

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 607
3281260

BETWEEN HISSLER KAHIKA
 Applicant

AND FIRST SECURITY GUARD
 SERVICES LIMITED
 Respondent

Member of Authority: Claire English

Representatives: Tim Vogel, advocate for the Applicant
 Matt Dearing for the Respondent

Investigation Meeting: On the papers

Submissions received: 16 July and 26 August 2024 from Applicant
 19 August 2024 from Respondent

Determination: 10 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Hissler Kahika, resigned from his employment with the respondent (First Security) on 27 September 2023. He says his last day was 10 October 2023, and he did not receive his final pay and holiday pay until 20 October 2023.

[2] Mr Kahika says he should have received his final pay on 11 October 2023, being the date of the next pay run, and that First Security withheld his final pay until he had returned certain items of work property. As a result, he could not meet his immediate financial commitments and this caused financial and emotional stress, worry, and concern.

[3] He raises a claim of unjustified disadvantage, and seeks remedies of compensation for hurt, humiliation, and injury to feelings of \$7,500; special damages of \$1,925 + GST for legal costs prior to litigation commencing; that penalties be awarded against First Security for a breach of clause 3.2 of his employment agreement, failing to pay holiday pay when due, failing to pay wages when due; that the whole or part of those penalties is paid to him; and an award of costs and the filing fee.

[4] First Security does not agree that any unjustified disadvantage occurred. It says that Mr Kahika's last day of work was in fact 11 October 2023 (although he did not work on this day), and that his final pay was due in the next pay run which was 18 October 2023, not 11 October 2023. First Security acknowledges that the final pay was by its own reckoning, two days late on 20 October but says that it has apologised for this, and Mr Kahika has not provided any evidence to support his claims of loss or hardship.

[5] First Security says that a delay of such short duration, that is, two days, has not created a disadvantage in all the circumstances, and in any event, this was not unjustified. It denies any remedies are properly owed.

The Authority's investigation

[6] It was discussed and agreed by the parties that given the limited scope of the issues between the parties, it was appropriate for the matter to be determined on the papers. Witness statements were provided by Mr Kahika, and in his support by his sister Ms Rikkeena Kahika. Witness statements were provided for First Security by Ms Jill Priest, and Mr Lee Dixon. Both parties provided written legal 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 were:

- (a) Was Mr Kahika unjustifiably disadvantaged by the timing of his final pay?

- (b) If First Security's actions were not justified should compensation under s123(1)(c)(i) of the Act be awarded?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Kahika that contributed to the situation giving rise to his grievance?
- (d) Should penalties be awarded, and if so, should any part of them be paid to Mr Kahika?
- (e) Should special damages be awarded in respect of legal costs?
- (f) Should either party (in addition) contribute to the costs of representation of the other party?

Background

[9] Mr Kahika commenced employment with First Security on 12 December 2022. He resigned from his employment on 27 September 2023, by way of email to Ms Priest at First Security. The subject line of this email was "Notice resignation: (2) WEEKS NOTICE REQUEST."

[10] The email stated:

I have come to a decision to resign from today on the 27th of September 2023....I am giving two weeks resignation notice due to nothing being written in the contract requiring me to give a definitive minimum duration length of notice period....My final leave date will be the 10th of October 2023.

[11] First Security replied by email on the following day stating:

Your resignation is accepted after your final shift on 10th October 2023. I have attached a copy of your contract which states 2 weeks notice is required in Schedule A...Once all property is returned, signed exit form is sent to me I will complete the process and your final pay will be completed in the next scheduled pay run.

[12] Mr Kahika's last day of work was Tuesday 10 October 2023. He says he expected to receive his final pay in the next pay run, which was Wednesday 11 October 2023.

[13] Mr Kahika's final pay was made on 20 October, which he says was 9 days late. He says that he attempted to contact First Security about this, but received no response prior to receiving payment on 20 October.

