

ATTENTION IS DRAWN TO AN  
ORDER PROHIBITING PUBLICATION  
OF PARTIES' IDENTIFICATION

IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE

[2021] NZERA 300  
3096952

BETWEEN                      N  
   Applicant

A N D                              Q Limited  
   First Respondent

AND                                S  
   Second respondent

Member of Authority:        David G Beck

Representatives:              G, advocate for the Applicant  
   Anthony Herring and Penny Mander, counsel for the  
   Respondent

Investigation Meeting:        19 and 20 April 2021 at Christchurch

Submissions Received:        20 April 2021 from the Applicant  
   27 April 2021 from the Respondent

Date of Determination:        14 July 2021

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**DETERMINATION OF THE AUTHORITY**

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## **Prohibition from publication**

[1] Pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (“the Act”) the Authority has discretion to not publish the parties names and certain features of this dispute that involved sensitive relationship matters. Whilst the parties both sought non-publication and it was granted on an interim basis, I record I have considered relevant case law to be satisfied that a sound basis exists for the exercise of ongoing discretion.<sup>1</sup> Non-publication departs from the important principle of open justice so, I must be convinced of specific adverse consequences pertaining to the applicant that would allow me to depart from the open justice principle as the standard for such a departure is a high one.

[2] I am satisfied on considering specific private contextual matters that identification of the parties is not in the public interest as it would have adverse health consequences for the applicant and I order that non publication continues on a permanent basis.

[3] I use the following randomly generated identifiers:

- N – The applicant.
- Q - The respondent company (Q Ltd).
- S – The owner and sole director of Q Ltd.
- A – A first witness for the applicant.
- G – A second witness for the applicant.
- M – A witness for Q Ltd.

## **The employment relationship problem**

[4] N asserts that she was initially employed by S personally or Q Limited in an administration role on or around 14 February 2019. The engagement that was not the subject of an employment agreement, ended on 27 April 2020 when C says she was summarily dismissed by S in an unjustified manner. In the alternative N claims that the act of dismissal

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<sup>1</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 and *Chief of Defence Force v Darnley* [2021] NZEmpC 40.

was one of discrimination related to their personal relationship not continuing that also involved a period of sexual harassment.

[5] By contrast, S is claiming N was not employed by him or his company.

### **The Authority Process**

[6] The parties were directed to participate in mediation but did not succeed in resolving the matter.

[7] At the investigation meeting I heard what I considered relevant evidence from and questioned N, S, A, G and M.

[8] Pursuant to s 174E of 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, only what I consider relevant.

### **Issues**

[9] The issues to be decided are:

- (a) Was N in an employment relationship and if she was, who was her employer?
- (b) If I find N was in an employment relationship, was she unjustifiably dismissed in a discriminatory or otherwise fashion and what remedies are appropriate including consideration of wage arrears caused by a unilateral reduction of remuneration and a claimed penalty for breach of good faith.
- (c) Did S sexually harass N in the context of an employment relationship and if so, what remedies should flow from such a finding.
- (d) If any remedies are awarded should they be reduced due to any contribution from N?
- (e) An assessment of the level of costs to be awarded to the successful party.

### **What caused N's employment relationship problem?**

[10] N recalled being involved in an initially consensual personal relationship with S in early February 2019 and said this led around 14 February to her being engaged as an employee in his small business doing administration tasks, after S purchased a phone for her and said he would assist her financially to buy a motor vehicle that she could pay off through working for him.

[11] N says that for the next 3-4 weeks in which she worked part-time, she was paid by S in cash and goods and requested, but was not provided with an employment agreement. N says she signalled the personal relationship would not continue whilst she continued working for him but she had difficulty in persuading S to this viewpoint. N related that during the weekend of 9-10 March she had a significant argument with S that led to him indicating he wanted nothing further to do with her and she should not return to his workplace.

[12] S claimed that N occasionally during the period in dispute, visited the workplace with her friend G to "hang out" and that any money and goods he gave her were in the context of their personal relationship. S conceded in his evidential brief that N asked him "for a job" and that he had indicated he would consider this but that "it was unlikely that I would employ her as I considered her as a girlfriend only". S maintained this position during the investigation meeting claiming his business did not have the capacity or need to engage N at the time as administrative work was covered by existing employees.

