

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 453  
3061296

BETWEEN	CORY GATES Applicant
AND	DC CLADDING & RE-CLAD SOLUTIONS LIMITED First Respondent
AND	DEAN COOK Second Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Mathews, Advocate for the Applicant  
No appearance by Respondents

Investigation Meeting: On the papers

Information Received: 26 July 2019 from Applicant

Date of Determination: 01 August 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Gates said he was employed by either DC Cladding & Re-Clad Solutions Limited (DC Cladding) or Dean Cook personally. Mr Cook is the sole director and shareholder of DC Cladding.

[2] From the limited information currently before the Authority it appeared that Mr Gates was aware that he had been offered work with DC Cladding at the outset of the relationship, and that he accepted that offer of work.

[3] The Authority has therefore proceeded to determine this matter on the basis that it was more likely than not that Mr Gates entered into a contractual relationship to do work with DC Cladding, and not Mr Cook personally.

[4] Accordingly, DC Cladding has therefore been treated in this matter as the contracting entity, so it is that entity that has been determined by the Authority to have been the subject of Mr Gates' various employment related claims.

[5] Mr Gates claimed that his employer (whoever the Authority determined that to be):

- (a) Failed to provide him with a written employment agreement;
- (b) Should have a penalty imposed on it for not providing a written employment agreement;
- (c) Breached its good faith obligations to him by telling him DC Cladding was in liquidation to avoid paying Mr Gates his wages, when it was not;
- (d) Should have a penalty imposed on it for its breach of good faith;
- (e) Unjustifiably disadvantaged him in his employment by:
  - (i) Consistently failing to pay Mr Gates on time, or in full for the work he had done;
  - (ii) Making Mr Gates go to "*great lengths*" to get his wages. This allegedly involved Mr Gates having to contact and locate Mr Cook, engaged with him to get paid his wages shortfall. Mr Gates said he had to travel at his own expense to see Mr Cook in person in order to collect cash wages from him (Mr Cook) after Mr Gates' paydate had been missed or his wages had been shortpaid;
  - (iii) Making fabricated allegations and unfounded accusations against Mr Gates, as an excuse for not paying him for all of the hours he had worked.
  - (iv) Refusing to meet with Mr Gates to discuss the breakdown of the relationship between the parties and the wage arrears Mr Gates was owed.

- (f) Owed him wage arrears for;
  - (i) Not paying him for all of the hours he had worked; and
  - (ii) Not paying him any holiday pay when his employment ended; and
- (g) Unjustifiably constructively dismissed him, by failing to pay his wages, in full and on time, and not appropriately addressing those breaches after Mr Gates raised them as a serious issue.

[6] DC Cladding and Mr Cook have not responded to any of the claims Mr Gates has made against them.

### **No mediation**

[7] Mediation has not occurred.

[8] Mr Gates said that Mr Cook and DC Cladding “*spent several weeks avoiding Mediation Services when it was attempting to set mediation dates.*” When a mediation date was finally agreed DC Cladding, and in particular, Mr Cook did not attend.

[9] Instead DC Cladding and Mr Cook left Mr Gates and his advocate waiting at mediation. Mr Cook phoned Mediation Services after the scheduled mediation start time to say that he was running an hour late because of a flat tyre.

[10] Mr Gates and his advocate waited for Mr Cook for a further two hours, expecting him to attend mediation, even if he was later than expected. However Mr Cook failed to show up to mediation and did not answer calls from the mediator to find out where he was or if he intended to attend mediation that day.

### **No Appearance by Respondent**

[11] Although the Authority had given DC Cladding and Mr Cook more time to provide a response to Mr Gates’ claims, they did not avail themselves of these opportunities.

[12] Mr Cook’s mode of operating appeared to be to miss deadlines, then when the Authority followed up with him about the missed deadline he said he would take the necessary steps immediately. He then failed to do so.

[13] When the Authority continued to engage with Mr Cook to get information relevant to its investigation he made a variety of excuses for not doing what he had said he was going to do. He also failed to provide the requested proof of the explanations he had given for the delay.

[14] DC Cladding and Mr Cook failed to engage in the Authority's investigation in a constructive manner.

