \$1,802.97. Pro-Auto Cars has breached s 4 Wages Protection Act 1981(WPA) by failing to pay Mr Durgesh the correct amount wages being \$4,320.00.

³ Holidays Act 2003, s 27.

⁴ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

Pro-Auto Car's Loan

[34] After the investigation meeting Mr Durgesh confirmed there was still \$2,000.00 owing on the loan agreement.

[35] Mr Durgesh's claim for repayment of the \$2,000.00 loan to Pro-Auto Cars can be determined by the Authority if the payment arose during the course of an employment relationship and in the work context.⁵ If it falls within the definition of an employment relationship then the Authority has exclusive jurisdiction to consider that aspect of the claim.

[36] I consider the loan payment would not have come about, but for the employment relationship and the loan was connected with the business, because the reason for loan was to assist in paying staff wages. In the circumstances I am satisfied the loan payment was sufficiently within the work context and the employment relationship that it falls within the Authority's jurisdiction and is therefore a matter I can determine. I find the loan of \$2,000.00 is due and owing to Mr Durgesh.⁶

Whether leave should be granted for monies owed by Pro-Auto Cars to be recovered from Karan, if and to the extent that Pro-Auto Cars itself is unable to make payment?

[37] Mr Durgesh was not paid his correct wages, annual holiday pay or sick leave after his employment was terminated in breach of employment standards and the HA and WPA. Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or Court) and to the extent the employer is unable to pay the money owing.

[38] In oral evidence Mr Karan told the Authority that he was in charge and made the hiring, payment of wages and holiday pay decisions on Pro-Auto Cars behalf. The evidence showed he had at least aided, abetted, counselled or procured the non-payment of the wages provided for in the employment agreement. I am satisfied Mr Karan is a person involved in a breach of employment standards under s 142W(1) of the Act and an officer of the company under s 142W (2) of the Act. As Mr Karan is a person

⁵ *FMV v TZB* [2021] NZSC 102 at [93].

⁶ *Syed Kazmi v Tetrad Holdings & anor* [2023] NZERA 75.

involved in the breach, within the meaning of s 142W of the Act, the grounds for granting leave to Mr Durgesh are made out under s 142Y of the Act.

[39] At the investigation meeting Mr Karan stated that he was considering closing Pro-Auto Cars and that Pro-Auto Cars would have difficulty in making any payments that might be awarded to Mr Durgesh.

Did Mr Durgesh breach the terms of his employment agreement by damaging company cars in a manner that caused losses to Pro-Auto Cars, and if so, what damages should be awarded to Pro-Auto Cars in respect of this?

[40] Mr Durgesh's employment agreement has no provision that deems Mr Durgesh to be liable for any damage to vehicles caused during the course of his employment. To apply such financial ability to employees, who may have accidentally caused damage to an employer's property, while conducting work related business would seem to undermine the statutory framework for resolving employment relationship problems. This could potentially expose employees to significant financial liability for an accident even in circumstances that could never justify a dismissal. As stated by the Employment Court;

it is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties.⁷

[41] In the circumstances Pro-Auto Cars counterclaim is unsuccessful and I will not award damages against Mr Durgesh.

Orders

[42] Durgesh Durgesh's claims for wage arrears and holiday pay have been upheld. Within 14 days of this of determination Pro-Auto Cars Refinishing Limited is ordered to pay Durgesh Durgesh the following sums:

- (a) Wage arrears of \$4,320.00 (gross)
- (b) Annual holidays \$1,541.97 (gross)
- (c) Sick leave \$216.00 (gross)

⁷ *George v Auckland Council* [2013] NZEmpC 179 at [147].

(d) Interest as awarded in paragraph [32]

(e) Outstanding loan \$2000.

[43] Pranesh Karan is a person involved in the breaches of employment standards by Pro-Auto Cars Refinishing Limited. Pranesh Karan is therefore liable for the amounts set out in paragraphs [42](a) to [42](d) to Durgesh Durgesh from the breaches of employment standards by Pro-Auto Cars Refinishing Limited, if Pro-Auto Cars Refinishing Limited is unable to pay the amounts owed, pursuant to s 142Y of the Act.

Costs

[44] Costs are reserved.

[45] If Mr Durgesh seeks costs he may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Pro-Auto Cars will then have 14 days to lodge any reply memorandum.

[46] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁸

Andrew Gane
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.