

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 80
3032271

BETWEEN	JACOB HODGSON Applicant
AND	RURAL NETWORKS LIMITED First Respondent
AND	GREENFIELDS INTERNET LIMITED Second Respondent
AND	TONY REIMANN Third Respondent
AND	WARREN HURST Fourth Respondent

Member of Authority: Robin Arthur

Representatives: Frances Joychild QC, counsel for the Applicant
Douglas Erickson, counsel for the first, second and
third Respondents
Fourth Respondent in person

Investigation Meeting: 26 and 27 September 2019

Determination: 21 February 2020

DETERMINATION OF THE AUTHORITY

- A. Jacob Hodgson was an employee solely of Greenfields Internet Limited (GIL), not jointly with Rural Networks Limited or, in their personal capacities, Tony Reimann or Warren Hurst.**
- B. His employment by GIL ended by constructive dismissal.**

- C. In settlement of his personal grievance for unjustified dismissal GIL must pay Mr Hodgson the following sums within 28 days of the date of this determination:**
- (i) \$17,863 in reimbursement of wages lost as a result of his grievance; and**
 - (ii) \$20,000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- D. GIL also owes Mr Hodgson arrears for wages and other money payable for his employment. The arrears GIL must pay him within 28 days of the date of this determination are:**
- (i) \$83,320 as wages;**
 - (ii) \$6,665.60 as holiday pay;**
 - (iii) \$1,353 as KiwiSaver contributions;**
 - (iv) \$ 6,141.20 as reimbursement for expenses; and**
 - (v) interest on those amounts to be calculated from 2 March 2018 until the day payment is made.**
- E. Within 28 days of the date of this determination GIL must also pay to the Authority a penalty of \$6,000 for a breach of the Holidays Act 2003.**
- F. Mr Hodgson’s claim for further penalties against Mr Reimann and Mr Hurst for aiding and abetting breaches of his terms of employment by failing to pay his holiday pay are dismissed. The claim is barred by s 76(1A) of the Holidays Act 2003.**
- G. Failure to pay Mr Hodgson his salary and holiday pay were breaches of employment standards. Mr Reimann, as a director of GIL, and Mr Hurst, as a person exercising significant influence over the management of GIL, were each “a person involved in the breach” as defined in s 142W of the Employment Relations Act 2000.**
- H. Costs are reserved.**

Employment Relationship Problem

[1] Jacob Hodgson applied to the Authority for orders concerning his employment in an internet services business from early 2016 until February 2018. He said he was not paid wages due to him over a period of more than two years and his eventual resignation from the job, because of this and other breaches of duties owed to him by his employer, amounted to a constructive dismissal.

[2] Mr Hodgson claimed that how he came to be employed, and the work he did, meant that his employer, in effect, comprised two companies and two individuals: Greenfields Internet Limited (GIL); Rural Networks Limited (RNL); Tony Reimann, the sole director of GIL and RNL; and Warren Hurst, who used the title of Network Development Manager for GIL and RNL.

[3] Mr Hodgson sought orders for wage arrears, including unpaid holiday pay and KiwiSaver contributions, for remedies for his personal grievance for constructive dismissal and for penalties to be imposed on GIL, RNL, Mr Reimann and Mr Hurst.

[4] GIL, RNL and Mr Reimann accepted Mr Hodgson was an employee of GIL but denied he was employed by any of the other respondents. They accepted he was entitled to pay for the time he worked for GIL. However they denied his remuneration and hours of work had been agreed so considered the Authority should calculate any arrears due on a *quantum meruit* basis, that is an assessment of the reasonable value of, or reasonable remuneration for, the work Mr Hodgson did.

[5] Mr Hurst made no formal reply to Mr Hodgson's claims.

The Authority's investigation

[6] This matter had a somewhat complicated procedural history. Mr Hodgson's initial statement of problem, lodged in July 2018, was the subject of an Authority investigation meeting in March 2019. That meeting adjourned while the parties' representatives explored the prospects of resolving by agreement the question of who employed Mr Hodgson. This resulted in a joint memorandum identifying GIL as his sole employer.

[7] Plans were then made for the Authority's investigation to continue in June 2019. Meanwhile GIL also lodged, on 29 April 2019, its own application to the Authority

alleging Mr Hodgson had committed some post-employment breaches of confidentiality obligations. In reply Mr Hodgson, who was by then assisted by present counsel and not his earlier representative, denied those allegations and opposed GIL's request that its later application being investigated jointly with his much earlier application. Mr Hodgson also resiled from his earlier concession that GIL was his sole employer.

[8] The matter was then assigned to me to continue the Authority's investigation. I declined GIL's request that its later application be jointly investigated with Mr Hodgson's earlier application. Arrangements were made for Mr Hodgson to lodge an amended statement of problem, to clarify aspects of his claims, and for the investigation to proceed. GIL, RNL and Mr Reimann, represented by counsel, lodged an amended statement in reply.

[9] Mr Hurst did not lodge a statement in reply. In response to a witness summons issued at the Authority's own volition Mr Hurst did attend the first day of the two-day investigation meeting.

[10] Other witnesses, who had each provided a written witness statement and gave further oral evidence by answering questions, were Mr Hodgson, his mother Rosalie Hodgson, his father Donald Hodgson, Mr Reimann and Janet Nicolson.

[11] Ms Nicholson is a director of Rural Networks South Island Limited (RNSIL), a company that had a business relationship with RNL for the purpose of providing services to RNSIL clients in Central Otago. GIL and RNL have been involved in litigation with RNSIL about their respective business obligations.¹ Ms Nicholson attended the Authority investigation meeting by FaceTime audio visual link from Dunedin. Her evidence related to work Mr Hodgson had done for RNSIL in the South Island, on behalf of RNL, and arrangements she made to pay Mr Hodgson directly for some of that work. She and her husband, fellow RNSIL director Brent Nicholson, made that arrangement after finding out Mr Hodgson had not been paid for the work he had done.

¹ See *Greenfields Internet Limited & Rural Networks Limited v Rural Networks South Island Limited & Central Lakes Internet Company Limited* [2019] NZHC 45, [2019] NZHC 465, [2019] NZHC 504, and [2019] NZHC 645.

