

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 141
3023137

BETWEEN

DONN PJONGLUCK
Applicant

AND

FREEDOM INSTITUTE OF
HIGHER EDUCATION
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Allan Halse, Advocate for the Applicant
Treasure McKinstry, Counsel for the Respondent

Investigation Meeting: 3 December 2018 in Hamilton

Further information: 12 December 2018

Determination: 11 March 2019

DETERMINATION OF THE AUTHORITY

- A. Donn Pjongluck was an employee of Freedom Institute of Higher Education Limited (FIHE), not an independent contractor.**
- B. For its breach of good faith obligations owed to Dr Pjongluck, FIHE must pay a penalty of \$5,000 into the Authority. On recovery of the penalty the Authority is to pay \$4,000 to Dr Pjongluck and transfer \$1,000 to a Crown Bank Account.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Donn Pjongluck, a Thai national with academic experience as a researcher and teacher, began working for Freedom Institute of Higher Education Limited (FIHE or the Institute) from 1 May 2017. FIHE is a Hamilton-based private training and education provider of certificate, diploma and degree programmes in business, English, health and foundation studies ranging from levels one to nine in the New Zealand qualifications framework.

[2] In a meeting with Dr Pjongluck on 21 August 2017 FIHE director Susan Stevenson ended his full-time role with the Institute. She also discussed arrangements for him to continue work on what was described as “a job-sheet contract” basis for House of Montrose Limited (HML), another company in which Mrs Stevenson is a director and shareholder. HML operates an education consultancy and programme design business. It trades under the name of New Zealand Curriculum Design Institute (NZCDI). FIHE’s prospectus describes NZCDI as its programme design partner institute.

[3] The parties disagreed about what had happened in the 21 August meeting before Mrs Stevenson talked about termination of Dr Pjongluck’s full-time role. She said her decision about his role followed his responses to concerns she raised that he had not been honest with her about work-related activities and other performance issues. He said those concerns were not raised with him in that meeting. Dr Pjongluck said the topic of terminating his role only arose after he sought leave to return urgently to Thailand because his father was terminally ill. He said Mrs Stevenson had agreed to him taking leave but said she would have to terminate his full-time role. He said he “begged” not to have his work with FIHE terminated and Mrs Stevenson had then offered to send him a contract for another role.

[4] Statements of problem lodged on Dr Pjongluck’s behalf in December 2017 and in April 2018 outlined three concerns – firstly, about how his full-time work for the Institute came to end; secondly, about what was said to be FIHE’s failure to confirm an on-going role for him; and, thirdly, about what he saw as incorrect and damaging information Mrs Stevenson had later sent Immigration New Zealand about those changes. His application to the Authority sought findings and orders that FIHE

had breached its good faith obligations to Dr Pjongluck, should pay a penalty for that breach and should be required to pay his costs of representation.

[5] FIHE's initial statement in reply said Dr Pjongluck was "formally terminated" on 21 August 2017 for three counts of "dishonesty" and "failure to perform [his] work to an acceptable standard after a prolonged period of support and then performance management". It is said he was sent a "termination letter" on 8 September 2017 after failing to carry out "special steps" requested and agreed by him at the 21 August meeting. The phrase 'special steps' referred to the offer of an alternative role both parties agreed was discussed in the 21 August meeting.

[6] FIHE's reply did not respond directly to the concern about its contact with Immigration New Zealand. However it did provide a copy of an email Mrs Stevenson sent to an Immigration officer on 7 October 2017. This was her response to a query from Immigration New Zealand on 3 October 2017 about Dr Pjongluck's employment with FIHE. Her email reply said Dr Pjongluck had advised FIHE on 21 August that he had to return to Thailand to care for his dying father. She wrote that "as it was unclear when he might return or his availability and reliability to perform his work role" they had agreed a change to his role and referred to an email sent to Dr Pjongluck on 26 August about that change. She included an extract from that email which stated she was "formally ending [his] full-time tenure track status originally contracted and changing it to continue as a job sheet based casual contract consultant for us". She also told Immigration New Zealand that FIHE has "not utilised any of Dr Pjongluck's services on any type of contract" since 26 August.

[7] FIHE, after taking legal advice, lodged a second statement in reply some months later. This reply said Dr Pjongluck was an independent contractor, not an employee. It agreed his contract for services was terminated at a meeting on 21 August 2017. However it said a new contract for services with a company associated with FIHE was forwarded to him but he had not responded.

[8] Both mediation and then investigation of this matter were delayed because Dr Pjongluck had returned to Thailand in late August 2017 to be involved in the care of his terminally-ill father, who died ten months later in July 2018. From January 2018 Dr Pjongluck also took up a teaching role at a university in Thailand at which he had previously been a senior lecturer.

