

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 545  
3019084

BETWEEN	NICHOLAS FOUHY Applicant
AND	ABTEC NEW ZEALAND 1993 LIMITED TRADING AS ABTEC AUDIO LOUNGE Respondent

Member of Authority: Trish MacKinnon

Representatives: Gerard Dewar, counsel for Applicant  
No appearance for Respondent

Investigation Meeting: 28 June 2019 at Wellington

Submissions Received: On the day orally from the Applicant  
None from the Respondent

Date of Determination: 23 September 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Nicholas Fouhy claims he was both unjustifiably disadvantaged during his employment by an action of his employer, and unjustifiably dismissed by that employer. The employer is Abtec New Zealand 1993 Limited, trading as Abtec Audio Lounge, (Abtec).

[2] Mr Fouhy also asks the Authority to determine whether Abtec is liable to pay tax on wages he earned while working for it. Mr Fouhy seeks remedies including unpaid wages and holiday pay, and compensation for hurt, humiliation and injury to feelings.

[3] Abtec, in its statement in reply, asserted Mr Fouhy was an independent contractor and the Authority has no jurisdiction in regard to the claims he made. It said Mr Fouhy was not dismissed and it was not liable to pay his tax.

[4] In an earlier preliminary determination I found Mr Fouhy to have been an employee while working for Abtec, notwithstanding Abtec's claim that he was an independent contractor.<sup>1</sup>

[5] Abtec changed its name to Angus and Burrell Holdings 2018 Limited on 6 September 2018. Mr Ashley Edward Burrell is one of the two directors of the company, and has been since 30 June 1996. The second director is Mr Angus William Kincaid, who was appointed a director on 5 September 2018. Mr Burrell and Mr Kincaid are both shareholders, as are other members of the Burrell family and Burrell Marketing Group NZ Limited. For ease of reference I shall continue to refer to the respondent as Abtec or the company.

[6] Abtec took part in the preliminary proceedings but did not participate in the case management conference following the issuing of the 8 October 2018 determination. Nor did it attend or participate in the substantive proceedings.

[7] I am satisfied the company formally known as Abtec New Zealand 1993 Limited, trading as Abtec Audio Lounge, and currently known as Angus and Burrell Holdings 2018 Limited, was properly informed through its registered address of all matters pertaining to these proceedings.

[8] When no representative of the company appeared at the investigation meeting of 28 June 2019, I asked an Authority Officer to contact Mr Burrell by telephone. Her attempt to do so was met with the response that Mr Burrell was not available and his whereabouts were unknown. No attempt was made to contact Mr Kincaid who had previously made it known in writing to the Authority that he did not wish to have any contact over the matter.

[9] I delayed the start of the investigation meeting by 15 minutes to allow for late arrival due, for example, to the exigencies of traffic and then proceeded in the respondent's absence in accordance with clause 12, Schedule 2 to the Employment Relations Act 2000 (the Act).

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<sup>1</sup> NZERA Wellington 88, 8 October 2018.

## Issues

[10] The issues for determination are whether:

- a. Mr Fouhy was unjustifiably dismissed;
- b. Mr Fouhy was unjustifiably disadvantaged;
- c. Abtec is liable for payment of tax on Mr Fouhy's wages;
- d. Wages are owed; and
- e. Holiday pay is owed.

## Unjustifiable dismissal

[11] Mr Fouhy claims to have been unjustifiably dismissed, both constructively and actually. I will first consider whether he was constructively dismissed.

[12] It is well established that an employee may be constructively dismissed by the employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>2</sup> held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[13] Mr Fouhy claims it was Mr Burrell's conduct towards him over several months that caused him to seek alternative employment and tender his resignation. There was no suggestion that Mr Fouhy was asked to resign or face being dismissed. Nor did Mr Fouhy claim his employer's conduct towards him was intended to coerce him to resign.

[14] Although not pleaded clearly Mr Fouhy appears to rely on the third category of constructive dismissal, although he has not indicated a specific breach of duty by Abtec

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<sup>2</sup> [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

towards him that caused his resignation. His claim relates more to his employer's conduct towards him over a period of time constituting a breach of duty. This was not a "final straw" situation. It was more of a realisation over a period of months by Mr Fouhy that he was having to work longer hours than he had been led to believe; that he was not being treated respectfully by his employer; and that this was not likely to change.

[15] It was Mr Fouhy's evidence that all was well initially but from approximately six months into the employment relationship Mr Burrell's attitude changed and he became demanding and verbally abusive. Mr Fouhy said he was forced to work long hours and, on the two days he did not attend the workplace due to illness during his employment, he was made to undertake work remotely from home. He had a work vehicle but says he was forbidden from dropping his wife off at work in the car in the mornings and from taking her home after work. Mr Fouhy claimed Mr Burrell would impinge on his home and family time by contacting him almost every night to discuss work matters.