[12] At the time of the Authority's investigation meeting GIL had been removed from the Companies Office register as it had not provided an annual report. Mr Reimann undertook to take steps to have the company restored to the register. Subsequent communication to the Authority, through counsel, indicated this had proven to be more complicated than expected. This was said to be because the parent company of GIL, Alliant Limited, had also been removed from the register for the same reason. Mr Reimann was also a director of that parent company. All shares of Alliant Limited had, in turn, been held by ACL Nominees (No 8) Limited, a trust company ultimately held by Anderson Creagh Lai Limited. The latter company is in business as a commercial law firm.

[13] By December 2019 GIL's status on the Companies Office register had not changed. Counsel were asked to comment on the proposition that issuing the Authority's determination was not dependent on the Companies Office reinstating GIL to its register. Rather, reinstatement (or failure to reinstate) would only be relevant to any question of enforcement of any remedies awarded. Both counsel advised they agreed with this view and the Authority could proceed to issue its determination. A check of the Companies Office register on the date of issue of this determination showed GIL had not yet been reinstated on the register.

[14] 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. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.²

The issues

[15] The issues for determination were:

- (i) Who was Mr Hodgson's employer: was it solely GIL or also RNL and/or Mr Reimann and/or Mr Hurst?
- (ii) Were there any breaches of duty owed to Mr Hodgson in the employment relationship (whether by GIL only or by others as well) and, if so, did that cause his resignation, thereby amounting to a constructive dismissal?

² Employment Relations Act 2000, s 174C(4).

- (iii) If Mr Hodgson's employment ended by constructive dismissal, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation for humiliation, loss of dignity and injury to his feelings?
- (iv) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Hodgson that contributed to the situation giving rise to his grievance?
- (v) Should whoever was found to be Mr Hodgson's employer be ordered to pay wage arrears to him (for wages, holiday pay and KiwiSaver contributions not paid to him)? If so, of what amount, and with interest?
- (vi) Is whoever was found to be Mr Hodgson's employer liable to a penalty for failure to pay holiday pay? If so, of what amount?
- (vii) Depending on the findings regarding the identity of the employer, were Mr Reimann and Mr Hurst, individually or both liable to penalties for aiding and abetting failure to pay holiday pay to Mr Hodgson?
- (viii) Were Mr Hurst and Mr Riemann persons involved in a breach of employment standards, as defined in section 142W of the Act?
- (ix) Should any party contribute to the costs of representation of other parties?

Who was Mr Hodgson's employer?

Formation of the employment relationship

[16] Although GIL accepted it had an employment relationship with Mr Hodgson, some further examination of how this relationship was formed was needed to determine whether this relationship extended to or included other parties and what obligations, including the level of pay, arose from it.

[17] In 2015 Mr Hodgson, then aged 16, was a Year 12 student attending high school in Cambridge. He was interested in technology and computers. His older sister was flatting with Mr Hurst in Auckland. Through her, Mr Hodgson found out Mr Hurst was involved with a newly-established telecommunications company. His sister arranged for the two to meet. They made arrangements for Mr Hodgson to take part in two weeks' work experience with Mr Hurst in the mid-year school holidays. Mr Hodgson said Mr Hurst talked to him in October 2015 about ongoing work with the business. Around this time, Mr Hodgson's father, Donald Hodgson, also talked with Mr Hurst

about his son's employment prospects. Mr Hodgson was weighing up whether to leave school to work in the business or to return to school in 2016 to do NCEA Level 3 studies.

[18] In December 2015, during the school holidays, Mr Hodgson worked with Mr Hurst. He said Mr Hurst and Mr Reimann offered him full time, ongoing employment. He said this offer was made during lunch with the two men on 13 January 2016. On that day he sent a text resigning from a part-time job he had at his school cafeteria. His text said he was not returning to school for the 2016 year. He said this text supported his evidence that he had been offered and accepted a full-time job with the business. Mr Hurst and Mr Reimann denied any such job offer was made.

[19] However it was not necessary to resolve this conflicting evidence about what was said on that particular day because a later email from Mr Hurst provided better and more reliable evidence about the basis on which Mr Hodgson was engaged in ongoing work for the business.

[20] Mr Hodgson had continued to work with Mr Hurst during the summer months. In February 2016, with the school year about to begin, Mr Hodgson and his father pressed Mr Hurst to confirm the basis of his employment. Mr Hurst responded with the following email, dated 23 February 2016:

Subject: Terms of having you on board

Hi Jacob,

In lieu of a formal offer document which will follow, the basic terms of having you working for Greenfields are as follows:

1/ For December 2015 we will pay you \$1000. This will be paid within the next 2 weeks.

2/ From January 1 2016, you will be employed as a Trainee Field Engineer. A full list of tasks and obligations will be in the final offer document.

3/ You will be salaried at \$32,000 for the first 9 months and then you will receive automatic salary increases of \$2000 per annum at 9 monthly increments. You will receive 4 weeks annual leave and 1 week sick leave.

4/ Salary will be paid monthly in arrears on the 10th of the month or the next business day where the 10th falls on a weekend or a public holiday.

5/ At our cost, we will put you through part time tuition in 2016 in a course that is a precursor to a Bachelors degree in Engineering, Technology and

Communications. Arrangements for further studies in 2017 and beyond will be negotiated in the second half of 2016 and each subsequent year.

This forms the basic framework. A letter of offer and formal contract is to follow.

As you are staying with Bridget and I, we will have to charge you a reasonable board rate which is yet to be established and you will pay this to Bridget.

Regards
Warren

Warren Hurst
Network Development Manager
Greenfields Limited
www.greenfields.net.nz

[21] The reference in Mr Hurst's email sign off to Greenfields Limited was incorrect. There is a company registered with that name but it had no connection with Mr Hurst, Mr Reimann or GIL. GIL submitted that the word "Internet" was omitted by error from the company name Mr Hurst used in his email sign off. It said this should have referred to GIL. The accompanying website address connects to a website promoting GIL's services.

[22] The reference in Mr Hurst's email to "a reasonable board rate" was because Mr Hodgson lived with Mr Hurst in Auckland over the two year period he worked for the business. While Mr Hurst, and his wife until they separated in May 2016, may have incurred costs in providing board to Mr Hodgson, that was not a matter within the scope of the Authority's investigation of matters arising from the employment relationship. Those arrangements were a private matter between Mr Hurst, Mrs Hurst and Mr Hodgson. If there was any failure or shortfall in payment for board that was not, in this case, a matter for resolution in the employment jurisdiction.