[9] Dr Pjongluck had returned to New Zealand briefly in October 2017 to arrange for his children, who were in school in Auckland, to return with him to Thailand so they could spend time with their grandfather before his death. During this brief return Dr Pjongluck made a day-trip to Hamilton on 3 October with a friend. While visiting the local civic gardens there, and by chance only, he encountered Mr and Mrs Stevenson. There was some discussion between them about FIHE looking at opening an Auckland campus in early 2018 and the prospects Dr Pjongluck might be able to do some work associated with that development. In a follow-up email he sent later that day Dr Pjongluck referred to the prospect of working for FIHE “on a visiting basis” for Institute programmes in Auckland, if he was “back to Auckland by then” or “on a distant basis”, meaning from Thailand.

[10] Immigration New Zealand’s query to Mrs Stevenson was also sent on 3 October. Dr Pjongluck said Mrs Stevenson’s reply on 7 October had led to Immigration New Zealand writing to him and advising he could face deportation on a number of grounds, including providing misleading information. At the time Dr Pjongluck still had a 12-month ‘tied’ work visa, granted in July 2017, allowing him to work for FIHE and it appears his residence application may have indicated he was still working for FIHE at the time of making his residence application. A copy of that application was not among documents provided for the Authority investigation.

[11] On advice from an immigration consultant Dr Pjongluck withdrew his residence application. Dr Pjongluck and his wife, who was trained as a chemical engineer, later pursued visa applications under a different skilled migrant category. He was then granted a 12-month ‘open’ work visa in January 2018, enabling him to work for any employer in any occupation in New Zealand. However Dr Pjongluck said Mrs Stevenson’s response to Immigration New Zealand was misleading and had resulted in him incurring significant additional costs for visa applications, for consultants’ advice and for travel for him, his wife and children to Bangkok. The travel was said to be necessary to avoid deportation.

[12] FIHE’s position was that Dr Pjongluck had sought and agreed a change to his work status with the Institute but changed his mind, and his account of events, only after he encountered immigration problems from October 2017 onwards.

The Authority's investigation

[13] Dr Pjongluck, Mrs Stevenson and her husband Graeme Stevenson lodged written witness statements for the Authority investigation. Mr Stevenson is also a director and shareholder in FIHE and HML. He manages the finances and operations of the two businesses.

[14] At the investigation meeting all three witnesses, under oath, answered questions from me and the parties' representatives. The representatives also had the opportunity to make oral closing submissions.

[15] 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

[16] The following issues were open for investigation and determination:

- (i) Was Mr Pjongluck's work for the Institute undertaken as an employee or as an independent contractor?
- (ii) If Mr Pjongluck was the Institute's employee, was he fairly consulted before a decision was made to terminate his full-time employment and offer him ongoing work on a casual, part-time basis?
- (iii) If the Institute failed to consult Mr Pjongluck fairly, what remedies should be awarded (a \$5000 penalty for breach of good faith being sought)?
- (iv) Did the Institute, during a period Mr Pjongluck was employed, unjustifiably disadvantage him by communicating with Immigration New Zealand about his immigration status and his position with the Institute?
- (v) If Mr Pjongluck was unjustifiably disadvantaged by such communication, what remedies, if any, should be awarded to him?
- (vi) If Mr Pjongluck is found to have a personal grievance, should any recommendations about the Institute's work practices be made under s 123(1)(ca) of the Act?

- (vii) Should either party contribute to the costs of representation of the other party?

[17] The statements of problem lodged for Dr Pjongluck in December 2017 and April 2018 did not seek any remedies for his disadvantage grievance over the Immigration New Zealand communications. In oral closing submissions at the end of the Authority's investigation meeting, when asked about remedies, his advocate said Dr Pjongluck sought a "significant component" of compensation for hurt and humiliation. Although the investigation was complete, and no further written submissions were called for, Dr Pjongluck's advocate subsequently lodged a written submission on 12 December 2017 adding new claims. He sought compensation of \$30,000 for the hurt and humiliation of being accused of dishonesty, reimbursement of \$29,073 for immigration and travel costs, and lost wages of an unspecified amount for unjustified dismissal.

[18] Those additional claims were not raised in the statements of problem lodged for Dr Pjongluck and were not included in the issues identified by the Authority at its case management conference in 10 September 2018 when arrangements for the investigation meeting were made. It was not open to the Authority to determine those belated additional claims. Those submissions have however been considered, and for reasons canvassed later in this determination, the immigration costs and lost wages claims could not have been awarded anyway. In relation to the events that included allegations of dishonesty, Dr Pjongluck's claim had sought a penalty for a breach of good faith obligations. The application lodged on his behalf in the Authority had neither raised nor pursued a finding of unjustified disadvantage grievance in relation to the dishonesty allegation, so distress compensation (which is a grievance remedy), could not belatedly be sought and awarded.

Was Dr Pjongluck an employee or an independent contractor?

