

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 154
3023741

BETWEEN SUMIT SHARMA
 Applicant

AND ICON CONCEPTS 2012
 LIMITED
 First Respondent

AND HAROLD MANI
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Danny Gelb, Advocate for the Applicant
 Masla Mani for the First Respondent and Harold Mani in
 person as Second Respondent

Investigation Meeting: 8 May 2018

Determination: 9 May 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sumit Sharma worked from 6 June until 27 July 2017 as supply and distribution co-ordinator for Icon Concepts 2012 Limited. Icon operates an electronic and white ware appliance repairs and sale business. Harold Mani, son of Icon's sole shareholder and director Masla Mani, supervised Mr Sharma's work.

[2] Mr Sharma resigned on 27 July 2017 because he had not received his agreed weekly wage of \$840 in any of the seven weeks he had worked. During that period he received one payment of \$400 and got a further \$300 Harold Mani had a customer pay him directly.

[3] Mr Sharma said his resignation was due to the failure to pay his wages so was really a constructive dismissal. One category of constructive dismissal is where an employer's breach of a term of the employment is so serious that it is reasonably

foreseeable that a worker will resign rather than put up with that situation.¹ Mr Sharma said not paying his wages for so long was such a breach.

[4] To remedy his personal grievance for unjustified dismissal Mr Sharma sought orders for:

- (i) Icon to pay him \$5,684, being the difference between his wages owed for work over seven weeks and three days of employment, less the \$700 paid to him;
- (ii) holiday pay and interest on that amount;
- (iii) lost wages for the ten weeks from 28 July until he got a new job on 5 October 2017, amounting to \$8,400;
- (iv) compensation for the distress caused by failure to pay him and by how his job with Icon came to an end; and
- (v) a penalty against Harold Mani for aiding and abetting the breach of his employment agreement by failing to pay his wages.

[5] In the remainder of this determination Harold Mani is referred to as Mr Mani. Icon's director Masla Mani is referred to by his whole name.

[6] The statement in reply submitted by Icon and Mr Mani accepted Mr Sharma had worked from 6 June to 22 July 2017. It said they were prepared to pay him \$5,040 for that period but said that amount should be deducted from \$7,900 they claimed Mr Sharma owed Icon for "stolen goods and damaged property". They said that left a balance of \$2,860 in Icon's favour. They alleged Mr Sharma had damaged a gate when he stayed at Mr Mani's house without permission while Mr Mani was away in Fiji and had sold products without giving the proceeds to Icon.

[7] They also accused Mr Sharma of "acting fraudulently" because they said two documents he provided the Authority showed signatures that Mr Mani denied were his. One was an employment agreement between Mr Sharma and Icon. The other was an Employer Supplementary Form, which is an Immigration New Zealand form for employers who offer a position to a person from overseas.

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172

The issues

- [8] The issues for investigation and determination were:
- (i) Was Mr Sharma's resignation on 27 July 2017 really a constructive dismissal?
 - (ii) If so, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
 - (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Sharma that contributed to the situation giving rise to his grievance?
 - (iv) Are any wages or holiday pay owed to Mr Sharma, with interest?
 - (v) Are any liabilities of Icon Concepts 2012 Limited for wages arrears and holiday pay able to be offset by the amount of \$7900 said to be owed by Mr Sharma from the proceeds of sale of stock and for repairs to a gate at Mr Mani's house?
 - (vi) Did Harold Mani aid and abet breaches of Mr Sharma's terms of employment and, if so, should a penalty be imposed under s134(2) of the Act?
 - (vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[9] A case management conference held on 21 March 2018 made arrangements for the parties to lodge witness statements. During the conference call Mr Mani confirmed he had acted as the agent of Icon in his various interactions with Mr Sharma.

[10] The call was held against a background where Mr Mani, on Icon's behalf, had postponed mediation dates set in October, November and December 2017 on the grounds that Masla Mani was too unwell to attend. Under direction from the Authority the parties did finally attend mediation in February 2018, without resolving the matter.

[11] Directions made during the conference call, and confirmed by written Minute after, required Mr Mani, his brother Vijay Mani and his father Masla Mani to lodge written witness statements in advance of the investigation meeting. They did not do so. Neither, despite another specific direction, had Icon and Mr Mani lodged any documents supporting their allegations about Mr Sharma's documents or to show any complaint was made to the Police or Immigration.

