

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 458  
3048372

BETWEEN MARK GUEST  
Applicant

A N D ANNEXURE SERVICES LIMITED  
First Respondent

TYRE RECYCLING SERVICES NEW  
ZEALAND LIMITED  
Second Respondent

TYRE SHREDDING 2016 LIMITED  
Third Respondent

JAMISON INVESTMENTS LIMITED  
Fourth Respondent

PETER BENDEN  
Fifth Respondent

MICHAEL LE ROY  
Sixth Respondent

MARLENE LE ROY  
Seventh Respondent

MELODIE CLARK  
Eighth Respondent

Member of Authority: David G Beck

Representatives: Christine Gordon, advocate for the Applicant  
Michael Le Roy and Peter Benden for the Respondents

Investigation Meeting: 8 September 2020 in Christchurch

Submissions Received: 25 September 2020 from the Applicant  
None from the Respondents

Date of Determination: 10 November 2020

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Mr Guest asserts that he was engaged by Michael Le Roy as a Truck Driver/Tyre Collector/Yard Person pursuant to an undated individual employment agreement that has his employer stated as 2016 Tyre Shredding Limited at around mid- August 2017, and that he was summarily dismissed on 16 October 2018.

[2] Mr Guest claims he was unjustifiably dismissed and seeks compensation, holiday pay due and lost wages. Mr Guest seeks a finding that all the respondents cited were his employer.

[3] Mr Le Roy contends that Mr Guest was engaged as a contractor by 2016 Tyre Shredding Services Limited (the first respondent that has now changed its name to Annexure Services Limited) and if that was not the case, Mr Guest was justifiably, summarily dismissed for assaulting Mr Le Roy on 28 September 2018.

## **The Authority Process**

[4] Despite not filing briefs of evidence and other associated documentation as directed, Mr Le Roy and Mr Benden participated in the investigation meeting as did Mr Guest (who did file a timely brief of evidence prior to the investigation meeting).

[5] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”) I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

## **Issues**

[6] The issues to be decided are:

- a) Was Mr Guest in an employment relationship with any of the cited respondents or was he a contractor?
- b) If Mr Guest is deemed to be an employee then:
  - (i) Who was the employer?
  - (ii) Was Mr Guest unjustifiably dismissed?
  - (iii) If there was an unjustified dismissal what remedies are appropriate?
  - (iv) Is holiday pay due and owing and in what amount?
- c) An assessment of the level of costs to be awarded to the successful party.

## **Was Mr Guest an employee or a contractor?**

[7] To determine whether Mr Guest was an employee or a contractor s 6 of the Act requires that the Authority examine the true nature of the relationship and assess all relevant factors, including applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*<sup>1</sup>. If I find Mr Guest is not an employee then I have no jurisdiction to determine his claims.

[8] The following matters from *Bryson* require my attention:

- (i) the intention of the parties;
- (ii) whether there was any written documentation setting out the terms of the relationship or 'label' attached to such;
- (iii) an examination of how the relationship operated in context including looking at issues of control and integration;
- (iv) whether overall, it could be reasonably established that Mr Guest was operating a business on his own account; and
- (v) industry practice defining contractual relationships.

[9] The test applied in context and my findings are discussed below.

### **Intention of the parties**

[10] Mr Guest recalls being approached by Mr Le Roy whilst he was working in the tyre bay of a service station and because of his experience in the industry being offered 'a job' with a set weekly wage. Mr Guest said he could not recall any talk of being deemed a contractor. Mr Guest says that the initial engagement was casual with no agreement being provided until after about four weeks.

[11] Mr Le Roy said that he had previously been engaged in employment disputes with employees and that his accountant had advised him that the only way to avoid a personal grievance was to engage the person as a contractor. He recalled that he engaged Mr Guest by calling him and asking "do you want a job". He said Mr Guest replaced an employee who had left. Mr Le Roy claimed an agreement was signed before employment commenced. Mr Le Roy made no mention of any discussion about Mr Guest being a contractor believing this was clearly recorded in the agreement he signed.