[19] Dr Pjongluck had contacted Mrs Stevenson in February 2017 about the prospects of work with FIHE. In early February Mrs Stevenson, after a meeting with him, advised Dr Pjongluck by email there was a strong possibility of a part-time teaching role on two diploma courses in July 2017 and there might be some teaching work on Masters course in 2018. He was interested in doing that work and Mrs Stevenson arranged for him to take part in some courses to familiarise himself with

the Institute's work and teaching processes. In March 2017, following an unexpected resignation, FIHE advertised the role of Business School Leader. Dr Pjongluck applied and was offered the position.

[20] In April 2017 Dr Pjongluck was sent an agreement, headed Individual Contractor Agreement. It began with a term defining "[t]he parties to this employment agreement". It described the position in this way:

The contractor is being contracted to become a facilitating Business School Leader, Research Manager (for programmes Levels 5 to 9) and associated consulting work attracted by Freedom.

[21] Dr Pjongluck signed the agreement on 21 April and began work for FIHE from 1 May 2017.

[22] FIHE said the agreement established that its relationship with Dr Pjongluck was clearly as an independent contractor so the Authority had no jurisdiction to consider his application. Dr Pjongluck submitted that his role and work for FIHE really fitted the Act's definition of an employee, that is a person employed by an employer to do any work for hire or reward under a contract of service.¹

[23] In determining whether Dr Pjongluck was an independent contractor or an employee of FIHE, the Act directs the Authority to determine the "real nature of the relationship between them".² In doing so the Authority must "consider all relevant matters, including any matters that indicate the intention of the persons" but must not treat "any statement by the persons that describes the nature of their relationship" as determining the matter.³

[24] Factors to be considered in assessing the real nature of the relationship between parties include:⁴

- the written and oral terms of any agreement (for what those terms may indicate of a common intention of the parties);
- divergences from those terms and conditions apparent from the way the relationship operated in practice;

¹ Employment Relations Act 2000, s 6(1)(a).

² Section 6(2).

³ Section 6(3).

⁴ *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [32].

- the way in which the parties actually behaved in implementing their agreement;
- the levels of control and integration and whether a person was (fundamentally) working on her or his own account; and
- industry practice (which may assist the analysis, but is of itself not determinative).

[25] While principles developed in case law guide the assessment in any particular case, the Employment Court has emphasised that the inquiry in each case is “intensely factual” and is to be determined accordingly.⁵ It has also cautioned against focussing too closely on how the factual details of the particular case for determination are the same as or different from those of other cases.⁶

[26] The real nature of the relationship may have evolved, developed or fluctuated in a way that looked at realistically, became different from its nature at the time it was formed or had worked subsequently.⁷ The Authority’s determination, ultimately, considers the substance of the relationship, the arrangements made and how the work was carried, rather than what may initially be apparent or be said about its form.

The terms of the agreement

[27] The written agreement Mrs Stevenson had prepared and provided to Dr Pjongluck was, at best, a hybrid of terms that might apply to an ‘employee’ or to an independent ‘contractor’ providing services. It used both words, sometimes interchangeably. For example, the term setting the place of work said the employee’s main place of work was in Hamilton but then said the contractor agreed to travel for work. It set hours of work from 8.30am to 5.30pm for 48 weeks of the year, a term more typical for an employee. It referred to “the contractor” having to “apply prior” if they wished to be paid for leave but specific clauses required annual leave to be taken “in weeks outside the contract” and sick leave would “not normally be reimbursed”. It also stated that a contractor away two days in a row had to provide a medical certificate at their own cost.

⁵ *Singh v Eric James and Associates Ltd* [2010] NZEmpC 1 at [16].

⁶ *Franix Construction v Tozer* [2014] NZEmpC 159 at [41].

⁷ *Koia v Carlyon Holdings* [2001] ERNZ 585 at [31] and *Brunton v Garden City Helicopters Ltd* [2011] NZEmpC 29 at [42].

[28] And it included a term described as a “90 day trial period”, starting on the first day of work, during which he could be dismissed and “not [be] entitled to bring a personal grievance or other legal proceedings in respect of the contract termination”.

[29] All those terms, as drafted by FIHE, clearly shadowed the statutory provisions for employees. They were, as plainly, a clumsy in-house attempt at drafting an agreement that avoided those obligations by referring to a supposed ‘contractor’.

[30] An annual salary of \$50,000, described as inclusive of GST, was set for 48 weeks, to be paid monthly. No invoice was required and the same amount was paid each month, regardless of actual hours worked. The arrangement was more typical of a salaried employer than an independent contractor providing services.

[31] A term on disputes referred to resolving contract relationship problems. It said such problems “might be a personal grievance, a dispute or other issue”. A personal grievance is a statutory provision only available to employees. The dispute term also referred to the parties being able to seek help from an external party for problems that could not be resolved, including mediation provided by the Ministry of Business. It said the contractor or FIHE “might want to go to Arbitration or Small Claims Court” if a problem could not be resolved at mediation. Again such a provision was clearly intended to shadow the mandatory requirement for a dispute resolution process in an employment agreement, substituting words referring to a contractor rather than an employee.