[23] What Mr Hurst's 23 February 2016 email did establish unequivocally was that Mr Hodgson was offered clear and certain terms about the basis on which he was to work for "Greenfields" as a Trainee Field Engineer. Those terms were in effect from 1 January 2016.

[24] In his evidence Mr Reimann said he had not, as director of GIL, authorised Mr Hurst to offer Mr Hodgson employment. GIL's closing submissions said Mr Hurst had no actual authority to enter an employment relationship with Mr Hodgson on behalf of GIL but conceded Mr Hurst had the apparent or ostensible authority to do so. It accepted this was so because Mr Hurst had the title of Network Development Manager,

used a GIL email address, had authority to make internet payments on GIL's behalf and, according to Mr Reimann, was left to his own devices in running the company.

[25] Mr Hodgson's subsequent and ongoing performance of work for the business showed he had accepted and relied on the offer of employment made to him in that email. The reference to a "formal offer document" and a "formal contract" to follow made no difference to the essential terms offered by Mr Hurst and accepted by Mr Hodgson. By dint of his performance of the offered role as a "trainee field engineer", Mr Hodgson's employment had become ongoing and salaried on the basis set out in Mr Hurst's email.

Mr Hodgson's work

[26] GIL operated as an internet service provider. RNL was in the business of installing towers to broadcast wireless broadband to rural properties. The towers were connected through a router back to the land-based fibre network. Once installed, the RNL towers enabled GIL to provide wireless broadband services to customers. A wireless receiver, cabling and a modem had to be installed at the home or business of customers in order to connect them through RNL's towers to GIL's network.

[27] Mr Hodgson's work included tasks carried out for both GIL and RNL. Most often he worked with or alongside Mr Hurst but was also required, on some occasions, to work alone. On at least one occasion, he was left in sole charge of the business and customer queries or problems for a week.

[28] Work Mr Hodgson did in his capacity as a trainee field engineer included:

- installing modems and radios and running cables;
- bringing equipment online and programming equipment for customer use;
- maintaining software and checking equipment speeds;
- responding to text queries from customers about service issues or faults;
- fixing physical and software faults, including by wiring batteries at solar sites, climbing towers and roofs to adjust radios or replace connectors, and remotely logging onto devices;
- operating machinery, including diggers and forklifts;
- transporting company vehicles between Auckland and Wairarapa;
- involvement in site planning;
- working on sites in Central Otago, Wairarapa, Auckland and Waikato; and

- assisting Brent Nicholson of RNSIL with installations in Central Otago.

[29] Mr Hurst, giving oral evidence under summons, disputed Mr Hodgson's account of the level of responsibility he sometimes had in carrying out his work and the amount of time he worked on his own. Mr Hurst also said he and Mr Hodgson "did not work a normal business day". He said Mr Hodgson sometimes stayed up late to play online games with friends and then 'slept in' the next day. He also said Mr Hodgson sometimes returned home to Hamilton on Thursdays and did not return to work until Tuesday in the following week. Mr Hurst said the volume of work varied and he and Mr Hodgson would discuss "what was on" each week and "set expectations".

[30] Mr Hurst's evidence about variable hours or days of work did not negate Mr Hodgson's account or claim. Rather it was consistent with the "salaried" basis of the terms of employment Mr Hurst had set out in his 23 February 2016 email. What happened in respect of actually paying Mr Hodgson for his work was, however, not consistent with the term stating "salary will be paid monthly". While Mr Hodgson was reimbursed for some work expenses, he got no monthly salary payments at all during 2016 and for most of 2017. His first payment of any amount as salary was when he got two payments of \$300 in September 2017. According to the terms of his employment, the monthly payment due by that time, before tax, was \$2,833.

[31] When Mr Hodgson asked, early on in his employment, when he would get paid, Mr Hurst told him the business had cash flow problems. Mr Hurst promised Mr Hodgson he would get a lump sum payment later. In response to one query about his pay Mr Hodgson was also told he would be given shares in the company. Mr Hurst appeared to be progressing that measure. In an email sent to Mr Hodgson on 20 January 2017, bearing the subject heading "share transfer", Mr Hurst asked what name and address Mr Hodgson wanted on the share certificate.

[32] And Mr Hodgson was also drawn into a scheme for investing in RNL's tower-building programme that involved a supposed credit for a portion of his salary. In July 2016 Mr Hodgson was told about what was described as a "Sector Buddy Programme" operated by RNL and GIL. The programme was a form of investment selling "sponsorship" of a sector. Funds raised were to be used for installation of towers in an area. Investors were then promised a \$20 "monthly buddy payment" over the following 36 months for each customer who connected to the network through that newly-

installed sector. At the end of the 36 month term investors were to be paid their “initial sponsorship payment in full”.

[33] Mr Hodgson was persuaded this was a good opportunity. He encouraged some family members to contribute funds. He paid RNL \$20,000 in August 2016. In return he was provided with two Network Sector Agreements valued at \$27,500. The difference between the two amounts was said to comprise \$7,500 in lieu of some of the salary owed to him.

[34] Although RNL subsequently made some of the promised monthly sector payments, it soon fell into arrears. Those arrears were also a matter of dispute that Mr Hodgson had pursued with RNL, Mr Reimann and Mr Hurst. However that commercial arrangement, as with the earlier mentioned tenancy issue of whether Mr Hodgson paid board to Mr Hurst, were not matters for resolution in the employment jurisdiction.

[35] By email in September 2017, and in an exchange of texts with Mr Hurst in December 2017, Mr Hodgson continued to press for payment of his salary.