[12] On the day before the investigation meeting Mr Mani sought its postponement on the grounds he was suffering back pain. He provided documents that showed he suffered a back injury on 4 March 2018 and on 10 April he was advised of an appointment with an orthopaedic specialist on 29 May. While Mr Mani's injury was unfortunate, none of that material indicated he was incapable of attending and participating in an Authority investigation meeting. If he were, there was no explanation as to why he had not sought postponement earlier than the day before its long notified date. In light of earlier repeated delays in attending mediation and the respondent's failure (without any explanation offered) to comply with the Authority directions to lodge witness statements and relevant documents, I was not persuaded further delay in addressing Mr Sharma's application was warranted. The postponement request was declined.

[13] Later the same day Mr Mani advised he would probably attend the investigation meeting although he considered his ability to participate was compromised by the medication he was taking for pain due to his back injury. He did attend along with Vijay Mani and Masla Mani.

[14] Because there otherwise would have been no direct evidence from either respondent at the investigation meeting, I permitted Mr Mani and Masla Mani to give oral evidence. However, because of their failures to abide by directions to lodge witness statements and documents earlier, I declined their request to extend that indulgence further to allow Vijay Mani to also give oral evidence.

[15] I also declined a further request to delay the investigation meeting, this time by Masla Mani, because he said he had not seen the witness statements and documents that Mr Sharma had submitted in compliance with the Authority's timetable directions. Those statements and documents, when lodged, were sent to Mr Mani at the respondents' email address for service in their statement in reply. I was

satisfied both respondents had been given adequate opportunity to consider that material, to prepare and to respond. Their failure to use that opportunity did not require any further delay.

[16] 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.

Credibility and the evidential standard

[17] Authority findings are made to the balance of probability, that is what is more likely than not to have occurred, as best as can be determined on the available evidence. It also requires some assessment of the credibility of what is said by witnesses to have occurred. In this case there were some real difficulties with the credibility of what Mr Mani and Masla Mani said about whether any arrangements were made with Mr Sharma to work for Icon.

[18] This was illustrated by Mr Mani's oral evidence about a string of text messages exchanged between him and Mr Sharma in the period from 1 June to 27 July. Mr Sharma had provided copies of those texts in his evidence for the Authority investigation and I checked them on his phone during the investigation meeting. They included texts where it appeared Mr Mani gave Mr Sharma instructions about delivering products to customers, reporting on sales and dealing with a complaint. This was consistent with Mr Sharma's evidence of being employed by Icon and working under Mr Mani's direction. However Mr Mani denied he sent many of those texts to Mr Sharma. Mr Mani said he left his phone at his house in Auckland when he travelled to Fiji. He suggested Mr Sharma, who stayed at Mr Mani's house for some of that time, had sent those texts from Mr Mani's phone to give a false impression Mr Sharma was an employee. It was a highly unlikely story given Mr Mani accepted texts sent from his phone in early June and late July were definitely written by him. If the ones in the intervening weeks were fabrications, it was likely Mr Mani would have noticed and made that allegation much earlier.

[19] Credibility issues were further compounded by inconsistent references by Mr Mani and Masla Mani to whether or not Mr Sharma was employed by Icon in any capacity. Masla Mani insisted he had declined to employ Mr Sharma at all but later

said Mr Sharma was employed as a casual worker and paid by Vijay Mani. In his closing submissions Malsa Mani said of Mr Sharma: “When he worked for me he sold things without my permission”.

[20] Similar inconsistencies were apparent in Mr Mani’s evidence. He insisted Mr Sharma was not employed by Icon at all. However he could not explain texts he sent to Mr Sharma about stock and customers, apart from suggesting they were fabricated by Mr Sharma using Mr Mani’s phone in his absence. He also said Mr Sharma had full access to his phone in order to access his Facebook account and “to text customers and bits and pieces”. When asked if Mr Sharma needed such access because he worked for Icon, Mr Mani replied: “Yes, when he was there for a trial for the first week”. Earlier in his evidence Mr Mani said Mr Sharma had “turned up and did bits and pieces”.

[21] Mr Mani also sought to resile from the contents of the statement in reply he had lodged with the Authority which referred to Mr Sharma working for the company from 6 June to 22 July.

[22] Against that background the evidence of Mr Sharma has been preferred as more reliable and credible where there was a conflict with the evidence of Mr Mani and Masla Mani.

Mr Sharma’s employment and the circumstances of his resignation

[23] In 2017 Mr Sharma had a job with a North Shore business but wanted a job with an employer who would support an application for an extension of his visa. He saw Icon had advertised a job with Student Job Search and, through another Indian friend who had worked a few days for Icon, got contact details for Mr Mani. They met and according to Mr Sharma, Mr Mani offered him a job and agreed to support his application for a visa extension. Mr Sharma said he and Mr Mani then completed the employment agreement and the employer’s form needed for his application to Immigration New Zealand. The agreement showed he was to be paid \$21 an hour and his usual hours of work would be between 8am and 4.30pm.