[32] A term headed “Contractor protection provision” stated the contractor and FIHE were “entitled to certain protections” in an unspecified “Contracts Act” and they should refer to “this Act for further information or above remedies for any dispute or grievance by either party”. The reference does not appear to relate directly to any of the contractual statutes that were in effect at the time and were replaced by the Contract and Commercial Law Act 2017. The 2017 Act gained royal assent on 1 March 2017 (before the agreement was offered to Dr Pjongluck) and came into effect from 1 September 2017.

[33] Another term stated the contractor could be dismissed without notice if FIHE concluded “after following a fair process ... that the contractor has engaged in serious misconduct”. Instances of serious misconduct listed included dishonesty and a

serious breach of FIHE's policies and procedures. Another term on ending the contract referred to FIHE being able to "end the contractor's job with reasonable cause". Both terms were clearly more typical of an employment relationship.

[34] While a fixed term employment agreement on a probationary basis would have been illegal, it appears that an agreement of that type was really what FIHE had used to employ Dr Pjongluck.⁸ In her oral evidence Mrs Stevenson said the agreement offered to Dr Pjongluck was "aspirational". His role was primarily to research and prepare the process and systems FIHE needed to develop a Bachelor of Business programme, with the hope he could later teach at the post-graduate level of such a programme.

[35] And the wording of a term headed "Type of client-contractor relationship" was, in reality, consistent with such an intended fixed-term employment relationship:

The contractor will work on a three year tenure track contract with a view to transiting to a permanent role if their performance is satisfactory ... during the tenure period. The client will give reasonable notice of all contractor work and in detail. If this tenure track contract is accepted, the contractor must complete it – unless either the client or contractor ends this agreement. Notice by either period [sic] must be given 3 months in advance unless there is a serious misconduct event in which case the client may terminate the contract immediately.

Divergences and actual behaviour

[36] Dr Pjongluck was permitted to work some of the time in Auckland and, when in Hamilton, his work and working hours was not closely supervised each day. While Mrs Stevenson said this was consistent with an independent contractor relationship, such arrangements are also not untypical for a professional salaried employee. Three factors in the actual behaviour of the parties, once he began working, indicated divergence from formal references in the written agreement to be a contractor.

[37] Firstly, FIHE expected exclusive service from Dr Pjongluck. The written agreement included a term required him to seek approval from FIHE for "any other contractual work" he wished to do. He had told Mrs Stevenson that, during the first week of working for FIHE, he was also completing work involving supervising some MBA students for the Thai university at which he had previously worked. Thereafter FIHE expected him to work only for the Institute. Such exclusivity is more typical of

⁸ See Employment Relations Act 2000, s 66(2) and (3) and s 67.

an employment relationship. And suspicions that Mrs Stevenson later came to hold that he was continuing to do work other than for FIHE, because he often seemed tired, became an issue about his honesty that Mrs Stevenson said she raised with him in their 21 August meeting.

[38] Secondly, Mrs Stevenson also because concerned that Dr Pjongluck had missed some meetings and arrived late on days he was due to be working in Hamilton. Close attention to his timekeeping was more typical of an employment relationship.

[39] Thirdly, Mrs Stevenson said she had become concerned Dr Pjongluck was not meeting deadlines set for items on a work priorities list and other tasks he was given to complete between May and August. Most weeks she met with Dr Pjongluck on a Monday for what she called a coaching session. She identified six of those meetings as having become “performance coaching in nature”, with Dr Pjongluck being asked to provide evidence of having performed and completed tasks to a satisfactory level. Again, this close supervision was more typical of a relationship of employment rather than independent contracting.

The common law tests

[40] The features, already discussed, of how Dr Pjongluck came to be more closely supervised during his work for FIHE met aspects of the common law test of control that are indicative of an employment relationship. His work was also closely integrated into the work of the Institute. He was included in the staff profiles on the Institute’s webpage. He had an FIHE email address and, when in Hamilton, worked in Institute-provided premises. In respect of the fundamental test, of whether he was working on his own account, Dr Pjongluck was not required to provide invoices. He was paid a set salary month each month, regardless of actual hours worked. Neither could he have delegated his work to someone else to complete nor profit from doing the work differently and more cheaply.

Industry practice

[41] Mrs Stevenson said the arrangement she made with Dr Pjongluck was typical in the private training establishment sector and tertiary education. She used the examples of her own work in the past, independently contracting to public tertiary institutions, and of HML’s curriculum development business

contracting to clients. The latter example, involving HML contracting with another entity and stipulating an individual consultant to do the work, was a genuine example of independent contracting. However other examples involving individuals in this sector, including Mrs Stevenson's own previous experience, as likely indicate widespread industry misuse of the labelling to deny employment rights rather than lawful practice that could be given weight in determining the real nature of the particular relationship that existed between Dr Pjongluck and FIHE.⁹

Conclusion: really an employment relationship

[42] A final factor in considering all relevant matters under s 6(3) of the Act is the statutory object of acknowledging and addressing the inherent inequality of power in employment relationships.¹⁰ In this case, the assessment of common intent is tempered by acknowledging that Dr Pjongluck, although a well-qualified and experienced tertiary teacher, was relatively new to New Zealand. He was in an inherently unequal position in being offered and accepting an agreement that was stated to be on a contractual rather than employment basis.