[36] A lengthy extract from those December text exchanges is included below. The text is as written, without correction for spelling or punctuation. Some bold emphasis has been added. They are important evidence about what happened and the nature of the employment relationship, including Mr Hurst’s role. The extract begins with Mr Hurst’s response to a text query from Mr Hodgson about a technical issue that needed to be resolved for work in Cromwell on the next day:

4 December 2017

Hurst	9:54:05 pm	Fuck off. I am not at work, I have spent more time designing networks and providing exceptional customer service than you have been alive. Don’t presume to start to tell me what i should or shouldn't do or when i should or shouldn't do it. I tell you what to do. Not the other way around
Hodgson	9:57:25 pm	OK hey what’s the status on all that stuff you said you were going to do for me and others last month or was it the month before that or maby last year? Just wondering as you said you are providing exceptional customer service?
Hurst	9:58:22 pm	No update
Hodgson	10:01:04 pm	Well that’s helpful great to see your keeping to a scheduled and keeping to your promasses of doing it tommorow great customer service so reliable sorry my apologize exceptional customer service

Hurst 10:03:22 pm The two issues are unrelated

Hodgson 10:04:54 pm If you say so but it all seems the same as you treat everything as low priority exceptions being getting a screw

Hurst 10:05:31 pm You are out of line, Be careful

Hodgson 10:11:58 pm I'm out of line you keep lying to me every day and have yet to actually do something I have asked of you to do we are coming up on two years now and yes maby the last comment was uncalled for but think about my boat here ive been working with you for two years now and nothing happened then most resently we finally came to a agreeemnt to go for \$300 per week to keep me happy as you sort out all the things that you have yet to sort out and you have failed to meet that so in theory I should not be doing any work any more as you have failed in your end of the deal . I have been patcient with you but here the story Warren you are Fucking me and I have been patience and I dont think I've been asking for too much but apparently it is so if I'm so out of line

Hurst 10:22:50 pm You can do what ever you want to do and I will respect any decision you make with a cool head and your criticisms of me from an HR perspective are probably fair. But **you are an employee in this company for the time being and regardless of what you think of me from that perspective you do not have the right to tell me what to do nor to disrespect me.** That will never change. I will look at Cromwell when i am good and ready to do so and you will respect my decisions regarding it. I have ultimate responsibility for the network and the customers and my decisions regarding them are final

Hodgson 19:29:38 pm I have no employment agreement you have promased that for me since nearly day one so am I a employee as I dont seem to be

Hurst 10:33:00 pm It is called common law, **If both parties act consistently with the existence of a contract it is deemed to exist.**

Hodgson 10:36:22 pm But you dont have the right to quote that as you have bretched that by failing to uphold it and by paying me sober up get some sleep and don't try and quote the bible with me

Hurst 10:48:55 pm I am neither drunk nor tired, Breech or not is irrelevant. If I breech it it gives you no rights at all. Contract law is not tit for tat. If I breech it up the wazoo you are absolutely obliged to still uphold your side of it... similarly if you breech itj it gives me no rights to breech it.

Hodgson 10:51:03 pm So I'll see you in court then as you have failed to uphold it ? Or do I see tony in court it gets confusing who is legally in the wrong here.

Hurst 10:51:38 pm Fill your boots

Hodgson 10:52:09 pm So are you dismissing me from work?

Hurst 10:57:32 pm Not at all. Nothing i have said to you tonight is an HR issue. I couldn't dismiss you if I wanted to. All i am saying is you will respect me as your superior in this company. You don't get to tell me what to do or when to do it and I get the final say as to what happens. with the customeps and the network. It has nothing to do with HR at this stage at all

5 December 2017

Hodgson 12:13:27 am I'm going to sleep just stop warren and think for once and just think .why

Hurst 7:38:46 am You see for you this is personal.. as it should be... for me this is part of the business that i juggle with every other part. I appreciate and factor in the effect it has on you from a stress perspective but that is all and you do get preferential treatment over some that we owe money to. The things you are waiting on are admin tasks and they get done after all the work gets done and at the moment there is very little time for it so progress is slow. My point last night and this morning is the same. You can be angry and pissed off with me but you can't be unprofessional... and last night you were.

...

Hodgson 7:44:04 am Telling me to fuck off when asking a question thats unprofessional failing to meet obligations to me over a whole year is unprofestion failing to meet deadline and payment with me is unprofestion . so yes you have been unprofessional

...

Hurst 8:22:29 am I have my perspective of events and you have yours. I am not discussing this any further.

Hodgson 8:24:50 am also saying tht I get preferential treatment over some things you owe money to well apparently not paying employees is fully professional and that you are prioritising me .. I have yet to see any realy money so i dont know how that .works and also The first rule of business is to pay your employess not to just tell them they are priorities when they are not

Hurst 8:30:33 am What part of not discussing it any further didn't you get? I disagree with what you are saying and there is nothing you can say to change that... if you feel better ranting at me further go for it but i won't be engaging in this thread of discussion any longer

Hodgson 8:45:33 am Please clarify what the agreement of what my employment is.

Hodgson 10:09:26 am Have you got that clarification ?

Hurst 10:10:04 am No, I won't have it today

Hurst 10:10:35 am **I am sure I sent it to you in february last year in a letter** but i couldn't find that this morning

[37] In resolving the issue of the existence and nature of the employment relationship, three significant points arose from those text exchanges. Firstly, Mr Hurst referred to Mr Hodgson as “an employee in this company”. Secondly, he described the existence of an employment agreement as established by the parties’ consistent actions. And, thirdly, he responded to Mr Hodgson’s request for “clarification” of his employment and employment agreement by referring to “a letter” sent in February 2016. Later in the morning of 5 December 2017 Mr Hurst sent Mr Hodgson an email forwarding the 23 February 2016 email (which had the subject heading of “Terms of having you on board”) with the message: “This is all I have and all I have sent you so far”. Significantly Mr Hurst’s December 2017 email did not resile from any of the “basic terms” he had set out in his February 2016 email.

Mr Reimann’s involvement from December 2017

[38] In early December Mr Reimann became directly involved in addressing Mr Hodgson’s concerns. He said Mr Nicholson of RNSIL had rung him and told him Mr Hurst and Mr Hodgson were “having a row”. Mr Reimann spoke to Mr Hurst about the situation. He contacted Mr Hodgson and arranged to meet him. Before the meeting Mr Hodgson sent Mr Reimann information about his various concerns. Those concerns included payments not made under RNL’s sector buddy programme and expenses not paid to him for food and travel. He also sent Mr Reimann the email he had received from Mr Hurst on 23 February 2016.

[39] They met at Mr Hodgson’s mother’s house in Hamilton on 8 December 2017. Mr Reimann told Mr Hodgson that Mr Hurst did not have authority to offer him employment. At the time Mr Hodgson began work for the business Mr Hurst was an undischarged bankrupt, a fact Mr Reimann said he believed Mr Hodgson knew. Mr Reimann undertook to sort out Mr Hodgson’s concerns, including documentation of his employment arrangement.