[24] Mr Sharma soon found his new job with Icon required longer hours and more work than he expected but did what was asked of him. He understood he would be paid weekly and after two weeks he asked Mr Mani for his wages. He did so again

throughout the following weeks. He produced copies of texts sent to Mr Mani on 14 June, 26 June, 7 July, 13 July, 21 July, 26 July and 27 July. On 27 July Mr Sharma did not go to work and the following text exchange ensued:

Mr Mani: I'm here you're not. I need to know where is my stock.

Mr Sharma: Where is my 6 weeks wages asked you thousand times but I have not got any answer, I informed to immigration that I left my current job so there is no use to be there today. Thanks

Mr Mani: I've got a lot of stock missing. I am going to send it to the police. I've got no choice. Then I will inform immigration regarding this today. It is a theft what you have done.

Mr Sharma: You know very well I have not done anything wrong, you making false obligations (sic) anyways if you want to take it further that's okay I going to lodge my issues to concern (sic) department. Thanks

[25] Considering all the evidence, and particularly the content of the many texts sent between the mobile phones of Mr Mani and Mr Sharma in the period from 1 June to 27 July, the balance of probability favoured a conclusion that Mr Mani had employed Mr Sharma to work for Icon, despite Masla Mani's evidence that he said he did not want Mr Sharma to work for the company and did not know how he came to do so. As a matter of likelihood, it was also more probable than not that Mr Mani had signed the employment agreement and the Immigration form that Mr Sharma provided as proof of his employment by Icon.

[26] Out of that employment relationship came the wage-work bargain. Failure to pay wages for work done breached a fundamental term of Mr Sharma's employment agreement. For a working week of at least 40 hours (although he worked more) and at the agreed rate of \$21 an hour, Mr Sharma legitimately expected to be paid \$840 a week, less tax. The only two payments made to Mr Sharma, of \$300 on 26 June and of \$400 on 7 July, left him with no confidence he would be paid regularly and in full any time soon. It left Mr Sharma unable to pay the rent on his flat or to buy food. In those circumstances it was reasonably foreseeable a worker would resign rather than put up with such a serious breach. Mr Sharma's employment by Icon therefore ended by constructive dismissal.

Arrears of wages with holiday pay and interest

[27] Icon and Mr Mani's statement in reply admitted Mr Sharma had worked through seven weeks and they were prepared to pay \$5,040, without explaining how

that sum was reached. The latter sum equates to six weeks' pay at an hourly rate of \$21 for 40 hours a week.

[28] In the absence of time and wage records from Icon Mr Sharma's account of what is owed to him prevails.² For what he said was seven weeks and three days' work (7.6 weeks) at the rate of \$21 an hour for forty hours a week, with a deduction of \$700 for two payments made to him, he was due \$5684 by the day he resigned.

[29] On the gross earnings of \$6,384 he should have received during his employment, Mr Sharma was entitled to holiday pay of \$510.72.³

[30] On the resulting total of \$6,894.72, less \$700 paid, he was entitled to interest at the rate of five percent from 28 July 2017 to the date of this determination.⁴ The claim was raised before the relevant provisions of the Interest on Money Claims Act 2016 came into effect earlier this year. The Judicature (Prescribed Rate of Interest) Order 2011 still applied to the calculation of interest in this case. For the period of 285 days that Mr Sharma was deprived of the use of his wages and holiday pay, Icon must pay him \$241.85 as interest.⁵

Remedies

[31] As well as orders for those arrears and interest, Mr Sharma was also entitled to an assessment of remedies for his personal grievance for unjustified dismissal arising from his constructive dismissal.

Reimbursement of lost wages

[32] The Authority may award reimbursement of wages lost as a result of that grievance from the date of his resignation. In Mr Sharma's case that loss was for a ten week period until he got a new job on 2 October 2017. At the rate of \$840 a week that loss totalled \$8400. His evidence disclosed diligent efforts to find a new job, mitigating his loss. This warranted the order for Icon to pay him \$8400 under s 123(1)(b) of the Act.

² Employment Relations Act 2000, s 132(2).

³ Holidays Act 2003, s 23.

⁴ Employment Relations Act, Schedule 2 clause 12 and Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177) clause 4.

⁵ \$6,894.72 minus \$700 equals \$6,194.72 at five per cent equals \$309.74 for 365 days. Interest for 285 days from 27 July 2017 to 8 May 2018 is \$241.85.