[13] N's advocate (G) approached S on 27 April indicating that he considered N had been unjustifiably dismissed. The matter remained unresolved and N then engaged legal counsel and through counsel's letter of 12 June 2019 raised a personal grievance with S claiming N had been unjustifiably dismissed and sexually harassed.

[14] S responded on 10 July 2019 asserting N had never been employed, confirmed that he had considering offering her a job but then their personal relationship broke down and he says he signalled no job offer would be forthcoming and he had "cut communications with her". I record that S was not forthcoming on the reason for the relationship breakdown that did in evidence not reflect well upon him.

## **Was N an employee and if so, who was her employer?**

[15] To assist, the Act sets out a test in section 6 to determine the real nature of the relationship.<sup>2</sup> Whilst this test is usually applied to determine the question of whether a person is engaged as an employee or a contractor it has some applicability in this context. However, as is evident in the facts of this case, I should also have regard as an ‘overlay’, section 3 (a) (ii) of the Act that acknowledges that bargaining inequality may exist and should be addressed as a recent full bench of the Employment Court observed in the context of an analysis of s 6 of the Act that:

We have also considered the recent judgment of the Supreme Court in *Uber*. There the court emphasised that the relative bargaining power of the parties can lead to a situation where contracts are drawn to avoid important statutory employment protections. The contractual documents in such situations may not be consistent with the real relationship.

And:

Given the requirement of s 3 of the New Zealand Act to acknowledge and address the inherent inequality of power in employment relationships, these are not controversial propositions, though they are worth emphasising.<sup>3</sup>

[16] In *Prasad v LSG Sky Chefs New Zealand Ltd* another full bench of the Employment Court opined that “it becomes increasingly likely that an employment relationship will be found to exist” in examples that include where “the documentation is non-existent...” and:

In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine what the real nature of the relationship is.

[17] I find on the facts here, before applying the statutory test set out in s 6 of the Act, that a clear imbalance of bargaining power between the parties existed with S being a relatively mature and experienced businessman engaging in a personal relationship with a young unemployed and vulnerable woman (N) to whom he was holding out the prospect of long term employment.

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<sup>2</sup> Section 6 Employment Relations Act 2000

<sup>3</sup> *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69 at [95] – [96] citing *Uber BV v Aslam* [2021] UKSC 5 at [76] and [84]-[85].

[18] To determine whether N was an employee Section 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>4</sup>. If I find N was not an employee then I have no jurisdiction to determine N's personal grievance claims.

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

- (a) The intention of the parties.
- (b) Whether there was any written documentation setting out the terms of the relationship or 'label' attached to such.
- (c) An examination of how the relationship operated in context including looking at issues of control and integration.
- (d) Whether overall, it could be reasonably established that N was operating a business on his own account; and
- (e) Whether there is overwhelming evidence of any industry practice defining contractual relationships.

[20] Applying the above factors involves carefully assessing the evidence of both parties and weighing up various considerations as none is singly determinative. The test applied in context and my findings are discussed below.

### ***Intention of the parties***

[21] The absence of a written agreement determining the intentions of the parties at the commencement of the relationship is problematic. What I have to assess is N's suggestion that the engagement rapidly evolved after she formed an intimate personal relationship with S and S's suggestion that it was not formalised by S beyond an offer only in his contemplation that never came to fruition.

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<sup>4</sup> *Bryson v Three Foot Six Limited* [2005] NZSC 34 (SC).

[22] On assessing the limited evidence it was clear that S purchased a cell phone for N and suggested he could assist N in purchasing a vehicle by her paying him back for work she would engage in. This was indicative of an employment arrangement being in at least, contemplation.

### ***The control test***

[23] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.<sup>5</sup>

[24] The timing of each engagement and work allocation was at all times under the control of S but it was unclear whether he exercised this power as he freely conceded his workplace was at times a casual situation although I do acknowledge his co-worker appeared to be employed with a formal agreement and regular hours.

[25] I find this part of the test to be inconclusive.