[16] There was little evidence Mr Fouhy raised any of these concerns with his employer, other than in relation to the Saturday work when the hours were lengthened at one point. I note that Mr Burrell, in a written statement prepared for the hearing of the preliminary matter, denied all Mr Fouhy's claims of abusive or poor treatment. That written statement also noted he had changed Mr Fouhy's hours to accommodate the concern he had raised over Saturday hours.

[17] Mr Fouhy acknowledged he did not raise other matters that caused him stress and anxiety, such as Mr Burrell's behaviour towards him, which he described as intimidating and overbearing. Mr Fouhy also referred to his increasing discomfort at being caught in the middle of a family argument between Mr Burrell and one of his (Mr Burrell's) adult children.

[18] These matters affected Mr Fouhy to the point where he said no longer wished to work at Abtec and, when an opportunity came up at his previous workplace, he applied for the position and was successful in obtaining it. After accepting the position Mr Fouhy tendered his resignation from Abtec on four weeks' notice. He and Mr Burrell agreed his last day of work would be 30 June 2016.

[19] Mr Fouhy acknowledged he had not raised his dislike of his employer's treatment of him during his employment, nor had he asked his employer to change his attitude towards him. He said he did not do so because he thought it might make matters worse and because

he wished to keep matters as pleasant as possible until he obtained alternative employment. He did not raise these matters while working out his notice after submitting his resignation either, and explained he did not do so at that time because he wanted to leave on good terms.

[20] Mr Fouhy's decision to avoid bringing to his employer's attention the matters he now says caused him to resign creates difficulties for his claim to have been constructively dismissed. In not bringing to his employer's attention matters that were of such concern to him that he believed he had to seek work elsewhere and resign, Mr Fouhy denied the employer the opportunity to address those matters. Had Mr Burrell been informed of the effect of his treatment of Mr Fouhy, he may have been willing to modify his behaviour.

[21] The mutual obligations of good faith oblige employees and employers to be active and constructive in establishing and maintaining a productive employment relationship.<sup>3</sup> This entails, amongst other factors, being responsive and communicative with each other. Mr Fouhy tolerated what he believed to be poor treatment from his employer without protest. He then took his own steps to address the situation by finding alternative employment and resigning. In such circumstances I do not find his resignation can be reasonably characterised as a constructive dismissal.

[22] However, I do find Mr Fouhy was unjustifiably dismissed by his employer during his notice period. After he had tendered his resignation on 2 June 2016, giving four weeks' notice, Mr Fouhy and Mr Burrell agreed that his last day of work would be Friday 30 June. Mr Fouhy was working out his notice when, on 25 June 2016, Mr Burrell unexpectedly told him that would be his last day at work. Mr Burrell ordered him to leave and said he would lose only a few days' pay. Mr Fouhy says he received no pay after that date.

[23] He had arrived at work that day in the company vehicle he had been assigned but was required to leave it at work. Mr Fouhy said Mr Burrell told him he could continue to use the company phone he had been issued, but later asked him to return it.

[24] Mr Fouhy was not consulted about a shortened period of notice, after he and Mr Burrell had agreed on the date his employment would end. He was shocked and dismayed to be told to leave on 25 June and had to ask his wife to pick him up from the workplace as he had no other means of transport home.

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<sup>3</sup> Section 4 of the Act.

[25] There had been no suggestion from Mr Burrell when Mr Fouhy resigned that the length of notice he had given was too long. In view of his role as National Sales Manager, I find one month was a short, but reasonable, period of notice. As there was no written employment agreement, there was no agreed period of notice, other than the agreement reached by Mr Fouhy and Mr Burrell that Mr Fouhy's last day of work would be 30 June.

[26] Mr Burrell's unilateral notification to Mr Fouhy to cease work on 25 June constituted a dismissal that was, in all the circumstances at the time, unjustifiable.<sup>4</sup> Mr Fouhy therefore has a personal grievance and I find no evidence that he contributed to the situation that gave rise to that grievance.

[27] I will return to the one week's lost notice shortly when considering whether wages are owed to Mr Fouhy. Additionally, I find he should be compensated by Abtec for his personal grievance by the payment of \$2,000.00 under s 123(1)(c)(i) of the Act for the effect on him of his employer's unjustifiable action.

### **Unjustifiable disadvantage and tax liability**

[28] Mr Fouhy was disadvantaged by his employer's failure to treat him as an employee throughout the employment relationship. One major aspect of this became clear to Mr Fouhy after he had resigned and was then informed he was responsible for paying his own income tax. As an employee, his employer should have been deducting PAYE from the net wages it paid him.