[14] Mr Kahika states that the effect of this delay in payment was “profound”, and says this is because he lives financially day to day. He gives evidence of multiple credit card debts, multiple car loans, and multiple personal loans that he has that needed paying.

[15] He says he suffered suicidal thoughts, anxiety, and felt stressed out not knowing what to do next. No medical evidence is provided in support of these statements. In response to a critique in the statement in reply of lack of evidence of disadvantage, he says that “It should be obvious to anyone that late payment of more than \$3,000, with no indication of when it would be paid, would disadvantage most people.”

[16] Mr Kahika contacted a lawyer on 19 October 2023. A personal grievance claim was sent to First Security on 20 October, which was the same day he received payment. It is on this basis that he claims legal costs, as he says he had to incur legal fees to get paid.

[17] There is no dispute that Mr Kahika’s last day at work, and last day he was paid for, was 10 October 2023. Ms Priest on behalf of First Security says that on Friday 13 October 2023, she emailed Mr Kahika reminding him to return company property and complete his exit form. On 19 October 2023, she received the completed exit form. Ms Priest then states she immediately processed the exit form and sent this to payroll, and payroll confirmed that Mr Kahika’s final pay would be processed on 20 October 2023, which it was.

[18] Ms Priest acknowledges the exit form was actually emailed to her on 17 October, however due to a combination of the email address used and working offsite, she did not realise she had the exit form until 19 October.

[19] Mr Dixon, First Security’s Payroll Operations Manager, also gave a witness statement. He advises that payroll received the required exit form on 19 October, and processed it as a “manual pay” which ensured it was paid on 20 October rather than waiting until the next scheduled pay run.

[20] Mr Dixon also states:

From a payroll point of view, we processed to the best of our ability with the data provided based on the date we received the data.

Analysis

[21] In claiming an unjustified disadvantage, Mr Kahika relies on the fact that 10 October was his last day of work, and that Ms Priest told him by email that “Your resignation is accepted after your final shift on 10th October 2023”, in support of his claim that he should have been paid in the next pay run which fell the next day on 11 October.

[22] In fact, as the witness statements provided by Ms Priest and Mr Dixon make clear, no action was taken to process Mr Kahika’s final pay until after he had both returned company property and completed an exit form. This is consistent with the further advice in Ms Priest’s email, stating “Once all property is returned, signed exit form is sent to me I will complete the process and your final pay will be completed in the next scheduled pay run.”

[23] No evidence is given about any steps that were taken by First Security to pay Mr Kahika’s final pay on time on 11 October. Instead, the evidence of both witnesses for the respondent is that no steps were taken to progress the payment of Mr Kahika’s final pay until after both the receipt of his exit form, and the receipt of his personal grievance claim.

[24] No evidence was given either about why this delay existed at all.

[25] In the legal submissions for First Security, it was submitted that the correct date for the payment of Mr Kahika’s final pay was 18 October, not 11 October, for three reasons:

- a. first, that given Mr Kahika resigned on 27 September, his 2-week notice period expired on 11 October (not 10 October as Mr Kahika contends);
- b. second, a text from Mr Kahika on Monday 9 October (the text copy provided to me was undated) to Ms Priest stating “I am leaving this Wednesday”; and
- c. third, a text from Mr Kahika to his manager on 18 October showing Mr Kahika accepted that his final pay was due on 18 October, where he said: “Just making sure just wanted to confirm with you that if today was the

day that my final pay that I received today just for my final pay”. I note that Mr Kahika did not receive any response to this text prior to receiving his final pay on 20 October.

[26] First Security’s position is that Mr Kahika should have received his final pay on 18 October 2023. It accepts that his final pay was late even so, being paid on 20 October 2023, but submits that any disadvantage was “not so significant as to constitute an unjustified disadvantage warranting remedies”. And that the delay was explained by Ms Priest being out of office and missing the email with the exit form sent on 17 October 2023, meaning that in all the circumstances, no compensation or penalties are properly due.