### ***The integration test***

[26] This test requires a consideration of whether N could be viewed as an integral part of S's business. I had no strong evidence this was the case but have to balance that up with the short period of the parties alleged employment relationship. N says she worked at administrative tasks including email ordering components for the business and cleaning duties but no hours were recorded and she appeared not to have agreed start and finish times. A friend of N (A) gave corroborating evidence including that she had looked after N's children whilst N was at work and N related to her other details of the engagement. A also said she visited the workplace and observed N 'in the office' and heard her answer the phone and saw her send emails.

[27] S in evidence and his co-worker (M) claimed N did not actually carry out any work directed by S but that she "did work of her own accord" and that she just 'hung out' sometimes during working hours in a very casual workplace to be with S. S conceded N did cleaning in the workplace and made one client call at his direction.

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<sup>5</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).

[28] M whilst suggesting he never discussed with S him offering N a job and he thought there was no need for an admin person, recalled seeing N in the workplace and S and N working together on the computer. He also said he noticed N and S being affectionate with each other in the workplace.

[29] N indicated she dressed tidily to attend work to which S claimed “I told her to dress nicely as hanging out with me”.

[30] I could not find that N was integral to Q Ltd’s business but I do conclude on the evidence that N undertook some work tasks.

### ***Fundamental test***

[31] Basically the application of this test is a consideration of whether N could reasonably be considered to be in business on her own account or performing services on her own account and thus assuming an element of risk in his engagement with S including profit and loss from any joint venture.

[32] In this regard I found no evidence that N ran a business on her own account – she owned no plant or equipment and did not contract with other companies. All N had to offer was her administrative skills and experience.

[33] In applying the fundamental test I am also obliged to take into consideration in this context, the objectives set by legislation that at s 3 (a)(ii) of the Act mandates that I acknowledge and address “the inherent inequality of power in employment relationships”.

[34] I find that this this type of engagement has the element of a dominant party setting terms and although informal in nature it had the basic elements of an employment relationship (i.e: work undertaken for reward).

### ***Taxation issues***

[35] Here there was a direct conflict of evidence – N said she was paid in cash and product from S and S denied this claiming any cash or product he gave N was in the context of their personal relationship.

[36] I can only conclude that money and product was received by N that she considered as a wage and that this was indicative of an employment relationship.

### ***Industry practice***

[37] I have nothing before me to determine what industry practice was and this was not a determinative factor.

### **Overall finding was N an employee?**

[38] Section 6 of the Act allows the Authority to determine the true nature of the relationship and in these circumstances it has been an aid only. For reasons discussed in taking the totality of the relationship into account and how it was formed I conclude that N was an employee for a brief period of time given S conceded he was contemplating formalising the relationship.

### **Who was N's employer?**

[39] Judge Corkill in *Wilson v Bruce Wilson Painting and Decorating Limited* summarised applicable principles as:

- (a) The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in issue).
- (b) The standard of proof is on the balance of probabilities.
- (c) The question of who the employer was must be determined at the outset of the employment.
- (d) It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties; the question to be asked is who would an independent but knowledgeable observer have said was the employer.
- (e) Failure to notify or make an employee aware of the identity of the employer is not conclusive.<sup>6</sup>

[40] N gave evidence that she knew of S's company and that she considered he was offering her a job in that company. However, I have to balance this up with an absence of any

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<sup>6</sup> *Wilson v Bruce Wilson Painting and Decorating Limited* [2014] 11 NZER 712 at [13].

documentation to this effect and S and M's evidence that the business did not need additional administrative support.

### **Finding**

[41] In objectively observing how the employment relationship was formed, I find S initiated contact, he described that he had a 'job' for N and then concluded the terms of remuneration with her and paid N personally. It is likely that the employment agreement contemplated (that S conceded N requested) would have accurately recorded the nature of the relationship but it was not provided to N for her consideration.

[42] In the absence of any employment agreement identifying Q Ltd as the employer I am led to the conclusion that for the entirety of the brief employment period as he paid her cash, that N's employer was S.

### **Was N sexually harassed by S?**

[43] I found this aspect of N's claim to be the most difficult to assess as evidence clearly showed a consensual relationship preceded the employment period and spilled over into such. N claimed that shortly after she commenced working for S, he was intimate with her in the workplace both through suggestive comments and physical touching and that she found this uncomfortable and advised she wished to deescalate the relationship to one of friendship but that S did not take this well. N says S showed up at her house after work hours and: "He became physical and grabbed my head and physically turned it towards his face and tried to kiss me" which felt humiliating as it was in front of a friend.

