

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 522  
3063032

BETWEEN	JAMES WILSON (aka JIM SCHOFIELD) Applicant
AND	MJB WHOLESALE LIMITED First Respondent
AND	EARTHLINK INCORPORATED Second Respondent
AND	MOTOR TRADE ASSOCIATION Third Respondent

Member of Authority:	Michael Loftus
Representatives:	Applicant in person Philip Mitchell, counsel for the Respondent
Investigation meeting:	12 April 2021 at Wellington
Submissions Received:	At the Investigation Meeting
Determination:	24 November 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Identity of the Applicant**

[1] Before proceeding it should be noted the applicant uses both Wilson and Schofield as his surname in his documentation. Indeed the bulk of his correspondence uses Schofield but the initial application was lodged under the name Wilson. For that reason Wilson is used throughout.

## **Employment Relationship Problem**

[2] Dr Wilson initially raised a number of complaints though while he cited multiple respondents it would appear all but one alleges misconduct by the first respondent, MJB Wholesale Limited (MJB). There is an allegation the second respondent, while receiving taxpayer funds, is “colluding with employers in stupid attempts to deny that people whom Earthlink has been paid to help were even employees.” Furthermore, there were also accusations of wrongdoing by MJB against others though there is no evidence of grievances on their behalf – indeed the evidence is one was settled.

[3] It also has to be noted that if the complaints constitute a personal grievance they are not in the format envisaged by the Employment Relations Act 2000 (the Act) as there is no specific identification of one of the grounds identified in s 103(1). That said, it would appear those that could be considered possible ground for a claim of personal grievance constitute allegations of unjustified disadvantage. The claims also raised the possibility Dr Wilson was suggesting he had been constructively dismissed but when this was put to him he expressly denied that was the case. That possibility shall not, therefore, be considered further.

[4] The response, tendered on behalf of the three respondents, was that it was unclear what the issues were with this concern being especially pertinent for MJB which was the prime target. There were also concerns about whether some of the allegations could possibly constitute personal grievances and/or proceed at all.

[5] It would be fair to say the Member of the Authority who initially dealt with this matter (not myself) shared some of these concerns, especially over whether or not some of the allegations could even be considered. She asked Dr Wilson to clarify his claims, as did I subsequently.

[6] Suffice to say these attempts were less than successful which led to MJB asking the claims be dismissed as frivolous and vexatious.<sup>1</sup> There was also a claim that Dr Wilson’s inability to follow instructions and clarify his claims should preclude his proceeding.<sup>2</sup>

---

<sup>1</sup> Clause 12A of schedule 2 of the Employment Relations Act 2000

<sup>2</sup> [2020] NZERA 466

[7] The application failed if only because MJB conceded it had transgressed in respect to one of the issues raised by Dr Wilson, albeit a minor one. The fact at least one matter remained live meant the claims could not be dismissed as frivolous and vexatious – that’s an all or nothing scenario. Nor could the matter be struck out on the basis Dr Wilson had failed to follow instruction as the Authority’s powers in respect to strike out are limited to frivolous and vexatious and what constitutes that is narrowly defined.

[8] In the end Dr Wilson conceded his claims against both the second and third respondent’s would not proceed and I decided to try and clarify matters by having Dr Wilson talk to his claims at the investigation. That led to Dr Wilson confirming six of the allegations remained live. They are that MJB:

- a. Failed to provide Dr Wilson with a written employment agreement;
- b. Failed to maintain employment records;
- c. Bullied Dr Wilson;
- d. Precluded Dr Wilson from taking work breaks;
- e. Underpaid Dr Wilson; and
- f. Required Dr Wilson break the law by having drive unwarranted vehicles.

## **Background**

[9] Dr Wilson was engaged by MJB as a car groomer on 17 October 2018 with the employment being arranged by Earthlink.

[10] In the words of one of its managers Earthlink is *a charitable organisation that assists people with mental health issues into work experience roles*. It operates in conjunction with the Ministry of Social Development. She went on to say those placements are often unpaid though the hope is they turn into ongoing paid employment.

[11] Dr Wilson entered into an arrangement with Earthlink on 25 September 2018 and a few opportunities were canvassed. One of those was MJB where, as already said, Dr Wilson commenced on 17 October. While MJB accepts it always considered

the arrangement to be work experience as opposed to employment it accepts Dr Wilson was paid throughout and that defence is not being pursued. The rate of pay was \$17.50 per hour and initially Dr Wilson worked five days a week. That reduced to 3 days in December and then increased to 4 in January 2019. Dr Wilson concedes the changes were agreed but adds he asked to return to 5 in January but was told no.