[43] On the assessment of relevant matters set out above in this determination, and not taking the contractor label in the agreement as a determining statement, the real nature of Dr Pjongluck's relationship with FIHE was as an employee, not an independent contractor. As a result the Authority had jurisdiction to investigate and determine his application.

Failure to consult fairly about a decision to end full-time employment?

[44] There was a substantial conflict of evidence between Mrs Stevenson and Dr Pjongluck about what happened in their meeting on 21 August 2019. The Authority determines such conflicts on the balance of the probabilities – that is what is more likely than not to have happened. In this case that required some assessment of evidence from Mr Stevenson, which in part supported but did not entirely corroborate the evidence of Mrs Stevenson, and what can be discerned of the parties' conduct and intent from relevant documents. Particularly relevant was a document Mrs Stevenson

⁹ See *Bryson*, above n 4, at [9]-[13].

¹⁰ Employment Relations Act 2000, s 3(a)(ii).

prepared headed “Termination Meeting Record 21st August 2017”. She said she wrote this record after the meeting, but inserted or added notes to it at a later date;

[45] The particular question for resolution about this meeting – what happened in it and what followed – concerned whether Mrs Stevenson’s actions that day met the good faith obligations on FIHE, as Dr Pjongluck’s employer. Both parties were obliged to not directly or indirectly doing anything likely to mislead or deceive the other and to be active, responsive and communicative in maintaining a productive employment relationship. FIHE, and Mrs Stevenson as its agent, was also required to provide Dr Pjongluck with access to information and the opportunity to comment on that information before making any decision adversely affecting the continuation of his employment.¹¹

[46] In her oral evidence Mrs Stevenson said her meeting with Dr Pjongluck on 21 August, a Monday, was arranged as “a regular work tracking meeting”. However before that meeting she said she had decided to question him about two issues.

[47] Firstly, she believed he had untruthfully told her he had missed two meetings with her in Hamilton because seats were not available on buses from Auckland at early enough times on those days. On at least one of those occasions she knew a student had got a seat on a bus at those times and she doubted Dr Pjongluck’s excuses.

[48] Secondly, she believed Dr Pjongluck was continuing to do work for someone else. This belief was based on delays in him completing FIHE tasks, her impression that he was frequently tired, and that he sometimes worked at an apartment provided for him by FIHE in Hamilton rather than at its premises, which seemed secretive.

[49] She said that he admitted both concerns were correct and she did not go on to discuss any of the other concerns she had about his work performance. Instead she told him she no longer trusted him or, as Mrs Stevenson put it in her oral evidence, she said “the trust between us was forever breached”. She said Dr Pjongluck had then assumed “he was terminated” and “begged” here not to stop his contract. She said “he was the first person to use the word termination and it was at that point I realised that was what we were doing”.

¹¹ Employment Relations Act 2000, s 4(1A)(b) and (c).

[50] She said he was so upset at the prospect of the termination of his employment, and what he said would be the resulting shame, that she offered him work on a “job-sheet” contract basis, that is task by task, with HML. She said her view at the time was that “there was no possibility he could ever work for [FIHE] again because of his dishonesty”. She said he was grateful for the offer and arrangements were then made to send him, by email, a contract for that work.

[51] Mrs Stevenson said it was not until after those arrangements were made that Dr Pjongluck mentioned his father’s terminal illness and his need to return to Thailand immediately. He had then given Mr Stevenson a silk tie and Mrs Stevenson an elaborately decorated urn as thank you gifts before departing.

[52] Dr Pjongluck’s account differed on most key points. He said the meeting began with a discussion of delays in completing work and he told Mrs Stevenson he would catch up. He said the discussion then turned to his father’s illness and his need to return to Thailand. He insisted there were no questions asked of him about buses or working for anyone else. As a result he emphatically denied have accepted or admitting he had lied to Mrs Stevenson about either topic. He offered to go on leave without pay but Mrs Stevenson said this could not be granted as FIHE would not know when he was returning. Instead she said his original agreement would need to be terminated. He agreed he had “begged” her not to “terminate him” as this would damage his long term career plans. He said Mrs Stevenson promised to send him a new contract on different employment terms and conditions.