[40] On 15 December 2017 Mr Reimann sent Mr Hodgson an email attaching a letter offering him “the position of Trainee Networks Engineer” and an employment agreement to “come into effect on the 15th of January 2018”. The agreement described Mr Hodgson as a “permanent employee”. Mr Reimann’s email included this statement about Mr Hodgson’s concerns over his pay: “Without prejudice, I am also investigating how we may recognise you for your efforts over the past year or so. Again this may take some time”.

[41] Around this time a bereavement occurred in Mr Hodgson's family and he put aside concerns about his employment issues for several weeks. In early February, in a text exchange with Mr Reimann, Mr Hodgson asked about getting paid his "normal salary as the contract negotiations go on". Mr Reimann replied that Mr Hodgson did not have a "normal" salary and said he had received no reply to the employment offer made to Mr Hodgson in December. Mr Hodgson told Mr Reimann he had sent a reply but, on checking his computer, found it had not been sent. He then sent his reply email to Mr Reimann on 5 February, attaching a list of questions about the proposed employment agreement. Mr Reimann confirmed by text that he had seen the email and would "look at it in due course".

[42] By 12 February no resolution was reached and Mr Hodgson sent Mr Reimann a further text query about "backpay for the last two years". Mr Reimann responded that "there is no back pay". A minute later he sent a further text reading: "Oh and the job offer you didn't accept is withdrawn. I will get an alternative to you in due course".

[43] A further extended exchange of texts continued throughout that day, touching on both payments due under RNL's sector buddy scheme and Mr Hodgson's employment situation. This culminated in Mr Hodgson sending an email in which he said he was unable to continue working "due to a lack of work contract and outstanding arrears payment plan". He said this was "not a resignation as such but a forced cession of my services to the company until these matters can be resolved taking effect imminently".

[44] In further emails exchanged over the following fortnight Mr Hodgson said he could not continue working "without a written commitment from the company" and Mr Reimann insisted that Mr Hurst, "since his bankruptcy", had no authority to make offers or undertakings on behalf of the company.

[45] On 23 February Mr Hodgson received a further email from Mr Reimann bearing the subject heading "Employment Offer". The email was dated 13 February but, for unknown reasons, Mr Hodgson did not see it until ten days later. Attached to the email was a letter of offer and draft employment agreement. It said Mr Hodgson would be employed "on a casual 'as required' basis with no expectation of ongoing employment".

[46] On 2 March Mr Hodgson sent Mr Reimann a further email saying he was “still withholding my services” until the matters of payment to him and his employment were resolved. Mr Reimann replied that there were “no services to withhold” as Mr Hodgson had “given no response to the job offer which has now expired”. He told Mr Hodgson that his mobile phone account, paid for by the company, would be terminated from 1 April 2018.

Conclusion on employment relationships

[47] Against that extended background regarding Mr Hodgson’s work, arrangements for it, and how he came to stop working, the evidence did not support any conclusion that his employment relationship extended beyond GIL.

[48] Throughout the available correspondence, including text exchanges, it was clear Mr Hodgson knew and understood he was employed by GIL. Some of the work he did, particularly in the South Island assisting with connections of RNSIL customers to RNL installations, was for the benefit of RNL. However assignment to those tasks, as part of GIL’s business, did not create a separate and parallel employment relationship with RNL. There was some evidence of expense reimbursements and part salary payments, for very small amounts, that referred to RNL or RNSIL work. RNL also invoiced RNSIL for time Mr Hodgson had spent working on installations for that company. However those were not established as anything more than accounting arrangements.

[49] Similarly, Mr Hodgson referred to the company throughout his dealings with Mr Hurst. It was clear from the outset, including from the contents of the 23 February 2016 email, that the company referred to was GIL. There was no significant evidence that the employment relationship had extended, at its outset or by conduct through it, to include Mr Hurst in any personal capacity.

[50] The same conclusion applied to Mr Reimann. While, as considered later in this determination, Mr Reimann more likely than not knew Mr Hodgson was working for GIL, he was not involved directly or indirectly in any way that indicated an employment relationship was intended or formed with Mr Reimann in any personal capacity.

Did the employment end by constructive dismissal?

[51] The extended background already given also clearly demonstrated the end of Mr Hodgson's employment by GIL amounted to a constructive dismissal. He used the word "cession" in describing his decision to stop doing any work for the company. He may have meant "cessation". The two words have different meanings. Whichever word he intended to use, his action in stopping work from 12 February 2018 was the result of breaches of duty owed to him by GIL. Those breaches occurred through the actions of Mr Hurst, the GIL manager directing his work, and Mr Reimann as GIL's director.

[52] The failure to pay the promised monthly salary payments and the declaration by Mr Reimann that there was "no backpay" were breaches of both contractual and statutory obligations to pay Mr Hodgson wages in the promised amounts at the promised times. Mr Hodgson also, by February 2018, could reasonably have drawn the conclusion, from what Mr Hurst and Mr Reimann had said to him, GIL would continue breach that essential term of his employment.

[53] The other significant breach was, through Mr Reimann's actions once he became directly involved from December 2017, to deny there was an existing employment relationship and to seek to reduce the terms and conditions of that relationship. The supposed 'offers' made to Mr Hodgson in two draft employment agreements, in December 2017 and in February 2018, differed in important respects from the terms set out in Mr Hurst's email of February 2016. The first written agreement offered referred to an annual salary of \$33,000. This was well short of the salary that he had been promised in 2016 that he would be receiving by the end of 2017. In the second written agreement offered, his existing permanent employment was to be reduced to casual employment only.

[54] Mr Hodgson's decision, communicated in his 12 February 2018 email, to stop working for the company was, in effect, a resignation. It was a reaction to what GIL's representatives had done. It was caused by the breaches referred to above. Those were breaches that any employer could reasonably foresee would result in an employee refusing to work under such conditions. Mr Hodgson did refuse. His refusal was a reasonably foreseeable result of his employer's actions. His employment therefore ended by constructive dismissal. Having established a personal grievance of unjustified

dismissal on those grounds, an assessment of remedies for Mr Hodgson's grievance was needed.