[12] Here I have to say I am not surprised there was some confusion about Dr Wilson's status with documentary evidence indicating both Earthlink and the Ministry of Social Development were discussing his status and whether or not he was in employment mid-January 2019. I also note the correspondence suggests Mr Baker, MJB's owner, had reported to Earthlink that Dr Wilson was working well and the two had discussed an on-going role but Dr Wilson was reticent as the work-environment was aggravating some allergies. That this was an issue was conceded by Dr Wilson.

[13] In summary, neither MJB nor Earthlink were aware of any issues and Dr Wilson never raised any concerns with either.

[14] That changed on 13 February 2019 when Dr Wilson failed to arrive for work. Instead he sent an e-mail that evening to James Graham, the Sales Manager, stating he would not be returning followed by a long list of complaints. Attached was a letter he had claimed to have written 15 days earlier which expresses similar views but which he accepts was not passed to MJB until 13 February. There is also reference to Dr Wilson's doctor having read the attached letter and advising Dr Wilson to simply walk away to which Dr Wilson's response is \$17.50 an hour isn't anything to walk away from.

[15] That letter was followed on 22 February by another stating its purpose was to raise Dr Wilson's personal grievance. MJB contacted Earthlink to advise them of this on 25 February and the later then tried to fulfil what it considered its obligation by trying to arrange a meeting with Dr Wilson to discuss matters. In the words of Earthlink's manager, *Mr Wilson avoided contact with me.*

[16] Finally of note is the fact that on 21 February 2019 MJB received a notice from the Inland Revenue Department advising Dr Wilson had a considerable debt and compulsory deductions were required. Dr Wilson's evidence is he knew this was coming at the time he ceased employment with MJB. It is MJB's view the raising of Dr Wilson's complaints was nothing more than dissatisfaction with the amount being

paid and a money grab given the IRD issue and the demanding content of Dr Wilson's letters. They included demands for payments that far exceeded anything Dr Wilson might hope to receive even if his claims were substantiated.

[17] Evidence was also given that an earlier work experience arrangement for Dr Wilson quickly broken down due to his alleging illegal and unethical work practices, which is not dissimilar to what has arisen here. Earthlink's enquiries in that case established the issues as Dr Wilson's failure to understand that organisation's business.

### **Discussion**

[18] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[19] As already said, and as was confirmed by Dr Wilson at the commencement of the investigation meeting there were six allegation of wrongdoing by MJB he wished to pursue. Each shall be considered separately.

[20] The first is an allegation MJB failed to provide Dr Wilson with a written employment agreement. That this failure occurred is acknowledged by MJB, indeed it was that acknowledgment that meant its application that Dr Wilson's claims be dismissed as frivolous and vexatious failed.

[21] In acknowledging an agreement was not provided MJB refers to the fact it had understood, albeit it now acknowledges incorrectly, that Dr Wilson was engaged in a work experience programme via an arrangement with the Ministry of Social Development and not as an employee. The second fact relied upon is that Dr Wilson never asked for an agreement.

[22] While it is accepted no employment agreement was provided that is not, of itself, sufficient to establish the existence of a personal grievance. Not only should Dr Wilson establish the act occurred he must also established it operated to his disadvantage. He has failed to do so.

[23] Dr Wilson proved incapable of giving any examples of how the failure to produce a written agreement operated to his disadvantage. Indeed, he did the opposite by saying the lack of an agreement actually operated to his advantage as it meant he was not bound to give any notice and could leave immediately when he chose to do so.

[24] For completeness I note the normal penalty for such a failure is a penalty which the application suggest Dr Wilson seeks. A penalty is for a wanton breach but here I would fail to conclude a wanton breach had occurred. That is because Dr Wilson failed to raise the issue and therefore deprived MJB of an opportunity to remedy the contended breach. Not only did he fail to raise it with MJB he did not air his concern with Earthlink, which was an organisation with which he had an arrangement under which it would look after his interests. Finally, I note that while MJB now concedes it entered into an employment arrangement with Dr Wilson the evidence leads me to understand why it might have thought the arrangement was something other than employment. In any event nothing rides on this as there is no claim Dr Wilson received anything short of a wage in excess of the statutory minima along with all other statutory entitlements such as leave etc.

[25] The second claim was that MJB failed to maintain employment records. The response is that was correct but that it has been remedied by way of MJB adopting the Xero accounting system.

[26] For two reasons I take this no further. The key one is that in closing Dr Wilson advised he was no longer pursuing this claim. The second is that even if the claim had not been withdrawn the situation is almost identical to that already discussed with regard to the employment agreement. Dr Wilson never raised a concern and there was no evidence as to how this disadvantaged him. The outcome would therefore have been the same had I had to decide the issue.

[27] Dr Wilson claims he was bullied. MJB denies the accusation has any validity.