[29] Throughout his employment Abtec paid Mr Fouhy what Mr Burrell referred to as a "net weekly wage" and a "shareholder salary". The company did not pay income tax on that net weekly wage, either during Mr Fouhy's employment, or after it terminated. Mr Fouhy eventually had to pay the tax himself, causing himself and his family considerable financial and personal stress.

[30] I find Abtec's failure to pay income tax on Mr Fouhy's wages constituted an unjustifiable action during his employment. During the course of the investigation meeting into the preliminary issue a letter from Mr Burrell to Mr Fouhy was produced in evidence. The letter, which Mr Burrell accepted he had written, was dated 21 July 2015 and was written

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<sup>4</sup> *The Auckland and Gisborne Amalgamated Society of Shop Employees and Related Trades (Other Than Auckland Butchers, Grocers and Chemists Employees) Industrial Union of Workers v Bos Upholstery Limited* [1985] ACJ 477.

after Mr Fouhy had accepted an offer to join Abtec, but before he had commenced work with the company. The letter recorded Abtec's confirmation of:

*...our offer to transfer one ordinary share in the Company to you, which will allow the Company to remunerate you via Shareholder Salary. Under this method, you will receive an agreed net weekly wage and your annual Income Tax will be paid after the Company's Accountant has filed your annual income Tax return. [underlining added]*

[31] The letter does not explicitly state Abtec would pay Mr Fouhy's annual income tax. However, the use of the passive future tense linking the payment of Mr Fouhy's tax to the Accountant's filing of his tax return strongly suggests that Abtec would be paying that income tax. When that was put to Mr Burrell in the course of the investigation meeting into the preliminary issue he agreed the words strongly implied Abtec would pay Mr Fouhy's income tax.

[32] Mr Burrell claimed no knowledge of how that process worked and said it was up to the company's accountant to decide whose tax would be paid. I did not find that evidence credible and find it far more likely that, as a professional engaged by the company, the accountant would have been instructed by Abtec on such matters.

[33] Mr Fouhy gave evidence on this matter, as did Brenda Ryan, Director of BJR Accounting Limited. Mr Fouhy engaged Ms Ryan's services in 2017 when he received advice from Inland Revenue Department (IRD) that his tax return for the year ended 31 March 2016 was overdue.

[34] Ms Ryan's evidence was that usually a shareholder salary was an allocation of the net profit based on shareholding. In her view it would be fair to believe that Mr Fouhy would be paid a normal PAYE-deducted net wage during the year, as well as 1% of the company's net profit at the end of the year, based on his 1% shareholding.

[35] In Ms Ryan's view it would also be fair to believe that Abtec, as the employer, would be meeting its employer responsibilities by filing monthly employer deduction forms with IRD and paying monthly PAYE and deductions to IRD. She said, if that had been done, there would be no further income tax for Mr Fouhy to pay on his Abtec wages and he would have received tax refunds of \$139.71 for the 2016 tax year and \$601.26 for the 2017 tax year.

[36] Abtec did not pay Mr Fouhy a PAYE-deducted net salary, however, which Ms Ryan described as unusual. Instead, it paid him net wages during the year but, instead of claiming the wage expenses in their accounts, it coded them to shareholder drawings. At the end of the year Abtec allocated the equivalent amount, which was \$25,150.00 for year ended 31 March 2016 and \$9,500.00 for the year ended 31 March 2017, as shareholder salary to Mr Fouhy.

[37] Ms Ryan's evidence, which I accept, was that this resulted in all of Mr Fouhy's net wages that had been paid to him during the year being included as un-taxed lump sums in his 2016 and 2017 tax returns. In total Mr Fouhy paid \$5,186.01 to IRD as a result of what Ms Ryan described as "the unusual treatment" of his wages by Abtec.

[38] In total Mr Fouhy paid \$5,186.01 to IRD, which should have been paid by his employer. I find Abtec's failure in this regard to constitute an unjustifiable action that disadvantaged Mr Fouhy. The sum he was obliged to pay IRD as a result of his employer's actions was a significant sum for a person on a moderate salary. I accept Mr Fouhy's evidence of the distress and financial burden it caused him. I find it appropriate that he be compensated for his personal grievance under s 123 of the Act.

[39] While I have found the liability for payment of Mr Fouhy's tax lay with Abtec, it is undisputed that Mr Fouhy has, albeit unwillingly, paid the tax. In the circumstances, I find the fair solution to be for Abtec to reimburse Mr Fouhy the amounts he paid.

[40] Under s 123(1)(b) of the Act Abtec is to reimburse Mr Fouhy \$5,186.01 and pay him \$740.97. Under s 123(1)(c) Abtec is to pay Mr Fouhy \$2,000.00 as compensation for the hurt and humiliation he suffered from his personal grievance.