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<sup>1</sup> [2005] NZSC 34 (SC)

[12] Turning to the undated ‘agreement’ that both parties conceded they signed, Mr Le Roy said he sought no legal advice on its preparation. What he did was download a standard employment agreement from a Google search and then he went through it and changed every reference to “employee” to read “contractor”. The problem is that that is all he did so, outwardly it appears to be an employment agreement. It is unlikely that Mr Guest would have picked up the changes Mr Le Roy made as amongst key indicators:

- (i) The title page indicates: INDIVIDUAL EMPLOYMENT AGREEMENT.
- (ii) The agreement provides for Public holidays, sick leave and bereavement leave
- (iii) It contains an annual leave clause referencing the Holidays Act 2002.
- (iv) It has a redundancy definition clause and employment protection provision referencing the Employment Relations Amendment Act (No.2) 2004.
- (v) It contains the standard required (required by the Act) disputes/personal grievance resolution procedure clause.
- (vi) It makes Mr Guest the subject of health and safety legislative obligations.
- (vii) The designations at the signature page, read “employee” and “employer”.
- (viii) Remuneration is expressed as “wages”.
- (ix) A “Job Description” schedule has space for an IRD number (that Mr Guest provided) and Kiwi saver details.
- (x) The above mentioned schedule states “[W]ages paid into employees [sic] nominated bank account on each following Friday”.

[13] I find that there was no ‘meeting of the minds’ regarding an intention to create a contracting relationship. Mr Le Roy may have intended this to be the form of relationship but he failed to communicate this at the time of engagement and he cannot reasonably claim that the document he used unambiguously demonstrated his intention.

[14] Mr Guest displayed no knowledge or awareness of possibly entering a contracting relationship.

[15] The agreement signed was, for all intents and purposes, an individual employment agreement.

[16] I also observe that at the ending of the relationship Mr Le Roy composed a letter over Mr Benden’s name (but not signature), with a heading “EMPLOYMENT CONTRACT TERMINATION” and he used the phrase: “[A]s per Clause 15/1 of your employment with 2016 TYRE SHREDDING LIMITED your Contract is TERMINATED IMMEDIATELY as from 2pm Tuesday 16 October 2018”.

### **The control test**

[17] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.<sup>2</sup> The timing of each engagement and indeed allocation of work was under the control of Mr Le Roy - he simply directed Mr Guest and others, to undertake the work at scheduled times and places by providing a weekly schedule of tyre collection locations. Mr Guest had no control over when he undertook the work.

[18] Mr Guest did not have the choice to turn work down. In the agreement provided, a clause “OTHER WORK” prevented Mr Guest from engaging in any other business or employment in competition or conflict with his employer without their permission.

[19] I find Mr Le Roy exercised significant if not total control over the timing and allocation of work and where it was to be performed.

### **The Integration Test**

[20] This test requires a consideration of whether Mr Guest could be viewed as an integral part of Mr Le Roy’s business. Mr Guest indicated that he drove a truck belonging to who he considered his employer and in any interactions with customers he would be portraying himself as an employee. He recalled working with another truck driver who Mr Guest said Mr Le Roy had told him was an employee. I had no further evidence to contemplate on this point except Mr Le Roy indicating that when he recruited Mr Guest he needed him as another employee had resigned.

[21] Although not produced on request for various reasons, Mr Le Roy during the investigation provided what purported to be a wage time and holidays record.

[22] On limited information provided I conclude that Mr Guest was an integral part of the business Mr Le Roy conducted.

### **Fundamental test**

[23] The application of this test is a consideration of whether Mr Guest could reasonably be considered in business on his own account and thus assuming an element of risk as to his engagement with the respondents including profit and loss from any joint venture.