[53] Mr Stevenson’s evidence did not assist resolving the conflict in these accounts. Mrs Stevenson had said he was “present” during the meeting but closer inquiry revealed that Mr Stevenson was in an adjoining office, with the door open to the office in which Mrs Stevenson sat with Dr Pjongluck. Although he could make eye contact with Mrs Stevenson from where he was sitting, Mr Stevenson did not join the conversation in the other room until late in the piece when Mrs Stevenson called him in to look at the gifts Dr Pjongluck had for them.

[54] Relying on Mrs Stevenson’s written and oral evidence and her written record of the 21 August meeting, it was clear FIHE breached good faith obligations to Dr Pjongluck in how it raised its concerns with him and then acted on those concerns. Her witness statement said the meeting was “called to address concerns about the

ongoing viability of the contract” with him “due especially to two trust related matters”. She said he then agreed that he had been dishonest and lied. Her statement then gave this description of what happened:

At this point in the meeting [Dr] Pjongluck was informed that due to the failure to be truthful ... and the failure to perform work and to a reasonable standard or to progress with the extensive coaching provided meant I could no longer trust him and his role was untenable.

[55] This accorded with Mrs Stevenson’s record which included the following account:

Donn then begged not to be terminated and to have this ‘on the record’ and bring shame to his family.

[FIHE] indicated that due to especially his dishonesty he was terminated and his termination could not be changed.

[56] Mrs Stevenson attempted to resile, to some degree, from the blunt account in her own witness statement and her own 21 August record. This was most likely because she had meanwhile realised the procedural failures in good faith and fairness confirmed by her own account.

[57] By that account, she gave Dr Pjongluck no notice of the serious concerns she would raise on 21 August about his honesty or that his work for the Institute could be terminated if what he said was not satisfactory. Even if, as she said in her oral evidence was correct, she did not have termination of the employment in mind before the meeting, what happened during the meeting fell well short of the “fair process” referred to in their agreement about how the contract could end for serious misconduct. Even by the time of the Authority investigation meeting the evidence Mrs Stevenson relied for her concerns, about missed buses and working for others, was sketchy and speculative. The s 4 good faith obligations required better access to whatever information was relied on and a better chance to consider that information and to comment on it. This includes the opportunity to get advice or representation.

[58] She had surprised Dr Pjongluck with the accusations, did not provide supporting information and, even if he did admit those failures, then moved to terminate his full-time employment agreement, without providing a fair opportunity for response, after seeking advice or representation if he wished to do so. Even if Dr Pjongluck did agree to replace his full-time role at FIHE for what amounted to no

more than an offer of a casual contract with HML, it was achieved in circumstances where those failures of good faith and fairness, rendered FIHE liable to a penalty for a breach of its good faith obligations.

Penalty for consultation failure

[59] As already noted, Dr Pjongluck had pursued only a penalty for those breaches. He had not raised a grievance of unjustified disadvantage or dismissal about those actions. Only the remedy of the penalty that he sought could be considered.

[60] In determining an appropriate level of penalty for this breach, the Authority considers the matters identified in s 133A of the Act, assisted by guidelines developed by the Employment Court.¹²

[61] FIHE's actions on 21 August were contrary to the Act's object to promote good faith in all aspects of the employment relationship. The breach, which included prior actions of not notifying Dr Pjongluck of the true extent of what was intended to be discussed on 21 August and not pausing to allow for response and representation, could be treated as a single event. Matters may have unfolded more suddenly than Mrs Stevenson anticipated but the outcome achieved became intentional rather than inadvertent. Dr Pjongluck suffered the loss of the opportunity to achieve or reasonably negotiate a different outcome while FIHE gained the termination of his employment without the effort or expense of following a full and fair process. For reasons canvassed elsewhere in this determination, and because of the limited nature of the claim he pursued in the Authority, he would not receive any other compensation or reparation for loss occasioned by the breach. The prospect of further work and income through the casual contract offered to Dr Pjongluck might, hypothetically, have mitigated potential adverse effects of the breach but, in practice, had not. While an articulate and intelligent man, FIHE's actions had taken advantage of Dr Pjongluck's relative vulnerability as a migrant with limited knowledge of New Zealand law and without the opportunity to take advice before, if that was what he did, he agreed to the changes made in his employment status on 21 August. There was no information confirming FIHE had previously engaged in similar breaches.

¹² See *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [18]-[20] and *Nicholson v Ford* [2018] NZEmpC 132 at [18]-[19].

[62] Applying the four-step approach recommended by the Court, FIHE was liable for a total provisional penalty of up to \$20,000 for its breach of its good faith obligations on 21 August 2017. A penalty was appropriate to deter both FIHE and other employers generally from engaging in such conduct. Considering aggravating and mitigating factors, the need for broad consistency in similar cases, and reserving the most serious penalty for the most serious cases, reducing the total provisional penalty to one quarter of the maximum, that is the amount sought in Dr Pjongluck's claim, was an appropriate adjustment. There was no evidence FIHE could not afford to pay a penalty of that amount. Standing back, \$5000 was a proportionate and relatively modest penalty for the breach while retaining the necessary deterrent aspect.