[15] Mr Gates' Statement of Problem was served on DC Cladding's registered office on 24 May 2019. It was signed for by "*Karen Cook*". It was brought to Mr Cook's attention because he has been in communication with the Authority about it.

[16] DC Cladding and Mr Cook did not file a Statement in Reply within fourteen days of service, as they were required to do. More than two months later, it has still failed to do so.

[17] The Authority contacted Mr Cook to find out if he and DC Cladding wanted to defend Mr Gates' claims. Mr Cook indicated that it did, so the Authority advised Mr Cook that he and DC Cladding had to apply for leave to file its Statement in Reply out of time.

[18] The Authority Officer explained to Mr Cook what he and DC Cladding had to do in order to defend Mr Gates' claims against it. That was followed up with an email from the Authority setting out what was required. Mr Cook emailed the Authority Officer who spoke with him on 12 June 2019 "*that he [Mr Cook] would be getting on to it first thing!*".

[19] That did not occur.

[20] On 12 June 2019 the Authority issued written directions to the parties, which (amongst other things) gave him and DC Cladding until 19 June to apply to the Authority for leave to file its Statement in Reply out of time. He and DC Cladding were also directed to provide certain information relevant to Mr Gates' claims against it.

[21] On 18 June 2019 the Authority again reminded Mr Cook that he and DC Cladding was still yet to file its application to file a Statement in Reply out of time. Mr Cook asked for leave on the basis filing a Statement in Reply on time "*must have slipped my mind*" and that "*my official statement in reply will be filed tomorrow*".

[22] On 20 June 2019 the Authority granted Mr Cook and DC Cladding leave to file its Statement of Reply out of time and it set a deadline of 5pm on 21 June 2019 for it to do so.

[23] No Statement in Reply was received. DC Cladding and Mr Cook have failed to comply with the Authority's directions regarding the provision of information relevant to the Authority's investigation.

[24] DC Cladding and Mr Cook have still not filed a Statement in Reply.

[25] On 24 June 2019 the Authority emailed the parties expressing concern that despite giving the respondents extra time to file a Statement in Reply they had not done so. The Authority noted that Mr Cook and DC Cladding had also failed to attend mediation and had failed to provide the documentation that the Authority had ordered them to produce.

[26] The Authority set a timetable for the exchange of affidavit evidence to enable this matter to progress to an 'on the papers' formal proof investigation.

[27] Mr Cook responded on 24 June 2019 claiming he had been involved in a car accident "*the other night*" and asking the Authority to ring him. He did not leave any contact details so he could be called back.

[28] The Authority replied to him on 24 June 2019 by seeking further information from Mr Cook, none of which was ever provided. He and DC Cladding were advised to take the Authority's investigation seriously. The Authority also confirmed that the matter was going to be determined in accordance with the timetable that had been notified to the parties.

[29] Mr Gates has complied with the Authority's timetable but Mr Cook and DC Cladding have not.

[30] Mr Gates filed an affidavit on 26 July 2019 in accordance with the Authority's timetable. No information has been provided by Mr Cook or DC Cladding, they did not file any of their own evidence and they failed to respond to Mr Gates' affidavit evidence.

[31] The Authority has therefore determined this matter based on the information that was provided to it.

## Issues

[32] The following issues are to be determined:

- (a) Does the Authority have jurisdiction to investigate Mr Gates' claims against DC Cladding?
- (b) If so, did DC Cladding fail to provide Mr Gates with a written employment agreement?
- (c) If so, should a penalty be imposed on it?
- (d) Is Mr Gates owed wage arrears?
- (e) Did DC Cladding breach its duty of good faith to Mr Gates?
- (f) If so, should a penalty be imposed on it?
- (g) Was Mr Gates unjustifiably disadvantaged in his employment?
- (h) If so, what if any remedies should he be awarded?
- (i) Was Mr Gates dismissed?
- (j) If so, was his dismissal justified?
- (k) If not, what if any remedies should he be awarded?
- (l) What if any costs should be awarded?