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<sup>2</sup> Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1<sup>st</sup> ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

[24] In this regard I found no evidence that Mr Guest ran a business on his own account – he was not GST registered, formed no company, owned no plant or equipment, did not contract with other entities and all he had to offer for hire was his driving expertise and labouring services.

[25] Mr Guest was paid a fixed weekly amount described as ‘wages’ in the agreement he signed and he indicated that during his working life, he had never been in business on his own account.

### **Taxation Issues**

[26] Mr Guest did not invoice for his services nor was there any evidence advanced that he was asked to do so. Mr Guest received payments on a regular basis from all of the respondents’ companies named in this determination.

[27] Despite being in possession of Mr Guest’s IRD details none of the respondents’ deducted PAYE on the amounts paid to Mr Guest. Mr Guest, shortly before his engagement was terminated was approached by an IRD investigator who advised that no PAYE deductions were being received and upon reconciling Mr Guest’s bank statements and his employment agreement it was ascertained Mr Guest was not liable for such as his gross payment stated was less than the nett amount paid - this gave the appearance that tax was being deducted.

[28] Upon being questioned Mr Le Roy openly confirmed that he was the subject of an ongoing IRD investigation and that he could provide no reason for PAYE not being deducted, claiming that his payroll was run by someone without his knowledge and that he had no idea why Mr Guest’s gross pay was X and his net pay was Y. I found Mr Le Roy’s evidence on this point wholly unconvincing.

[29] I can only conclude that money was received by Mr Guest for the services he undertook that was described as ‘wages’ but that PAYE was not deducted and the IRD are currently pursuing such with Mr Le Roy.

## **Industry Practice**

[30] I have nothing before me to determine industry practice and therefore do not consider this to be a relevant factor.

## **Overall finding: contractor or employee?**

[31] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances despite the paucity of evidence, I conclude that Mr Guest was an employee and that the Authority has jurisdiction to determine his personal grievance claims.

## **Who was Mr Guest's employer ?**

[32] Mr Guest's amended statement of problem somewhat ambitiously, sought that "all the named Respondents are the employer of the Applicant" and then proceeded to ask for a finding:

.... that Tyre Shredding 2016 Limited is a company set up with the intention of evading the legal responsibility of the person, if the courts were to pierce the corporate veil to expose that person to personal liability.

[33] Further in submissions Ms Gordon was unclear on what was being asked of the Authority as alternatively she asked for the 'corporate veil' to be examined and then alluded to Tyre Shredding 2016 Limited (a cited respondent) being allegedly used as a vehicle to transfer assets from Annexure Services Limited (another cited respondent if Mr Guest's claim succeeded).

[34] What was made clear through submissions is that Mr Le Roy and to a lesser extent Mr Benden, were involved in all four of the cited respondent companies.

## **The trail**

[35] Despite the above, the first step is to examine what entity Mr Guest contracted with. That according to the agreement headed "individual employment agreement", is a company named "2016 Tyre Shredding Limited" ("2016 TSL").

[36] 2016 TSL was incorporated on 16 June 2016 with the sole director identified as Peter Benden and this entity continued in existence during the whole period of Mr Guest's employment period. Mr Le Roy prepared and signed the aforementioned employment agreement but in what capacity is not stated.

[37] Shortly after the engagement of Mr Guest in February 2018, Mr Le Roy was declared bankrupt for the second time and unable to operate as a company director or be involved in the management of any company.

[38] Mr Guest indicated that Mr Le Roy told him that the business would just “roll on” with Mr Benden being a ‘silent’ partner. In addition, a company that Mr Le Roy was also involved with through another member of his household being a director (Jamison Investments Limited) was placed in receivership in August 2018.

[39] For the period August 2017 to February 2018 Jamison Investments was remunerating Mr Guest. From February 2018 to September 2018 Mr Guest was remunerated by a Tyre Recycling 2016 (a company registered with Mr Le Roy’s young step-daughter as director) and from September 2018 to October 2016 Tyre Shredding remunerated Mr Guest.