Compensation for humiliation, loss of dignity and injury to feelings

[33] Mr Sharma's evidence established he was humiliated by having to make repeated requests for his wages and going without that money throughout his employment. He had to rely on friends and flatmates in New Zealand to pay his rent and buy food. He was also upset that he was unable to send money home to his family in India to help with repayment instalments on a loan they took out there to fund his earlier studies in New Zealand.

[34] He was also, understandably, upset by Mr Mani's allegations that he stole property and threats that he would be the subject of complaints to the Police and Immigration New Zealand. There was no evidence provided for the Authority investigation sufficient to establish any reasonable basis for the allegations and threats Mr Mani made.

[35] A medical certificate from Mr Sharma's GP, issued in September 2017, expressed the opinion Mr Sharma was experiencing acute stress and anxiety as a result of problems due to "his previous work and visa". A clinical psychologist's report in November 2017 noted he still experienced symptoms of depression and anxiety that "appear to be directly related to his recent employment experience and immigration/visa worries". An assessment rated those symptoms as severe. The psychologist observed that Mr Sharma felt more positive after hearing on 21 November 2017 that his visa application was granted.

[36] The upset Mr Sharma experienced until that date was attributable to Icon's unjustified actions in withholding his wages and causing his resignation. Those actions also required him to make a further visa application so the anxiety about that process arose directly from the employer's wrongdoing.

[37] Given the evidence of his particular experience, assessed against the range of awards in similar cases, an award of \$12,000 under s 123(1)(c)(i) of the Act was appropriate to compensate Mr Sharma for the distress caused to him by Icon's actions.

No reduction for contribution

[38] Under s 124 of the Act the Authority must consider whether any remedies require reduction due to actions of the worker that contributed, in a blameworthy way, to the situation giving rise to his grievance.

[39] There was no evidence Mr Sharma's work was inadequate or withholding his wages was done for any cogent reason. The allegation he had kept proceeds from sales of stock he made in Mr Mani's absence or had damaged property arose only after his resignation so could not be said to have contributed to the situation giving rise to his grievance, that is the withholding of his wages.

Any offset for sale proceeds or damage to property?

[40] No reliable evidence was offered to substantiate Mr Mani's allegations that Mr Sharma had kept sales proceeds or damaged a gate at his house.

[41] The statement in reply, written by Mr Mani, said repair to a damaged gate cost \$2500 but he and Icon provided nothing to corroborate the claim Mr Sharma had damaged the gate or the cost of fixing it. In that statement Mr Mani also alleged Mr Sharma had "conned Vijay [Mani] into believing I had given him permission to stay at my property" while Mr Mani was away in Fiji. The allegation was inconsistent with a text that Mr Mani sent Mr Sharma on 13 July that read: "You'll be staying at my house yes."

[42] A further allegation said Mr Sharma sold a washing machine for \$2000, a fridge for \$2000, a TV sound bar for \$400 and a television for \$1500 but had not given Icon the proceeds from those sales. Those sales were said to be recorded in a receipt book that did not belong to Icon. In his oral evidence Mr Mani said Mr Sharma had sold the stock through his Facebook page but he had provided no documentary evidence to substantiate the allegation. In response to that more detailed allegation Mr Sharma accepted he had sold stock, as part of his job, through his Facebook page and the Facebook page of Mr Mani but insisted Vijay Mani had collected any proceeds from customers when they came to collect the goods.

[43] In the absence of any corroborating evidence for the allegations made by Mr Mani about stock and damage, there was no foundation for any negative finding against Mr Sharma or any offset from the wages owed to him by Icon.

A penalty for aiding and abetting a breach of an employment term

[44] The text messages that, on the balance of probability, were exchanged between Mr Sharma and Mr Mani established Mr Mani was responsible for the arrangements to employ Mr Sharma and had monitored his day-to-day work. In combination with Mr Sharma's evidence, those texts also established that Mr Mani never denied wages were owed but had given no adequate response to Mr Sharma's pleas to be paid. As Icon's representative in the employment relationship Mr Mani was responsible for being responsive and communicative in dealing with Mr Sharma's legitimate concerns.⁶ Mr Mani's arrangement to make two part payments, of \$400 and \$300, showed he was able to organise payments but also failed to have Mr Sharma paid his full weekly wage in any of the seven weeks of his employment. As the person managing Icon's employment of Mr Sharma, Mr Mani aided and abetted that fundamental breach of Mr Sharma's employment agreement with Icon.

[45] There were two flaws in Mr Mani's denial that he, on Icon's behalf, made the employment agreement with Mr Sharma and approved the Immigration form.