Remedies for unjustified dismissal

Lost wages

[55] Mr Hodgson sought an order requiring GIL to pay him the equivalent of six months' salary in reimbursement of wages or other money lost as a result of his grievance.³

[56] He gained new employment from 13 August 2018, almost six months after he stopped working for GIL. He was living at his mother's house permanently at that time. Mrs Hodgson gave evidence that her son had become depressed after the end of his work for GIL and required medication to assist with his condition over several months. He was sufficiently recovered by July 2018 to start work with his brother, an electrician. Through that work, he secured an ongoing job with another employer from August 2018.

[57] On that evidence an award of lost wages for a period of five months was appropriate. Calculated from the amount of \$21,436 he sought for a six-month period, the appropriate award of lost wages for five months was \$17,863. This is the amount GIL must pay Mr Hodgson within 28 days of the date of this determination as an award of wages made under s 123(1)(b)(i) and s 128 of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[58] Mr Hodgson was a high school student when Mr Hurst recruited him to work for GIL. There was a degree of naivety in the extent of trust Mr Hodgson showed in working in the way he did for so long without being paid. Mr Hurst appeared sophisticated and experienced in the business world. Mr Hodgson was encouraged to believe his income and opportunities would eventually grow in the fledgling business in the internet services sector.

[59] His relative inexperience in the working world compounded the humiliation and injury to his feelings Mr Hodgson experienced as a result of his constructive dismissal. His mother, in her evidence, said Mr Hodgson became withdrawn and would not leave

³ Employment Relations Act 2000, s 123(1)(b)(i) and s 128.

the house and sometimes not even get out of bed during the months after his employment with GIL ended. She observed that even when he gained new employment he was “scared stiff” when he went to work that the job would not work out. She said it was not until December 2018 that he “started to come right” and regain his confidence.

[60] In his oral evidence Mr Hodgson said it “just destroys you” to be “given the middle finger and told tough luck” after working for two years. The injury to his feelings was heightened by having lived in Mr Hurst’s house for much of that time. He said he was “treated like family” and believed he could trust Mr Hurst.

[61] Weighing the circumstances of the particular employment relationship and the range of awards in similar cases, the appropriate level of compensation for the humiliation, loss of dignity and injury to Mr Hodgson’s feelings was \$20,000. This is the amount that GIL must pay him within 28 days of the date of this determination under s 123(1)(c)(i) of the Act.

No reduction of remedies for contributory behaviour

[62] Where remedies are awarded for a personal grievance, the Authority must consider whether the nature or extent of those remedies should be reduced due to actions of the employee that contributed towards the situation giving rise to the grievance.⁴

[63] Some elements of Mr Hodgson’s communication with Mr Hurst and Mr Reimann about his concerns over his pay and his employment arrangements were clumsy and intemperate. However, the content of some of the communication from the two older men, who were much more experienced in business matters, fell short of what could reasonably be expected in addressing legitimate employment concerns. Even if the tone of some of what Mr Hodgson wrote had contributed to the situation giving rise to his grievance, this fell well short of being blameworthy to any extent that would require reduction of his remedies.

⁴ Employment Relations Act 2000, s 124.

Arrears of wages and other money payable

Salary

[64] Mr Hodgson submitted he was owed wage arrears of \$83,320 for his employment with GIL. Assessment of those arrears was challenging because of the absence of properly kept wage and leave records. The submitted amount was based on his entitlement to be paid salary at the amount, and with the increases promised, in Mr Hurst's email of 23 February 2016. It included a deduction of \$4,480 for various sums paid to him as salary during the two-year period. This deduction included a credit for some payments made directly to him by RNSIL for amounts that RNL had invoiced that company for his work.

[65] GIL submitted any award of arrears should be made only a *quantum meruit* basis rather than at Mr Hodgson's asserted contractual entitlement to the salary stated in the 23 February 2016 email. An award on such a basis can be assessed and made in situations where parties have not fixed the level of remuneration but work has been done with a legitimate expectation of payment and some reasonable sum should be paid for it.⁵ This principle did not apply to Mr Hodgson's case. As found earlier in this determination, he was offered and accepted employment with GIL on the terms stated in the 23 February 2016 email. He had performed work for two years on the basis of those terms. Those terms applied to assessment of arrears due. The resulting amount due for unpaid salary was, as submitted, the gross amount of \$83,320.

[66] Two further elements of arrears had to be calculated from the gross amount of \$83,320 due as salary. Firstly, Mr Hodgson was entitled to a KiwiSaver contribution from his employer from 9 December 2016, the date he turned 18.⁶ Secondly, he was due but not paid holiday pay, amounting to 8 per cent of the gross due.

KiwiSaver contribution

[67] The KiwiSaver contribution had to be calculated on a broad rather than precise basis. It applied to just over half the period of his employment. Applying the three per cent contribution to the 13 months of his employment that approximately fell after 9 December 2016, the amount due as a KiwiSaver contribution was \$1,353.⁷

⁵ *Lamont v Power Beat International* [1998] 2 ERNZ 20 at 31.

⁶ KiwiSaver Act 2006, s 101A and s 101C.

⁷ \$83,320, divided by 24 months, multiplied by 13 months, multiplied by 3 per cent.

Holiday pay

[68] Holiday pay, calculated at the rate of eight per cent on the gross amount of arrears due to Mr Hodgson, amounted to \$6,665.60.

Expenses

[69] Mr Hodgson was reimbursed for some expenses he incurred for food and travel during his employment. He had provided Mr Reimann with an account for outstanding expenses of \$6,141.20 which has remained unpaid. No evidence negated his entitlement to reimbursement for those expenses incurred in performance of his work for GIL. GIL must pay him this amount as part of the wage arrears due to him.

Order for payment of arrears with interest

[70] The arrears due for salary, KiwiSaver contributions, holiday pay and expenses total \$97,479.80. GIL must pay this sum to Mr Hodgson within 28 days of the date of this determination.

[71] The amounts due should have been paid to Mr Hodgson during his employment or, at the latest, at the end of his employment. He is entitled to an award of interest on money of which he was deprived the use. The date from which this interest runs is to be taken as 2 March 2018. It is the date on which Mr Reimann, by email, described a “job offer” to Mr Hodgson as having expired and which GIL can be deemed to have known and accepted its employment relationship with him was at an end. Interest is to be calculated using the Civil Debt interest calculator on the amount due for the period from 2 March 2018 until the date payment is made.⁸

Is GIL liable to a penalty for a failure to pay holiday pay?