Application of penalties recovered

[63] FIHE must pay the penalty of \$5000 into the Authority within 28 days of the date of this determination. Although not sought in Dr Pjongluck's statements of problem, the Authority has a discretionary power to order the whole or any part of any penalty recovered to be paid to any person. As the person directly affected by FIHE's breach of good faith, Dr Pjongluck should be paid \$4000 of the penalty (once paid into the Authority). The remainder must be transferred by the Authority to the Crown Account.

Communication with Immigration New Zealand – an unjustified disadvantage?

[64] FIHE could only be found to have unjustifiably disadvantaged Dr Pjongluck by its communication with Immigration New Zealand in October 2017 if he was still in an employment relationship with the Institute at that time. The same question would have arisen if he had raised and pursued a personal grievance for unjustified dismissal, which he had not.

[65] Confirming his employment status required a review of what happened, as apparent from the parties' correspondence, between 21 August and 3 October 2017.

[66] Some correspondence, or rather alleged correspondence, can be dismissed from that assessment at the outset. This is because FIHE was unable to establish, on the balance of probabilities that it had sent Dr Pjongluck two items of correspondence.

[67] Firstly, Mrs Stevenson's 21 August record, annotated later, referred to having sent him a contract for work for HML. Her 21 August note referred to this having

been sent on 22 or 25 August to an FIHE email address that was kept open for contact with Dr Pjongluck after his departure. It was referred to as the “rm address”.

[68] While FIHE produced a copy of a “casual individual contractor agreement” between HML and Dr Pjongluck that Mrs Stevenson said she prepared and sent to him, it could not produce any email to which the agreement was said to have been attached and sent on 22 or 25 August.

[69] And even if it had been sent to the rm address, earlier email correspondence showed Dr Pjongluck had advised Mrs Stevenson as early as June 2017 that he could not access emails at that address. Instead he had advised her then to use another FIHE address, called the pgl address, or to use his personal gmail address. There were examples of Mrs Stevenson subsequently using the pgl address, in July, for communicating with Dr Pjongluck.

[70] Secondly, Mrs Stevenson’s annotated 21 August record said the email account for rm address was closed two weeks after sending the HML agreement because no reply was received. Her notes then stated that a “termination letter” dated 8 September was sent to Dr Pjongluck’s personal email address. She produced a copy of the letter said to be sent. However she was unable to provide an email showing the letter was sent. Dr Pjongluck denied he received the 8 September letter at his personal email address. FIHE was unable, on the balance of probabilities, to prove otherwise.

[71] The letter said to have been sent included a statement that, at the 21 August meeting, Dr Pjongluck was “notified ... verbally that your role was being terminated due to serious misconduct and we would send a letter to this effect”. The letter then also referred to offering him “a casual contract for our other company” and saying this had been sent to his “rm email” without reply. It ended with a statement that as he had “failed to communicate as promised” FIHE had “ended up with no choice but to send you this termination letter to document the events of the last month”.

[72] Having discounted those documents as not likely having been actually sent by FIHE or received by Dr Pjongluck, the relevant exchanges were an email sent by Mrs Stevenson on 26 August, a reply from him on 31 August and his 3 October email.

[73] The copy of Mrs Stevenson’s 26 August email provided for the Authority investigation did not show the email address to which it was sent or its subject

heading. However Dr Pjongluck's reply of 31 August showed her 26 August email was sent to his pgl address at FIHE and bore the subject heading "Re: Contractual Changes". Significantly the text of Mrs Stevenson's 26 August email makes no reference to her emails supposedly sent on 22 or 25 August with a draft HML contract. This further supports the conclusion that, on the balance of probabilities, such emails either did not exist or were not sent.

[74] Mrs Stevenson's 26 August email included a clear statement about the end of Dr Pjongluck's full-time status with FIHE. It indicated his status had changed to a genuine contactor basis with an ability to accept or reject assignments offered, although it was equivocal about which entity was the employer because of the reference to the work being "for us" (as written):

Donn I am in this email formally

- a) ending your contract from the full-time status Agreed we developed and changing it to continue as a
- b) Job Sheet Contracted Consultant for us.

This means that Confidentiality/Intellectual Property and Conduct Code Contracts continue as signed and agreed but I will now send you 'job sheets' for work that comes up and you may accept or reject depending on you availability.

We are pleased you are to continue through b).

...

We think there will be some moderation work for you soon.

[75] Dr Pjongluck's 31 August reply, after outlining his father's medical situation, said:

Thank you v much for your kind offers and I hope I could be helpful to Freedom in certain ways. I don't know yet for sure when I will get to return to New Zealand but later on, if there is anything that you deem I am qualified to do and could contribute to Freedom by working from here in Thailand, please feel free to let me know, I am more than happy to do what I can.

I shall keep you posted of my situation and the timing that I would return to New Zealand.