[27] The key difference between the parties is the date on which Mr Kahika should have received his final pay. Was this properly 11 October 2023 or 18 October 2023? The facts make clear that the correct date was 11 October 2023. Mr Kahika’s 2 weeks’ contractual notice expired on 10 October 2023, and in addition, the date of 10 October 2023 was confirmed by Mr Kahika himself in his resignation email, and accepted and confirmed in turn by Ms Preist’s email in reply to him accepting his resignation.

[28] The submission that the correct date was 18 October is an assertion that only arose later as a result of Mr Kahika’s complaints about non-payment. The text from Mr Kahika that First Security now seeks to rely on saying “I am leaving on Wednesday” was a text that Mr Kahika sent in what the incomplete messages provided to me show was a dispute about his non-attendance at work and is not otherwise relevant to this complaint. There is no indication that this was considered by either party to override the agreement between Mr Kahika and Ms Priest that his last day of work would be Tuesday 10 October in satisfaction of his contractual notice obligations. First Security’s first letter of response to Mr Kahika’s personal grievance acknowledges his last day of work was on 10 October, and makes no reference to the date of 11 October as it later argues.

[29] Mr Kahika’s text of 18 October 2023 shows that Mr Kahika waited until two pay runs had been missed until he raised his concerns. First Security did not respond. It was only in the face of this repeated non-payment and non-response that Mr Kahika went to the trouble and expense of seeking legal advice and raising a personal grievance claim, to recover wages which were – without dispute – due to him.

[30] First Security's decision not to pay Mr Kahika on 11 October when his wages were properly due is unjustified. The evidence that I have been provided on behalf of First Security shows that no action was taken on behalf of First Security to progress or process Mr Kahika's final payment until after First Security was satisfied that he had returned all property to its satisfaction and completed their required paperwork, that is, the exit form. This is made clear by the response of First Security dated 31 October 2023. Even then, First Security acknowledges in that letter that Mr Kahika had done these things by 15 October, and yet this form was not sent to Ms Priest until 17 October and she was not on the lookout for it, meaning that the next available pay run on 18 October was missed through no fault of Mr Kahika's.

[31] The withholding of Mr Kahika's final pay in this manner is not justified, and is in breach of First Security's obligations under s. 4 of the Wages Protection Act 1983 to pay wages in full when they are due.

[32] Mr Kahika has suffered an unjustified disadvantage, and is entitled to remedies.

Remedies

Compensation

[33] He has claimed the sum of \$7,500 as compensation for hurt, humiliation and injury to feelings. He has given evidence in his witness statement that he suffered two types of adverse impact, the first being the practical difficulties of being unable to meet his financial obligations as they came due, and the second being the personal difficulties of anxiety, stress, and embarrassment resulting. In this last respect, Mr Kahika has raised serious concerns that he "started suffering from suicidal thoughts" and simply did not know what to do once First Security stopped responding to him as to when he could expect to be paid. I note that First Security takes issue with what it says is an absence of supporting evidence of actual loss, but Mr Kahika has not claimed actual loss (with the exception of certain legal costs). He has claimed compensation for hurt and humiliation, which are issues he is placed to give direct evidence of.

[34] I accept Mr Kahika's evidence as to the impacts experienced by him. It follows that I need to consider if the amount of \$7,500 that he has claimed is appropriate in all the circumstances. My view is that this is not proportional in all the circumstances, in particular the total delay being only 9 days and that the sum claimed is more than double the amount overdue which was \$3,115.71. Taking these factors into account as well as

current awards, my view is that compensation of \$5,000 is more appropriate. Orders are made accordingly.

[35] None of Mr Kahika's actions contributed to First Security's non-payment, and no reduction is made for contribution.

Penalties

[36] I must now consider if penalties should be awarded and if so, quantum. Submissions for Mr Kahika properly accept that in all the circumstances, penalties may be modest, but nonetheless are justified because First Security's actions amount to breaches of the Wages Protection Act and the Holidays Act, and because it has deemed these breaches trivial and has never apologised to Mr Kahika.