### **Does the Authority have jurisdiction to investigate Mr Gates' claims against DC Cladding?**

#### *Applicable law*

[33] The Authority only has jurisdiction to investigate claims that involve an employment relationship. Mr Gates' is therefore required to prove on the balance of probabilities that he and DC Cladding were in an employment relationship, as defined by the Employment Relations Act 2000 (the Act).

[34] Section 5 in the Act defines an employment relationship as any of the employment relationships specified in s 4(2) of the Act.

[35] Section 4(2) of the Act defines an employment relationship as (amongst other things) the relationship between an employer and "*an employee*" employed by the employer.

Section 4(2) of the Act does not include parties who are in an independent contractor relationship.

[36] Section 6 of the Act defines the meaning of “*employee*”. It includes any person employed by an employer to do any work for hire or reward under a contract for service.

[37] Section 6(2) of the Act requires the Authority, in determining whether or not a person is an employee, to determine “*the real nature of the relationship*” between the parties.

[38] When doing so, s 6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the parties involved, but it is not to treat as determinative any statement by the parties describing the nature of their relationship.

[39] The labelling of the relationship by the parties is therefore merely one of the factors to be considered within the overall factual matrix, so the parties’ intention is relevant but not decisive of the question of whether or not Mr Gates was an employee of DC Cladding.

[40] The control test, integration test and fundamental/economic reality test of the nature of the relationship are all relevant factors to be considered by the Authority along with other factual evidence.

[41] The Authority notes that its inquiry into the real nature of Mr Gates’ relationship with DC Cladding is one that is intensely factual.

#### *Offer of Work*

[42] Mr Cook made Mr Gates a verbal offer of work with DC Cladding during a personal meeting they had before Mr Gates started work. This offer was never documented.

[43] Mr Gates in his affidavit said that there was no discussion about him being an independent contractor either during the first meeting at which he was offered work or at any other time while he was working.

[44] Mr Gates stated that the first time that the phrase “*independent contractor*” came up was after he had finished working for DC Cladding, in response to his efforts to get Mr Cook to pay him his wages arrears for the work he had done. Mr Gates said that Mr Cook brought that up as an excuse to avoid him (Mr Gates) for the work he had done.

[45] The circumstances of the offer of work tended to suggest an employment relationship.

*Terms and conditions agreed by the parties*

[46] At the first meeting Mr Cook told Mr Gates that he would be paid by direct credit into his bank account on Thursdays. Mr Gates would be paid \$26 an hour for the hours worked but he would not be paid if he was not required to work, for example due to bad weather or if there was insufficient work to do.

[47] Mr Gates says that Mr Cook told him (Mr Gates) that he had to submit an invoice in order to be paid. Mr Cook apparently explained that as being the best way he had to be able to keep track of the various hours worked by everybody who was working for DC Cladding. He did not link the invoicing requirement to an independent contractor arrangement.

[48] Mr Gates was told that he would start work at 7:00 a.m. and he would finish work at 5:00 p.m. However Mr Gates advised the Authority that there were times that Mr Cook required him to work past 5:00 p.m, even when he had not wanted to.

*What do the relevant documents indicate?*

[49] There was no relevant documentation, other than the invoice Mr Gates was required to give Mr Cook each week before he would be paid. Although the Authority asked for a copy of the invoices, they were not provided.

[50] The use of invoices is a feature of an independent contractor arrangement, so it tends to indicate that the parties were not in an employment relationship.

*What did the parties intend?*

[51] There was no mutual intention regarding the status of the parties' relationship.

[52] Mr Gates appears to have assumed that he was an employee who was entering into an employment relationship. The use of invoices and Mr Cook's desire to avoid paying Mr Gates for any hours he did not actually work suggest that DC Cladding may have intended to enter into an independent contracting arrangement.

[53] Accordingly, there was no decisive evidence of any mutual intention regarding the type of relationship the parties had.

[54] Each party acted in accordance with the assumptions they had made about the status of their relationship.

[55] The Authority considers that the lack of mutual intention tended to support the existence of an employment relationship. The Act defines an employee as someone who is intending to work for a reward, which Mr Gates was obviously intending to do.