[76] His 3 October email threw further light on Dr Pjongluck's status with FIHE (bold emphasis added):

... Per our brief conversation at Hamilton garden, it seems Freedom is going to Auckland soon and as we discussed, if there is anything I could be of use on a visiting basis, please feel free to let me know. And if I am back to Auckland by then, I am happy to supervise or lecture on **assigned tasks**. Or

if there is anything you deem I could do on a distant basis, please feel free to let me know as well.

Thank you very much to allow me the opportunity to be with my dad in such a short notice by **changing my work status** at Freedom, as his time is indeed numbered. When I met with the doctor for the first time, he said 6 months could be the timeframe. So, it is important to let the kids be back to spend the remaining time with him and we are looking at possibility of having assignments done and sent back to NZ or other alternatives as they still wish to continue their school in NZ after a big adjustment, now having to adjust back again in Thailand.

Will keep posted and always happy to work with you **on whatever basis**.

[77] Objectively assessed those exchanges showed Dr Pjongluck had an expectation of offers of work for FIHE but not on an employed basis. Rather his words suggest he, subjectively, understood that he was no longer in an ongoing employment relationship with FIHE. Accordingly, FIHE's actions on 7 October did not occur while an employment relationship remained on foot so could not amount to an unjustified disadvantage.

[78] However, if that conclusion were wrong and the employment relationship had not ended, FIHE's actions did not fall outside the range of responses that a fair and reasonable employer could have given to Immigration New Zealand's query on 3 October. Factually, as Dr Pjongluck accepted in his oral evidence, there was "nothing wrong" in the actual wording of Mrs Stevenson's 7 October email to Immigration New Zealand. If anything, her account to Immigration New Zealand had withheld critical views she had about him.

No remedies for disadvantage

[79] And, if that conclusion was also wrong, Dr Pjongluck could not have been awarded the remedies he belatedly sought for any unjustified action in the response FIHE had made to Immigration New Zealand.

[80] On 21 August 2017, regardless of what happened about the future of his employment, he had sought and taken unpaid leave to return to Thailand. During his initial months there he was attending to his father and related family needs so would not have been earning wages at FIHE anyway. Understandably, he did not initially seek work elsewhere to mitigate those lost wages. However from January 2018 onwards he took up a role with the Thai university for which he had previously

worked. His salary for that work was, on his evidence, significantly better than he was paid by FIHE so there was no loss of wages on that account.

[81] His claim for immigration and travel costs would also fail. There was nothing established as incorrect about FIHE's response to Immigration New Zealand about his employment status. He had to change the nature of his application and that was his responsibility. There was also doubt that the visa issue was the reason for his children having to return to Thailand after FIHE's 7 October email to Immigration New Zealand. As Dr Pjongluck's 3 October email showed, in the extract set out earlier in this determination, plans were already made for children to return for family reasons.

Any recommendation to Institute about work practices?

[82] Dr Pjongluck's statements of problem asked for an audit and investigation of FIHE's immigration and employment practices and programmes as one part of resolving the employment relationship problem described in his application to the Authority. As noted at the Authority's 10 September case management conference, the jurisdiction and range of remedies available to the Authority did not go that wide. However, if Dr Pjongluck was found to have a personal grievance and FIHE's workplace conduct and practices were found to be a significant fact in that grievance, the Authority could make recommendations about action FIHE should take to prevent similar employment relationship problems occurring.¹³

[83] As Dr Pjongluck had not established the one grievance, concerning the Immigration New Zealand communication, that had been properly raised and pursued in his application, the recommendation section did not directly apply.

[84] However the following three points could be noted as arising out of the evidence that any employer could be expected to rectify in ongoing management of its employment relationships, its compliance with employment law and its observance of good faith obligations.

[85] Firstly, properly prepared employment agreements should be completed with employees. Avoiding employment rights and obligations by purporting to enter contracts for service, that is supposed independent contractor relationships, will not survive scrutiny under the s 6 reality test.

¹³ Employment Relations Act 2000, s 123(1)(ca).

[86] Secondly, advice is readily available to employers about the fair procedures required for managing performance and conduct issues and then, if necessary, taking disciplinary measures up to and including dismissal. Where there are failures to follow fair procedures and to make substantively reasonable decisions, the consequences of money and time can be substantial for a business if personal grievances are then properly pursued.

[87] Thirdly, where a representative has confirmed her or his authority to act for a worker, an employer must engage with that representative and provide all information that the worker could directly seek herself or himself. In FIHE's case Mrs Stevenson asserted Dr Pjongluck had breached supposed confidentiality obligations by talking to his representative and said she was considering "whether to take action over his confidentiality breach". It was a further instance of an unacceptable failure by FIHE to properly understand and comply with its obligations as an employer.

Costs

[88] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Dr Pjongluck may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Institute 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.

[89] 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.¹⁴

Robin Arthur
Member of the Employment Relations Authority

¹⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].