[40] It is clear from evidence including a 2018 decision of the Environment Court,<sup>3</sup> and an interim injunction granted by the High Court against Mr Le Roy and his associated companies<sup>4</sup>, that Mr Le Roy is/was the guiding hand in all entities despite his latter status as a bankrupt.

[41] After Mr Guest was dismissed, 2016 TSL on 30 November 2018 changed its name to Annexure Services Limited. Mr Le Roy, who is currently still an undischarged bankrupt, at the hearing also claimed to be representing a trust (Dorset Trustee Services NO 2 Limited) that is a 100% shareholder of Annexure Services Limited.

### **A sham**

[42] Given the background and centrality of Mr Le Roy’s involvement and operation of the ‘business’ an approach open to the Authority that I intend to use is in accord with Judge Perkins’ decision of *Bennett v Michaels*. Judge Perkins, whilst reviewing the law relating to the doctrine of ‘piercing the corporate veil’ and commenting that such an approach is rare or not available in most circumstances, noted that in certain circumstances where it can be established that an individual is creating and using corporate entities as a sham to avoid

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<sup>3</sup> *Canterbury Regional Council v Michael Benny Le Roy, Jamison Investment Limited, Tyre Recycling Services New Zealand Limited, 2016 Tyre Shredding Limited* Decision No. [2018] NZEnvC 53.

<sup>4</sup> *Tyre Collection Services Limited v Michael Benny Le Roy, Jamison Investments Limited, Tyre Recycling Services New Zealand Limited* [2016] NZHC 403.

responsibility and divert income for personal purposes, then lifting the corporate veil is an apt approach.<sup>5</sup>

[43] Here, it is clear from evidence that Mr Le Roy approached Mr Guest and engaged him personally before the parties executed the disputed agreement, then despite being unable to operate as a director or being involved in the management of a company, Mr Le Roy continued to run a tyre recycling business and continued to instruct Mr Guest as to tasks he should undertake on a day to day basis.

[44] Mr Le Roy was the only contact Mr Guest had with his ‘employer’ and when he was dismissed the process; such as it was, was undertaken solely at the instigation of Mr Le Roy.

[45] Mr Le Roy advanced no evidence to suggest he was not personally the ultimate recipient of income derived from the tyre shredding operation that he was running.

#### **What caused the employment relationship problem?**

[46] Mr Guest recalls being engaged around mid - August 2017 to work as a truck driver and tyre collector on a set payment of \$1360 gross per week. He received no pay slips but he produced bank account details of regular weekly wage amounts commencing with a payment of 24 August 2017 of \$1066.10 that increased to \$1020 in April 2018. I find Mr Guest reasonably assumed that the regular payment was his net wage with tax deducted.

[47] Mr Guest recalled Mr Le Roy advising him around February 2018 that he had been declared bankrupt but that Mr Benden would operate as a ‘silent’ partner in the business. Mr Guest says that he never met Mr Benden at any point during his employment (Mr Benden concurred with this) and all dealings continued through Mr Le Roy.

[48] Around September 2018, Mr Guest said that the Inland Revenue Department (“IRD”) approached him indicating that they had received no PAYE payments from him since 2017. Mr Guest says he discussed this with Mr Le Roy and was told not to worry he knew the “woman at IRD and she was trying to ruin him”.

[49] Mr Guest recalled a further visit from IRD and being advised that he would not be responsible for the unpaid tax. Mr Le Roy proffered no coherent explanation for not paying PAYE for Mr Guest other than he was still under investigation by IRD and had been for two

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<sup>5</sup> *Bennett v Michaels* [2016] ERNZ 247 at [35].

years. Without going into this further as I was provided with no documentation from either party, I will assume IRD has viewed the employment agreement and is seeking to recover alleged unpaid PAYE contributions owed from Mr Le Roy or entities he is associated with.

[50] Mr Guest, again without documentation but not contested by Mr Le Roy, described being approached by Environment Canterbury (ECAN) expressing concerns that Mr Le Roy was understating the number of tyres he was handling, altering tallies of tyres collected and using Mr Guest's signature.