[72] Mr Hodgson sought orders requiring GIL to pay a penalty for not paying him his holiday pay and for any penalty imposed to be paid to him.

[73] GIL breached its statutory obligations by failing to pay Mr Hodgson his annual holiday pay at the end of his employment.⁹ It is liable to a penalty of up to \$20,000 for

⁸ Employment Relations Act 2000, Schedule 2 clause 11 and www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁹ Holidays Act 2003, s 24 and s 27.

that breach.¹⁰ Mr Hodgson as an employee may bring an action in the Authority against GIL to recover such a penalty.¹¹

[74] Factors set in s 133A of the Act, applied through a methodology developed by the Employment Court, guide determination of the appropriate level of penalty.¹²

[75] This particular breach occurred in the content of a wider failure to pay wages for which a separate penalty claim could have been pursued. As described in his closing submissions, Mr Hodgson was “strung along for two years by excuses and enticements”. As a school leaver in his first post-school job, Mr Hodgson was in a relatively vulnerable position and had relied on his employer to do the right thing. Given the object of the Act to address the inherent inequality of power in the employment relationship and to promote effective enforcement of employment standards, a penalty had to be imposed for GIL’s failure to pay Mr Hodgson’s annual leave entitlements.¹³

[76] The failure to pay his holiday pay at the end of his employment was not mere inadvertence. It was part of the same course of conduct in which GIL had not paid Mr Hodgson his salary. It deprived him of income he was entitled to have the benefit of and GIL did nothing to mitigate any effects on him of its breach by, for example, not even having made part payment of the holiday pay due to him. As a new business with only one employee there were no previous occurrences of such breaches to take into account. The requirement for deterrence of such behaviour, by GIL or any other employer, required a substantial penalty. There was no evidence GIL was incapable of paying a penalty. Rather, the limited information about its finances (available in a profit and loss sheet for the 2019 year) showed income of more than \$200,000. In weighing those various factors, a final cross-check with other similar cases suggested a proportional outcome for a penalty was in the range of \$4,000 to \$6,000.¹⁴ GIL’s conduct warranted a penalty at the higher end of that range. Accordingly, GIL must

¹⁰ Holidays Act 2003, s 75.

¹¹ Holidays Act 2003, s 76(1).

¹² *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

¹³ Employment Relations Act 2000, s 3.

¹⁴ See, for example, *Green v BSC Solar (New Zealand) Limited* [2018] NZERA Christchurch 109 (\$5,500 for failure to pay holiday pay and one month’s notice); and *Van der Lee v Bella Vita Day Spa Ltd* [2017] NZERA Wellington 41 (\$5,000 for breaches of wage and holiday entitlements to a relatively naïve and vulnerable employee).

pay a penalty of \$6,000 for its failure to pay Mr Hodgson's holiday pay at the end of his employment.

[77] The penalty must be paid to the Authority within 28 days of the date of this determination. On payment the Authority must transfer the penalty amount to the Crown account. Mr Hodgson's request for a portion of the penalty is declined. The impact on him of the failure to pay the holiday pay has been addressed elsewhere in this determination's orders for arrears and compensation.¹⁵

No penalty for aiding and abetting this particular breach

[78] Mr Hodgson's amended statement of problem sought a penalty against both Mr Hurst and Mr Reiman for aiding and abetting GIL's failure to pay his holiday pay. However, as submitted on Mr Reimann's behalf in closing submissions, the proper application of the relevant provisions in the Act and the Holidays Act 2003 meant this claim could not succeed.

[79] A penalty is available under s 134(2) of the Act against "every person who incites, instigates, aids, or abets any breach of an employment agreement".

[80] While Mr Hodgson did not have a written employment agreement, in the full and proper form, the basic terms of his employment as set out in the 23 February 2016 email were supplemented by various terms implied by law. Those implied terms compliance by GIL with its statutory obligations to him as an employee. Complying with the requirement of the Holidays Act to pay his annual leave entitlements was such an obligation. The failure to pay his holiday pay was therefore, technically, also a breach of an implied term of his employment agreement.

[81] However the Holidays Act has a specific express provision about penalties for such failures:

75 Proceedings by Labour Inspector or employee concerned for penalty

(1) A Labour Inspector and the employee concerned are the only persons who may bring an action in the Authority against **an employer** to recover a penalty under section 75.

(1A) However, only a Labour Inspector may bring an action in the Authority against **a person involved in a failure to comply** in order to recover a penalty under section 75.

¹⁵ See *Borsboom*, above n 12, at [51].

[82] Considering that provision in its application to this case, the employer referred to in s75(1) is GIL and a penalty has been imposed on it. A “person involved in a failure”, as referred to in s 75(2), is a description that applies to both Mr Hurst and Mr Reimann. Subsection (2) allows only a Labour Inspector to bring an action in the Authority against such “a person”. The employee may only bring an action against “an employer”, not “a person involved”.

[83] Parliament clearly intended that only a Labour Inspector could pursue individual persons who were not “the employer” for such Holidays Act breaches. Allowing Mr Hodgson to seek a penalty under s 134(2) of the Employment Relations Act, against a person aiding a breach, was not permitted to pursue under s 75(2) of the Holidays Act, would defeat the limitation Parliament has set in place on such actions.

Persons involved in a breach of employment standards – s 142W of the Act

[84] While no penalty could be imposed on Mr Hurst and Mr Reimann personally in this case, their evidence as it emerged during the course of the Authority investigation did raise the issue of whether they each fell within the scope of s 142W of the Act:

142W Involvement in breaches

- (1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company;
 - (b) a partner if the entity is a partnership;
 - (c) a general partner if the entity is a limited partnership;
 - (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership;
 - (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

[85] The potential importance of resolution of this issue is apparent from reading this subsequent section of the Act:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
 - (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[86] If Mr Hurst or Mr Reimann were found to be a person involved in a breach of employment standards and GIL was not able to pay the arrears awarded to Mr Hodgson in this determination, Mr Hodgson would be able to seek the leave of the Authority to pursue them for payment of the arrears.