[56] If DC Cladding had wanted to create an independent contractor arrangement then the onus was on it to make that clear to Mr Gates by specifically discussing the status of the intended relationship and providing him with the documentation that was associated with an independent contractor relationship, such as a contract, so he could properly consider his options.

[57] The fact that Mr Gates never intended to be an independent contractor tends to support the existence of an employment relationship, in the absence of any evidence that showed he knew he was a contractor, and not an employee.

*How did the relationship operate in practise?*

[58] Mr Gates told the Authority that Mr Cook allocated him work by telling him when and where to go, what work to do, when to start work, when to finish work and whether he was required to work late or do additional work outside of his usual agreed hours of work. If the weather was bad, then it was Mr Cook who would tell Mr Gates not to come to work.

[59] It was also Mr Cook who identified which work sites Mr Gates was to be on and how long he was to do the work at each site.

[60] Mr Gates' evidence was that Mr Cook, on behalf of DC Cladding, was allocating the work to him and was monitoring the work that he did, so Mr Gates was merely following instructions regarding specific work that had to be undertaken.

[61] That was indicative of an employment relationship.

*Was Mr Gates in business on his own account?*

[62] Mr Gates said he was not in business on his own account.

[63] He had never operated his own business before and had only ever been an employee. Mr Gates did not have a business entity. He did not set up or own a company or other legal entity by which to operate his own business.

[64] Mr Gates did not have a commercial work vehicle of his own. He did not have business cards or an office. He did not have business tools or work items that he used to perform the work that he did for DC Cladding.

[65] This was indicative of an employment relationship.

#### *Taxation arrangements*

[66] The Authority was not provided with evidence about what if any tax had been deducted or paid on the amounts DC Cladding paid Mr Gates. Mr Gates said he had assumed that DC Cladding was deducting PAYE from his wages as required by law.

[67] There was no evidence to suggest that Mr Gates had structured his relationship with DC Cladding in a way that would have resulted in any sort of tax advantage or in him obtaining any other benefits that may be associated with self-employment.

[68] The fact that Mr Gates had not set up his affairs to enable him to obtain any tax advantages supports his evidence that he considered he was an employee and not someone who was in business on his own account.

#### *The control test*

[69] The control test looks at the degree of control that is exerted over the work and the manner in which it should be done. The greater extent to which an individual is regulated and supervised then the more likely they are to be considered an employee.

[70] Mr Gates said that Mr Cook exercised a high level of control over him in terms of allocating hours of work, the location of work and the type of work to be done. Mr Cook also approved Mr Gates' days and hours of work and he was the person who required Mr Gates to work outside of the agreed contractual hours of work.

[71] The degree of control that existed in this case was indicative of an employment relationship.

*The fundamental/economic reality test*

[72] The fundamental/economic reality test looks at whether a person performing services is in business on their own account.

[73] There was no evidence that Mr Gates was in business on his own account. He had no ability to profit from his own endeavours and he had not assumed any of the risks associated with someone who was engaged in business on their own account.

[74] Mr Gates expected to get paid for every hour that he worked, and he relied on the work that was allocated to him by DC Cladding in order to earn his wages.

[75] Mr Gates had no autonomy in terms of how or when or where he would do the work or even how many hours he could work. All of those factors were at DC Claddings sole discretion. Mr Gates was simply paid for the labour he did.

[76] The fundamental/economic test strongly suggested the existence of an employment relationship.

*Integration test*

[77] The integration test considers whether the work performed by Mr Gates was an integral part of DC Cladding's business and whether Mr Gates had effectively become part and parcel of DC Cladding's organisation.

[78] There was nothing to suggest that Mr Gates could or would be seen by outsiders as anything other than a DC Cladding employee. He was a Team Leader so was integrated into the DC Cladding business in terms of there not being any evidence that suggested or indicated that Mr Gates was operating distinct from DC Cladding in any way.

[79] The integration test was indicative of an employment relationship.

*Tools of trade*

[80] Mr Gates said that DC Cladding provided him with all the equipment necessary to carry out his duties. This involved providing all of the work tools that were required to undertake the work Mr Gates did for DC Cladding, which included the use of DC Cladding's work vehicle.

[81] This supported the existence of an employment relationship.