[51] Mr Guest claimed that he took no annual leave during his entire employment period. Mr Le Roy disputed this providing at the investigation meeting a typed list of holidays taken that amounted to 26 days paid as holidays.

#### *28 September meeting*

[52] Matters came to a head on 28 September at a morning staff meeting when Mr Guest says he was admonished by Mr Le Roy about his level of productivity and needing to shift more tyres and they then entered, on Mr Guest's recollection, a heated 'nose to nose' argument that Mr Guest said Mr Le Roy responded by raising the ECAN and IRD issues – Mr Guest claimed there was no body contact but afterwards he was sent home for the day.

[53] Mr Le Roy by contrast, claimed during the investigation meeting that Mr Guest had 'head butted' during the altercation - breaking his nose. This injury was first raised during the investigation meeting; it was not detailed in the statement in reply or a further response to an Authority Notice of Direction that was filed by Mr Le Roy on 24 July 2020.

[54] No evidence was led by any witnesses to the incident and on being pressed on whether he sought medical assistance, Mr Le Roy claimed that he had extensive first aid experience and simply manipulated his nose back into place.

#### *The dismissal*

[55] After the Friday 28 September incident, Mr Guest returned to work the following Monday and he said nothing further was said and he just continued working as normal.

[56] However, on 16 October, whilst he was unloading a truck Mr Guest was approached by Mr Le Roy who asked for the vehicle keys as he said he had lost his and wanted to cut a new set – Mr Guest gave him the keys. Then that evening, by a text of 7:07 pm, Mr Le Roy indicated that he had dropped off a letter from Peter Benden to Mr Guest’s daughter and that “it is self explanatory read it carefully thank you for your service”.

[57] The aforementioned letter over Mr Benden’s name as director (but not signed) headed “EMPLOYMENT CONTRACT TERMINATION”, indicated Mr Guest’s employment with 2016 Tyre Shredding Limited was terminated immediately due to:

1. SERIOUS AND SUSTAINED BREACH OF BUSINESS CONFIDENTIALITY
2. Continually FALSIFYING DOCUMENTATION on a daily basis
3. Assaulting a Fellow worker in the workplace

[58] The letter concluded with a suggestion that Mr Guest was now trespassed from three addresses.

[59] A robust text exchange between Mr Guest’s partner and Mr Le Roy then ensued that concluded with Mr Le Roy suggesting that the police had already been involved and “... do you want a shitfight well then you’ll get it from benden like I said he’s one prick I wouldn’t piss with I’m not going to text anymore”.

### **Was the dismissal justified?**

[60] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[61] Section 103A details factors that the Authority must objectively measure an employer’s actions against before concluding whether the employer, in context, acted in a fair and reasonable manner, these summarised are:

- a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;

- b) did the employer raised the issues of concern with the employee prior to deciding to dismiss;
- c) was the employee afforded a reasonable opportunity to respond to identified concerns; and
- d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- e) any other factor the Authority regards appropriate.

### **Applying factors identified by the Act**

[62] I find on the facts, that Mr Le Roy as the ‘guiding hand’ for the respondents gave scant attention to all of the above factors.

[63] Mr Le Roy in summary: did not identify specific concerns or allegations or put them to Mr Guest for consideration, he conducted no investigation, held no disciplinary meeting and he did not allow Mr Guest any opportunity to get advice or indeed to provide an explanation of any mitigating factors prior to issuing the decision to summarily dismiss him. Further, Mr Le Roy as the undisclosed decision-maker was essentially ruling on an incident that he had been involved in.

[64] Whilst the above factors are commonly referred to as procedural, I can find under s 103A(5) of the Act <sup>6</sup> that a dismissal that would otherwise be unjustified in a procedural sense had defects in process that were minor or inconsequential and they did not result in the employee being treated unfairly – this is clearly not one of those circumstances, Mr Guest was treated shabbily and his services were dispensed with in brutal and summary manner.