[87] On the evidence available to the Authority investigation, including the direct evidence of Mr Hurst and Mr Reimann, the following three questions arising under s 142W could be determined. Firstly, was there a breach of employment standards? Secondly, were Mr Hurst and Mr Reimann each "an officer" of GIL? Thirdly, had they aided or procured the breach or been, directly or indirectly, knowingly concerned in it?

[88] Before answering those questions, some detail about the history of the personal and business relationship between the two men had to be noted. These details, largely, emerged from the oral evidence of Mr Reimann and Mr Hurst.

[89] The two men had known one another since the early 1990s. In 2013 and 2014 both men had worked at Orcon, a telecommunications company and internet service provider – Mr Hurst as a director and Mr Reimann as chief operating officer. Various dealings concerning a sale of that business did not work out well for them. Mr Hurst was adjudicated bankrupt on 7 May 2015 and was not discharged from that bankruptcy

until 1 July 2018. Mr Reimann said he lost his house “after Orcon” and had to move to Tauranga and live in his mother’s house.

[90] Mr Hurst said he came up with the idea of setting up the Greenfields business soon after the Orcon sale. He said it mirrored a typical ‘telco’ structure, with GIL as the retail operations intended to sell internet services and RNL as the builder and owner of the towers infrastructure. GIL was incorporated in October 2014. RNL was incorporated the following month.

[91] Once Mr Hurst was adjudicated bankrupt in 2015 he could not be a director of either company. He arranged for Mr Reimann to be the director of both companies. Mr Reimann said he did so as “a favour for a friend”.

[92] While Mr Riemann said his role as a director was as “a figurehead, more than anything else” and Mr Hurst was the actual operator of the business, Mr Reimann also said he had told Mr Hurst that the company could not afford to employ anybody.

[93] Mr Hurst accepted, in answer to questions, that he effectively controlled the day to day operation but said Mr Reimann was really the director. Mr Hurst described the arrangement in this way: “We had an agreed set of operating principles and anything outside of that I would discuss with him”. He talked with Mr Reimann about decisions over supply of services, who “internet backhaul” was purchased from and building new towers. He said he “could use delegated authority but not make any decisions”.

[94] Mr Reimann said he was not directly involved in the business, was not employed in it and did not receive any remuneration for his role.

[95] The two men did socialise together, with Mr Reimann often staying at Mr Hurst’s house when he visited Auckland from Tauranga. Mr Reimann also accompanied Mr Hurst to some business meetings to see customers when they wanted “to show we have someone in charge”. He said this was “a show” and did not represent “the substance” of how the business operated.

Breach of employment standards

[96] The evidence concerning Mr Hodgson’s employment by GIL from early 2016 onwards disclosed multiple breaches of employment standards. He was not provided

with a written employment agreement complying with all the requirements of the Act.¹⁶ Failure to pay his monthly salary payments meant he did not receive the minimum wage during his employment.¹⁷ He was not paid in full and on time.¹⁸ And, as already found, he was not paid his annual leave entitlements.¹⁹

Officers of the entity

[97] On their own evidence, both men met the definition in s 142W(3) of being officers of GIL as the employing entity. Mr Reiman was the director. Mr Hurst, who ran the business from day to day, exercised significant influence over its management and administration.

Procurement and knowledge

[98] There was no credible argument that Mr Hurst had not procured the breaches or was not knowingly concerned in them. His email of 26 February 2013 told Mr Hodgson what terms he was employed on. Mr Hurst therefore knew, as things went along, that Mr Hodgson was not being paid in accordance with those terms. He received Mr Hodgson's repeated requests for payment. He offered excuses, delay and palliatives such as being involved in the RNL sector payment scheme or the prospect of getting shares in the company.

[99] Mr Reimann's evidence, paraphrased bluntly, was that he simply did not know Mr Hodgson was even an employee of the company, so could not have known about the breaches of employment standards, and he could not be held responsible for those breaches simply because he held the "figurehead" role as director of GIL.

[100] For three reasons that evidence did not absolve Mr Reimann from responsibility.

[101] Firstly, the role of director of a registered company that Mr Reimann had willingly accepted at the request of his friend, Mr Hurst, imposed certain statutory duties to exercise a degree of care and diligence about the company's operation. The duty to act in good faith and in the best interests of the company could not reasonably

¹⁶ Employment Relations Act 2000, s 63A and s 64.

¹⁷ Minimum Wages Act 1983.

¹⁸ Wages Protection Act 1983.

¹⁹ Holidays Act 2003.

extend to wilful blindness to whatever obligations Mr Hurst may have entered into with Mr Hodgson on GIL's behalf.²⁰

[102] Secondly, Mr Reimann's evidence that he did not know Mr Hodgson was employed by GIL lacked credibility. He had regular contact with Mr Hurst, including visiting him at his home in Auckland where Mr Hodgson also lived. Mr Hodgson was involved in discussions Mr Hurst and Mr Reimann had about the work of the business. On at least one occasion Mr Hurst arranged for Mr Reimann to pick up Mr Hodgson from the airport when he returned from working in the South Island and to drive Mr Hodgson home to Hamilton. It was, on the balance of probabilities, more likely than not that Mr Reimann knew that Mr Hodgson was, in fact, working for GIL.

[103] Thirdly, even if Mr Reimann did not know until December 2017, he was quickly made aware of Mr Hodgson's claim for backpay and the fact that he had been working for GIL for almost two years by then. Once he saw Mr Hurst's 23 February 2016, as he had in December 2017, Mr Reimann knew the terms of Mr Hodgson's employment. Mr Reimann was then fully involved in aiding and abetting the breach. He denied Mr Hodgson was owed any back pay. At the very least, Mr Reimann knew of and assisted in procuring the breaches through his actions over the remaining three months of the employment relationship.

[104] Accordingly, both Mr Hurst and Mr Reimann were persons involved in breaches of employment standards as defined by s 142W of the Act. If GIL were unable to pay the arrear in wages and other money ordered as arrears in this determination, Mr Hodgson would then have the option of seeking leave to pursue the remedy available against them under s 142Y of the Act.

Costs

[105] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[106] If they are not able to do so and an Authority determination on costs is needed Mr Hodgson may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum GIL, RNL, Mr Reimann and Mr Hurst would then have 14 days to lodge any reply

²⁰ Companies Act 1993, s 131.

memoranda. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[107] 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.²¹

Robin Arthur
Member of the Employment Relations Authority

²¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].