*Ability to sub-contract*

[82] Mr Gates has no ability to sub-contract the work that DC Cladding allocated to him. That was indicative of an employment relationship.

*Ability to work for others*

[83] Mr Gates made a full time commitment to DC Cladding. Mr Gates said he was required to work only for DC Cladding over the entire time that he was in a relationship with it, which meant he could not do work for anyone else.

[84] Mr Gates said he did not receive income from elsewhere and he did not engage in any other work activities while he was working for DC Cladding. That was indicative of an employment relationship.

*Industry practice*

[85] Mr Gates' evidence was that he didn't know anyone else in the industry who was working on an independent contractor arrangement. He also provided the Authority with an industry standard employment agreement, as an example of the sort of employment agreement someone in his position would normally expect to be given.

[86] The only evidence that was given regarding industry practice suggested there was more likely to have been an employment relationship than an independent contractor arrangement.

*Real nature of the relationship*

[87] After standing back and weighing all of the various factors, applicable legislation and well-established legal tests, the weight of the evidence supported the existence of an employment relationship.

[88] The Authority was therefore satisfied that Mr Gates had proven, on the balance of probabilities, that the real nature of the parties' relationship was more likely than not an employment relationship, as defined by the Act.

[89] Because Mr Gates has established that he was an employee in terms of the s 6(1)(a) meaning of employee in the Act, the Authority has jurisdiction to investigate his employment related claims against DC Cladding.

**Did DC Cladding fail to provide Mr Gates with a written employment agreement?**

[90] Because the parties were in an employment relationship, DC Cladding was legally required to provide Mr Gates with a written employment agreement that contained the specific information set out in s 65 of the Act. It failed to do so.

**Should a penalty be imposed?**

[91] A penalty should be imposed on DC Cladding for its breach of s 65 of the Act.

**Is Mr Gates owed wage arrears?**

[92] DC Cladding failed to provide any information that established it had paid Mr Gates correctly for all of the hours that he worked.

[93] Mr Gates gave uncontradicted evidence that he was owed wage arrears, so his claim succeeds. He is therefore invited to provide further evidence about the arrears he is claiming, in accordance with the timetable issued to the parties.

**Did DC Cladding breach its duty of good faith to Mr Gates?**

[94] DC Cladding breached good faith when it deliberately misled and deceived Mr Gates by telling him it was in liquidation, when it was not, in order to discourage him from pursuing his wage arrears claim against it.

**Should a penalty be imposed for the breach of good faith?**

[95] A penalty in accordance with s 4A of the Employment Relations Act 20000 (the Act) should be imposed on DC Cladding because its breach of good faith so serious that it must have been intended to undermine the parties' employment relationship, by seeking to deprive Mr Gates of the wages he was owed.

**Was Mr Gates unjustifiably disadvantaged in his employment?**

[96] Mr Gates described having to go to "*great lengths to simply get his full pay on most weeks*" from the second week of his employment until it ended. Mr Gates said he had still not

been paid any holiday pay. Mr Gates described the recurring pattern of having to send several messages and multiple requests to Mr Cook before DC Cladding would pay his wages.

[97] Mr Gates said that most weeks he would not be paid his full wages, so he would have to travel in his own time and at his own expense to Mr Cook to collect outstanding wages in cash from DC Cladding (paid to him by Mr Cook) some time after his pay was due.

[98] Mr Gates said this soured the relationship between him and Mr Cook who then fabricated unfounded accusations against Mr Gates as excuses for why he should not be paid. Mr Gates denied to the Authority the accusations Mr Cook had made against him, which were raised for the first time in response to Mr Gates' attempts to recover his wage arrears.

[99] These concerns were never formally addressed or pursued by Mr Cook while Mr Gates was employed and DC Cladding provided the Authority with no evidence to support them. DC Cladding also disadvantaged Mr Gates when Mr Cook refused to meet with him to discuss the breakdown in the relationship and/or payment of wage arrears.

[100] The Authority was concerned that Mr Cook's allegations appear to have been an improper attempt to avoid paying Mr Gates the wage arrears he was owed and/or were an attempt to intimidate him from pursuing his wage arrears claim.