[46] Firstly, there was no doubt Mr Sharma had worked for the company. If he had done so without a written employment agreement, Icon would then have been in breach of sections 63A(2), 64 and 65 of the Act and liable to penalties under those provisions. However even an entirely oral employment agreement must be taken to include an implied term that there is no work without pay and no pay without work. Mr Mani's failure to adequately address Mr Sharma's request for pay would have aided and abetted the breach of such a (notional) oral term.

[47] Secondly, similar problems arose if Mr Mani were correct in denying he signed any Immigration New Zealand document in support of Mr Sharma's employment by Icon. There was no doubt Mr Mani and Masla Mani knew Mr Sharma wanted such support so he could get a valid work visa. They both confirmed that in their oral evidence. If Icon had employed Mr Sharma knowing he did not have

⁶ Employment Relations Act 2000, s 4(1A)(b).

a valid visa, the company would be liable to various penalties under the Immigration Act 2009.

[48] Putting Mr Mani's denials aside, as unlikely and unproven, Mr Mani was liable to a penalty under s 134(2) of the Act of up to \$10,000. Matters to consider in setting the amount of any penalty include the Act's object of acknowledging and addressing the inherent inequality of power in employment relationships and the nature and extent of the breach.⁷ Mr Mani's texts, including threats about contacting the Police and Immigration, indicated his knowledge of the vulnerability of Mr Sharma to fearfulness about his status in New Zealand, even if the allegations of wrong doing were unfounded. Failure to pay the wages was not a brief one-off incident or an administrative mistake but a course of conduct that continued over many weeks. Mr Mani's actions in aiding and abetting the breach must then be taken to be deliberate rather than inadvertent. Mr Sharma, as a result, suffered not only the loss of the financial value of having money he was entitled to have when it was due to be paid, but also the loss of the sense of security and wellbeing that having his wages paid on time would have brought.

[49] There was no evidence Mr Mani took any steps to remediate the breach in any meaningful way or that he was not in a financial position to pay a penalty. And, while it was not Mr Mani personally, Icon had been subject to proceedings about similar conduct in the past. In 2017 the Authority ordered Icon to pay arrears of wages and holiday pay to a technician.⁸

[50] Considering those matters, and the questions of the seriousness of the breach, Mr Mani's ability to pay and proportionality of outcome I concluded a 50 per cent reduction of the maximum was warranted. Accordingly Mr Mani must personally pay \$5000 as a penalty for his actions in aiding and abetting the breach of Mr Sharma's terms of employment. It is an amount sufficient to punish him for his actions and to deter other employer's representatives from such failures.

[51] As Mr Sharma directly suffered the consequences of Mr Mani's actions, I also exercise the discretion to order that the whole of the \$5000 penalty be paid by Mr Mani to Mr Sharma, rather than to the Authority for transfer to the Crown Account.

⁷ Employment Relations Act 2000, s 133A.

⁸ *Hiep v Icon Concepts 2012 Limited* [2017] NZERA Auckland 315.

Costs

[52] Costs are typically awarded in the Authority on a daily tariff. In this matter, where the investigation meeting took less than a day, the full rate of \$4500 would not normally apply.

[53] However Mr Sharma incurred additional costs for the assistance of his representative. This included pursuing mediation repeatedly delayed by Icon and Mr Mani and having to respond to allegations, effectively a counterclaim, that were without any evidential foundation shown to the Authority.

[54] In those particular circumstances an award of costs of \$4500 was warranted.

Summary and orders

[55] Mr Sharma's employment by Icon ended by constructive dismissal because his resignation was the reasonably foreseeable result of not being paid his wages, in breach of a term of his employment agreement, that was an unjustified action of his employer.

[56] As a result of that finding, the following sums must be paid to Mr Sharma as arrears, remedies, a penalty and costs.

[57] Firstly, within 28 days of the date of this determination, Icon must pay Mr Sharma:

- (i) \$6,894.72 as arrears of wages and holiday pay;
- (ii) \$241.85 as interest on those arrears;
- (iii) \$8,400 as reimbursement of wages lost as a result of his grievance;
- (iv) \$12,000 as compensation for humiliation, loss of dignity and injury to feelings

[58] Secondly, within 28 days of the date of this determination, Mr Mani must pay a penalty of \$5,000 directly to Mr Sharma.

[59] Thirdly, within 28 days of the date of this determination, Icon and Mr Mani must pay \$4,500 to Mr Sharma as a contribution to his costs of representation. Those

cost are apportioned in equal measure to Icon and Mr Mani, that is they must each pay \$2,250 of that amount.⁹

Robin Arthur
Member of the Employment Relations Authority

⁹ Employment Relations Act 2000, Schedule 2 clause 15(2).