[65] I also observe that on a substantive basis, that if I was convinced that Mr Guest had assaulted Mr Le Roy (which on the evidence was not established) on 28 September 2018, he was inexplicably not stood down or suspended and was allowed to continue working until 16 October 2018 blissfully unaware of being under any investigation or disciplinary process. Whilst not condoning such behaviour, if it occurred, this could be viewed as Mr Le Roy continuing to affirm the employment as ongoing. Mr Le Roy failed to convince me of any plausible explanation for this delay. Likewise, the dismissal letter refers to Mr Guest allegedly

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<sup>6</sup> Section 103A (5) Employment Relations Act 2000 provides that: The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

falsifying documentation on a daily basis and nothing was done about bringing this to his attention.

[66] Mr Le Roy also claimed during the investigation meeting to have viewed evidence of Mr Guest taking money from customers and not remitting it to him but also did nothing about this in the interim and failed to specify this in the dismissal letter as a reason for enacting such.

[67] I note ‘for the record’ that Mr Benden gave no permission to have his name used on the dismissal letter and was not made aware of its content.

### **Finding**

[68] I find in all of the circumstances that Mr Guest was unjustifiably dismissed on both substantive and procedural grounds and that he is entitled to be compensated for such.

### **Holiday pay claim**

#### *Obligation*

[69] Mr Guest claimed 20 days unpaid holiday pay owing for the period 21 August 2017 to 16 October 2018 in the amount of \$7,868.

[70] Section 81 of the Holidays Act 2003 (“HA”) requires that an employer must keep an accessible and accurate, holidays and leave record in a prescribed format and s 82 HA provides an obligation that upon request, an employer should provide an employee with access to the holiday and leave record “as soon as practicable”.

[71] The document first provided at the investigation meeting that purported to be an accurate record clearly had the appearance of being concocted.

[72] I find both sections of the HA were not complied with.

*What is the approach if records do not exist or are incomplete ?*

[73] The Employment Court in *Shane Hatcher v Crowley Civil Limited*<sup>7</sup> states that the Authority may in some circumstances find that a failure to keep a holiday and leave record, or

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<sup>7</sup> *Shane Hatcher v Burgess Crowley Civil Limited* [2019] NZEmpC 117.

provide access to one, has prevented an employee from bringing an accurate claim. If such a finding is made then s 83(4) of the HA provides that the Authority may accept, in the absence of evidence to the contrary, statements made by the employee about holiday pay or leave actually paid or taken by the employee.

[74] It was noted in *Hatcher* that it remains open to the employer to submit evidence that would counter the statement made by the employee. Further, the word “may” in s 83(4) of the HA means that it remains open to the Authority not to accept the employee's statements but something more than a mere concern about imperfections would be required. An example was given where the Authority or Court may find the employee's statements are simply not credible. However, the overall purpose of s 83 HA is to shift the burden of proving a holiday pay arrears claim from the employee to the employer where no accurate records are kept, disclosed, or produced to the Authority.

#### Finding

[75] I find that given the paucity of information provided by Mr Le Roy and the belief that he held that Mr Guest was a contractor that it is more likely than not that Mr Guest was not, as he says, provided with paid time off for holidays. I find Mr Guest's claim proven in the absence of compelling evidence to the contrary.

#### **Consideration of penalty claims**

[76] I decline to award penalties against the respondents for failing to keep a holidays and leave record under s 83 HA as in the circumstances, howsoever misguided, Mr Le Roy appeared to wrongly, and arguably risibly, believe that Mr Guest was a contractor. Likewise, the claim for a penalty for the respondents' failure to produce records also fails on the same basis. In not awarding penalties I do not in any way condone the ‘cavalier’ attitude Mr Le Roy displayed to the investigation proceedings and his employer responsibilities but hope that my overall findings may give him pause to reflect upon his future approach.