[101] Mr Gates was obviously disadvantaged when DC Cladding failed to pay him for work he had done and/or failed to pay him in full each Thursday, as had been agreed by the parties at the outset of the relationship.

[102] DC Cladding offered no legitimate justification for not paying Mr Gates his wages on time or without deduction. DC Cladding was unable to justify the disadvantage Mr Gates suffered, in accordance with the statutory justification test in s 103A of the Act.

**What if any remedies should Mr Gates be awarded?**

[103] The Authority has insufficient information from which to assess remedies, so the parties will be provided with a timetable for that evidence to be filed.

**Was Mr Gates constructively dismissed?**

[104] DC Cladding's failure to pay Mr Gates in full, and on time, for the work he had done for it was a fundamental breach of duty that struck at the heart of the employment relationship.

[105] These ongoing breaches were so serious that it was reasonably foreseeable that Mr Gates would not continue to work in this sort of repeated and ongoing behaviour by his employer.

[106] Mr Gates also tried to address his employer's ongoing breaches while employed, but Mr Cook refused to meet with him (Mr Gates) to address the wage arrears or other issues that were related to breakdown of the employment relationship.

[107] Mr Gates' resignation, in response to DC Cladding's repeated and ongoing failure to pay him correctly, was a constructive dismissal.

**Was Mr Gates' dismissal justified?**

[108] Having established that Mr Gates was constructively dismissed, the onus passed to DC Cladding to justify his dismissal in accordance with the requirements set out in the s 103A(3) justification test in the Act.

[109] DC Cladding has been unable to discharge that onus.

[110] There was no good reason for Mr Gates' constructive dismissal. DC Cladding also failed to comply with its good faith obligations in s 4(1A) of the Act or with any of the four procedural fairness tests in s 103A(3) of the Act.

[111] Accordingly, the Authority determines that Mr Gates' dismissal was procedurally and substantively unjustified. Mr Gates' personal grievance claims for unjustified disadvantage and dismissal therefore succeed.

**What if any remedies should be awarded for his unjustified dismissal?**

[112] Evidence in support of remedies has been timetabled in the cover letter the Authority has sent the parties with this determination.

**What if any costs should be awarded?**

[113] Mr Gates as the successful party is entitled to an award of costs in his favour. Costs will be assessed in accordance with the Authority's usual notional daily tariff based approach to costs.

[114] The parties have been advised of a costs timetable and they have also been invited to identify any factors they say should result in adjustments being made to the notional daily tariff, which is currently \$4,500 for the first day of an investigation meeting.

**Outcome**

[115] The Authority makes the following findings:

- (a) DC Cladding was the entity that Mr Gates was engaged in a contractual relationship with, and not Mr Cook personally;
- (b) The real nature of the relationship that DC Cladding and Mr Gates were engaged in was more likely than no an employment relationship;
- (c) It has jurisdiction to investigate Mr Gates' claims;
- (d) DC Cladding breached s 65 of the Act because it failed to provide Mr Gates with a written employment agreement;
- (e) A penalty should be imposed on DC Cladding for its breach of s 65 of the Act;
- (f) Mr Gates is owed wage arrears. He is invited to provide further evidence to assist the Authority in assessing the amount he is owed;
- (g) DC Cladding breached its duty of good faith to Mr Gates;
- (h) A penalty is to be imposed on DC Cladding for its breach of good faith. The parties have been invited to provide further evidence/information relevant to the Authority's assessment of penalties;
- (i) DC Cladding unjustifiably disadvantaged Mr Gates in his employment;
- (j) Mr Gates has been invited to provide further evidence/information in support of his remedies claim for his disadvantage grievances;

- (k) DC Cladding constructively dismissed Mr Gates;
- (l) DC Cladding's constructive dismissal of Mr Gates was unjustified;
- (m) Mr Gates is entitled to remedies for his unjustified dismissal. He has been invited to provide further evidence in support of his remedies claim;
- (n) Mr Gates as the successful party is entitled to an award of costs in his favour. The parties have been invited to provide further information to the Authority to assist it in determining costs and disbursements.

**Rachel Larmer**  
**Member of the Employment Relations Authority**