[44] N also claimed a friend of S came into the workplace and discussed, in her presence, how he took sexually explicit videos of a woman he was dating and that N felt so uncomfortable about this she remonstrated with the friend and S and then she left the workplace upset. Later she recalled S insisted she take the said friend to a house in Christchurch and on the way N says he physically assaulted her by placing his hand on her thigh which he stopped after N swore at him.

[45] S did not address these claims in his evidence preferring to emphasise it was a consensual relationship. Whilst initially consensual I found that N did seek to exploit the

situation and pressed to continue the relationship against a background of a clear imbalance of power favouring S.

[46] Having however assessed the available evidence I cannot conclude S sexually harassed N in the workplace but N wishing to bring the relationship to an end and the circumstances in which it did end, are clearly factors in assessing ‘how and why’ the employment relationship ended. I find that there was evidence of unwanted sexual discussion in the workplace but it was not clear that N brought the alleged assault to S’s attention. I however, consider S behaviour overall was less than ideal and exacerbated N’s distress.

### **Was N’s dismissal justified?**

[47] 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.

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

[48] I find on the facts, that S gave insufficient attention to any procedural requirements before ending N’s employment after their personal relationship ended.

[49] Objectively viewed the reason for the ending of the employment and brief personal relationship was that S quickly wanted N out of his life.

### **Finding**

[50] I find that N was unjustifiably dismissed and that she is successful in her personal grievance and is entitled to remedies.

### **Remedies**

#### ***Lost wages***

[51] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by N and, s 128(2) mandates that this sum be the lesser of a sum equal to lost remuneration or three months’ ordinary time remuneration. Here I find N’s lost remuneration was attributed to the personal grievance.

[52] N claimed lost wages and said that after the relationship her distress caused her health issues and she had not worked for over twelve months.

[53] I find it is appropriate and equitable in all of the circumstances to award N lost wages of three months at the then minimum wage of \$17.70 (for a notional thirty hours per week) that amounts to a total of \$6,903. I do so by objectively contemplating that it was unlikely the employment would have been ongoing for a period beyond this time.

### ***Compensation for hurt and humiliation***

[54] N gave compelling evidence of the impact of the dismissal by S and the affect upon her during an exceptionally difficult period of her life. This included feeling depressed and anxious and socially isolated and the impact and circumstances of losing her job as making her lose confidence and feel worthless.

[55] With some justification, N felt S dispensed with her services in a callous fashion and the situation was made worse by S ignoring personal boundaries that N tried to impose.

[56] I find N was afforded no dignity and she suffered significant humiliation as a direct result of how she was dismissed.

[57] I am convinced that at the time, N suffered humiliation, loss of dignity and injury to feelings and even when she found alternative employment she was unable to put this unfortunate experience behind her that she has dwelt on for some time perceiving she was treated very unfairly. I surmise that the distress was genuinely felt and ongoing.

[58] Taking into account all the circumstances and awards made by the Authority and Court in similar situations, I consider N's evidence in all the circumstances warrants an award of compensation of \$18,000 under s 123(1)(c)(i) of the Act.

### **Contribution**

[59] Section 124 of the Act states that I must consider the extent to what, if any, N's actions contributed to the situation that gave rise to the personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted

should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>7</sup>.

[60] Given that the dismissal was not for performance or disciplinary issues I do not see any issues of contribution from N have been appropriately established. The hasty decision to end N's employment in context was personally motivated and brought no credit to S.

[61] I find that no reduction in the remedies I have awarded is justified.

### **Overall finding**

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

**a. N was unjustifiably dismissed from her employment by S.**

**b. S must pay N the sums below:**

**(i) \$6,903 gross lost wages;**

**(ii) \$18,000.00 compensation without deduction pursuant to  
s 123(1)(c)(i) of the Act.**

### **Costs**

[63] Costs are at the discretion of the Authority but here are not at issue as N's representative who is a family member, did not claim costs as he is not in the advocacy business. I however, award N the \$71.56 Authority filing fee that S must pay to her.

David Beck  
Member of the Employment Relations Authority

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<sup>7</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].