### **Wages owing?**

[41] I have found Mr Fouhy to have been owed wages for one week of the notice period he had agreed with his employer which was not paid following Mr Burrell's abrupt dismissal of him on 25 June 2016. In the course of Ms Ryan's evidence, she calculated \$901.43 to be the weekly gross amount that yields the \$750.00 weekly net wages paid to Mr Fouhy.<sup>5</sup> I accept that evidence and find Abtec owes Mr Fouhy unpaid wages in the sum of \$901.43 gross.

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<sup>5</sup> Using information publically available on IRD's website.

### **Holiday pay owing?**

[42] Mr Fouhy's evidence, which I accept, was that he took no annual holidays during his employment. The most time he took off was one hour to accompany his wife shopping. I am satisfied that was not annual leave but a lunch hour. Mr Fouhy is owed annual holidays based on 8% of his remuneration throughout his employment.

[43] Again I accept Ms Ryan's calculations of Mr Fouhy's gross wages. For the year ending 31 March 2016, his gross wages were \$30,224.95, and for the year ending 31 March 2017, \$11,421.12. Accordingly, Mr Fouhy is owed \$3,331.69 gross in holiday pay.

### **Costs**

[44] Mr Fouhy asked the Authority to deal with costs as part of the determination of his claims. His costs claim includes both the preliminary matter which was determined on 8 October 2018 and the substantive matter.

[45] The Authority's discretionary power to award costs is derived from clause 15 of Schedule 2 to the Act. The principles underlying awards of costs in the Authority were confirmed by a Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>6</sup> and reconfirmed 10 years later in *Fagotti v Acme & Co Ltd*.<sup>7</sup> They are well-known and I do not find it necessary to repeat them in this determination. The principles include the following which are of relevance in this instance:

- There is a discretion as to whether costs will be awarded and, if so, what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that has increased costs unnecessarily can be taken into account in considering an award;
- Costs generally follow the event;
- The nature of the case can influence questions of cost;
- Awards will generally be modest; and
- they are frequently judged against a notional daily tariff.

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<sup>6</sup> [2005] ERNZ 808 (EmpC).

<sup>7</sup> [2015] NZEmpC 135.

[46] In this instance I conclude that an award of costs to Mr Fouhy is appropriate to recognise his success in both the preliminary and substantive matters determined by the Authority.

[47] Mr Dewar, representing Mr Fouhy, submits an award of indemnity costs is justified. In support of that submission he says Abtec wilfully denied its employer liability to Mr Fouhy and failed to pay him minimum employment entitlements such as holiday pay. It had put Mr Fouhy in a position where he was obliged to seek specialist advice and specialist representation.

[48] I am not persuaded by that submission and do not find an award of full costs to be justified. Such awards are rarely made in the Authority, and are usually considered only when a party's behaviour has been particularly egregious. In this particular instance I find it more appropriate to use the Authority's notional daily tariff as the starting point for an award of costs in favour of Mr Fouhy and to consider any factors that would justify a movement upwards or downwards.

[49] The daily tariff is currently \$4,500 for the first day of hearing. The hearing of the preliminary matter occupied approximately three quarters of a day and the hearing of the substantive matter, approximately one quarter. Combining those two events, the investigation meeting into Mr Fouhy's claims occupied, over two separate hearing days, approximately one day so the starting point is \$4,500.

[50] I accept that Mr Fouhy was put to additional and unexpected expense as a result of his employer's treatment of the income tax liability issue. That resulted in his engaging an accountant to assist him. Taking that factor into account, as well as the unusual nature of the case I find an uplift of \$2,000 to be appropriate in all the circumstances. Additionally Mr Fouhy is entitled to reimbursement of the Authority's filing fee.

### **Summary of orders**

[51] Abtec New Zealand 1993 Limited, trading as Abtec Audio Lounge, and currently known as Angus and Burrell Holdings 2018 Limited, is ordered to pay the following sums to Mr Fouhy:

- (a) \$2,000.00 under s 123(1)(c)(i) of the Act (paragraph 27 above);
- (b) \$5,186.01 under s 123(1)(b) of the Act (paragraph 40 above);
- (c) \$740.97 under s 123(1)(b) of the Act (paragraph 40 above);
- (d) \$901.43 gross (\$750 net) in unpaid wages (paragraph 41 above);
- (e) \$3,331.69 gross in holiday pay owed under s 23 of the Holidays Act 2003 (paragraph 43 above);
- (f) \$6,500.00 as a contribution to the costs incurred by Mr Fouhy (paragraph 50 above); and
- (g) \$71.56, being reimbursement of the Authority's filing fee (paragraph 50 above).

Trish MacKinnon  
Member of the Employment Relations Authority