## **Remedies**

### **Lost wages**

[77] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Guest should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[78] Here I find Mr Guest's lost remuneration was attributed to the personal grievance. Mr Guest gave evidence that he secured alternative employment on 21 November 2018 and he claimed thirteen weeks' lost remuneration at a total of \$7,868.

[79] In view of the unjustified dismissal finding Mr Guest is entitled to lost wages claimed that I fix at \$7868 net.

### **Compensation for hurt and Humiliation**

[80] Mr Guest gave compelling evidence of the significant impact of the summary dismissal (without any outstanding holiday pay being paid) and the uncertainty it created at a difficult time to find immediate alternative employment. This necessitated that he borrowed money from his step-son that he found a humiliating experience on top of his inability to provide for his family and foster daughter.

[81] Mr Guest described a strain on his relationship with his partner and having to go to his GP and be prescribed anti-depressant medication (a GP certificate evidences this). Mr Guest described his mood picking up when he secured alternative employment but being anxious about threats made by Mr Le Roy in referencing what Mr Bendon could do if crossed.

### *Finding*

Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and considering the claim made in submissions, I consider Mr Guest's evidence warrants compensation of \$18,000 under s 123(1)(c)(i) of the Act.<sup>8</sup>

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<sup>8</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

## Contribution

[82] Section 124 of the Act states that I must consider the extent to what, if any, Mr Guest's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>9</sup>.

[83] Mr Guest conceded during the investigation that he initiated the negative exchange that led to his dismissal. To what extent that aggression escalated was unclear beyond Mr Guest conceding that he had an aggressive argument with Mr Le Roy and went 'toe to toe' with him. Against this, I have not found Mr Le Roy's recollection of the confrontation to be convincingly as bad as he suggests (an actual assault) and therefore can only conclude that Mr Guest was angry, was verbally aggressive and he invaded Mr Le Roy's personal space. I did hear evidence that Mr Le Roy responded in an uncompromising manner and that he was uncomplimentary about Mr Guest in front of others.

[84] Mr Le Roy also struck me as a pugnacious character not unused to provoking people by his manner of discourse as evidenced in the reports of previous litigation he has been involved in.

[85] Nevertheless, Mr Guest reacted aggressively and was likely verbally abusive which is not to be condoned and as such it falls within the category of blameworthy reactive behaviour.

[86] Overall, I find Mr Guest did contribute to the situation giving rise to the personal grievance but I have balanced this up with my finding that his later dismissal was procedurally deficient and in context his former employer did not consistently display 'model' behaviour.

[87] Mr Guest cannot be blamed for the deficiencies in process that robbed him of any opportunity to respond to the issues that led to his dismissal. The decision to dismiss was poorly communicated and the alleged reasons for such were not dealt with promptly.

[88] On balance, I find that the aggressive or reactive behaviour Mr Guest displayed to be in the lower range of contributory conduct and I find a 10% reduction in Mr Guest's remedies (compensation and lost wages) is warranted.

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<sup>9</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## **Outcome**

[89] **I have found that:**

- a. Michael Le Roy was Michael Guest's employer and is personally liable for the remedies detailed below.**
- b. Mark Guest was unjustifiably dismissed and disadvantaged by the manner in which his employment with Michael Le Roy was terminated.**
- c. Michael Le Roy failed to adhere to good faith obligations in effecting the dismissal.**
- d. Michael Le Roy must pay Mark Guest:**
  - (i) \$7,082 net lost wages;**
  - (ii) \$6,948.27 gross unpaid holiday pay;**
  - (iii) \$16,200 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.**

## **Costs**

[90] Costs are at the discretion of the Authority and here Mr Guest was successful in his claim of unjustified dismissal and has obtained significant compensatory remedies in an investigation meeting that took just under a day with timetabled legal submissions thereafter. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs. If no agreement is achieved, Mr Guest has fourteen days following the date of this determination to make a written submission on costs and Michael Le Roy has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck  
Member of the Employment Relations Authority