[37] First Security in contrast states that no penalties are appropriate, as the delay was only 2 days, was the result of administrative action, and was resolved promptly.

[38] It is not in dispute that First Security delayed paying Mr Kahika's final wages. This amounts to a breach of s. 4 of the Wages Protection Act 1983, and s. 27 of the Holidays Act 2003, although my view is that these breaches arise from the same conduct and should properly be considered as a single globalised breach.

[39] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,¹ *A Labour Inspector v Prabh*² and *A Labour Inspector v Daleson Investment*.³ Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[40] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arises in circumstances involving a distinct power imbalance.⁴ That is the case here.

[41] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally,

¹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

² *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

³ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁴ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

in the sense of intending to do the act in question⁵, or failed to take reasonable steps to fulfil their legal obligations.⁶ Here the evidence leads to a conclusion the failure is deliberate. First Security took no steps to pay Mr Kahika until it was satisfied that property had been returned and its exit form completed, and even then payment did not occur until 5 days after Mr Kahika had completed these steps and felt driven to raise a grievance claim via his lawyer.

[42] With respect to the severity, the court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%.⁷ There is no argument from either party for an alteration either way from this starting point though I note the loss is monetary and relatively minor. This factor suggests a reduction should be applied.

[43] There is no evidence of similar previous conduct by the respondent and finally I have taken into account the issues of consistency and proportionality. That, when combined with a perusal of recent penalties would also suggest 80% would lead to an improperly high figure.

[44] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$5,000. I take into account that there was no dispute as to the payment due, simply a lack of care by First Security to prioritise its obligations.

[45] The final issue is then to whom the penalty should be paid and here I note Mr Kahika has, by the inactions of First Security, been forced to take expensive action to get what was rightfully his and should never have been at issue given there was no dispute as to the amount involved. He should therefore share in the penalty and I consider half appropriate. Orders are made accordingly.

Special Damages

[46] Mr Kahika has also claimed \$1,925 + GST, being a total of \$2,213.75 of legal fees, as special damages. It is submitted that these costs are not litigation costs, nor are they related to mediation and are therefore distinct from the usual costs claim (which is also made). The amount claimed is for 7 hours of work over 4 months, and an invoice dated 15 February 2024 is provided in support.

⁵ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

⁶ *El-Agez v Comprade Limited*, TT 4121553, at para 18

⁷ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

[47] First Security states that it has acted in good faith at all times, and that it does not accept that representation fees in this matter were reasonably and necessarily incurred, given that Mr Kahika was paid before the raising of his personal grievance.

[48] While my view is that it was reasonable for Mr Kahika to seek advice when he did in light of First Security's default and lack of engagement with him, I am concerned that first, the invoice provided is not sufficient to show that the entirety of the amount claimed relates only to the steps Mr Kahika took in securing payment due to him, and second, the impact of this on Mr Kahika has already been taken into account in the award of penalties and in directing part of that penalty to be paid to Mr Kahika rather than to the Crown. For these reasons, I decline to award special damages.

Filing Fee

[49] As Mr Kahika has been successful, he is entitled to the reimbursement of his filing fee. Orders are made accordingly.

Orders

[50] Mr Hissler Kahika has a personal grievance in that he was unjustifiably disadvantaged by the non-payment of his wages and holiday pay when due.

[51] First Security Limited is ordered to pay to Hissler Kahika within 28 days of the date of this determination:

- a. The sum of \$5,000 without deduction as compensation for hurt and humiliation;
- b. The sum of \$71.55, being reimbursement of the filing fee.

[52] First Security Limited is ordered to pay a penalty of \$5,000 in respect of breaches of employment standards. Half of this (\$2,500) shall be paid to the Crown account, and half (\$2,500) to Mr Hissler Kahika, within 28 days of the date of this determination.

Costs

[53] Costs are reserved, noting that the parties might expect costs on a tariff basis to be assessed at the rate of one half day of hearing time. The parties are encouraged to resolve any issue of costs between themselves.

[54] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[55] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

Claire English
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