[28] When speaking to the claim Dr Wilson stated he felt he was being treated as if he were stupid and wasting time. He states that while he could provide no detail, he felt others were talking behind his back with his main concern being an accusation he was smelly. That said the only person he identified as having made such a comment appeared at the investigation as a supporting witness and friend.

[29] Subsidiary to the bullying claim Dr Wilson says he was being discriminated against because he was engaged through Earthlink and was therefore being given a discriminatory wage.

[30] Again significant difficulties arise. The first is that Dr Wilson admits he could provide no detail. The second is the evidence is contradictory and here I refer to two glaring examples. When giving oral evidence Dr Wilson claimed the issues were general but specifically identified Messrs Baker and Graham yet this is inconsistent with the letter to Mr Graham on 13 February where he states *I've had enough of wealthy arrogant aged jerks like your business partner. I don't think you are one of them but you are enabling one of them [by inaction] to ... pay decent folk as little as possible.*

[31] The second example is the only concrete example Dr Wilson gave was a single comment about being smelly. Aside from the fact almost every definition of bullying requires multiple events, the alleged perpetrator was Dr Wilson's friend and not an employer representative. Furthermore, Dr Wilson did nothing about it.

[32] There is then the fact the supporting evidence does little to help with two disgruntled ex-employees airing their own dissatisfaction while illustrating a relatively robust workplace. A robust workplace is something case-law acknowledges and for there to be bullying something more is required such as direct personalised abuse. Here most witnesses (both for Dr Wilson and MJB) accepted there was banter and continuing attempts at oral one-upmanship.

[33] I return to Dr Wilson's supporting witnesses. One stated he saw no abusive comments directed at Dr Wilson stating there was no more than a few "behind the back comments". The other also said he heard negative comments about Dr Wilson. He was a bit more specific but that is probably because he accepts he was a perpetrator and in my resulting opinion probably knew what he had said. That said he also put his behaviour down to the general robust nature of the workplace and was unable to say Dr Wilson himself had heard any abuse that was directed at him. It is, I conclude, difficult to be bullied as a result of comments you have not heard and here I again refer to Dr Wilson's admission he struggled to give specific examples of the alleged bullying.

[34] Finally, and perhaps most tellingly, Dr Wilson was engaged through an independent organisation which offered ongoing support to assist him in the employment and address any issues. By failing to avail himself of that assistance he has significantly undermined his claims of bullying.

[35] For these reasons I conclude Dr Wilson has failed to evidence his claim he was bullied.

[36] The next claim was that Dr Wilson was prevented from taking work breaks. Again MJB denies the claim has any validity.

[37] The issue here was workers were expected to be self regulating to some extent and while I accept Dr Wilson felt under pressure to complete tasks at the possible detriment of his breaks his evidence is once again he did not raise the issue other than perhaps obliquely. It is hard to say someone has been disadvantaged if they fail to raise an issue and allow it to be addressed but in any event I note Mr Graham's evidence of that he frequently told Dr Wilson to take breaks and often got a response such as "I'm ok" or "I want to wait till later". This is evidence which undermines the claim and which I accept if only because soon after it was given Dr Wilson stated he agreed with it but his issue was limited to the few days Mr Graham was absent. Again, and if that is correct, he was under a duty to raise the inconsistency – s 4(1A) of the Act requires both parties be active and communicative in maintaining the employment relationship and one can do little about something one is unaware of.

[38] Dr Wilson claims he was underpaid but when asked to explain it transpired that what he is actually claiming was that he was being undervalued and should have been paid more. He says he raised this with Mr Graham who advised Mr Baker was responsible for such things and, according to Dr Wilson, then said Mr Baker would not agree and it would not be worth the stress. Dr Wilson accepts he never raised this with Mr Baker.

[39] Mr Graham has little recollection of this other than a memory of Dr Wilson stating he was worth \$45 an hour and his unexpressed view was "I admired his optimism".

[40] The fact is Mr Wilson has failed to produce any evidence he was not paid in accordance with the arrangement he had with MJB. All he is actually saying is he

was not granted a wage increase he never formally sought. That is not a ground of grievance and I reject this allegation as lacking substance.

[41] The final claim was that Dr Wilson was required to break the law by driving unwarranted vehicles. His oral evidence suggests his real concern was with driving unregistered vehicles, which placed him at risk of prosecution. MJB's response is they have dealer plates which can be used to address the issue though the evidence for Dr Wilson supports a conclusion they are not always available.

[42] When pushed for examples Dr Wilson stated he relied upon one incident where he was required to pick up a vehicle and drive it some 5 to 7 kilometres. He adds there were also occasional incidents where a vehicle would be repositioned between MJB's two yards which were in close proximity.

[43] Mr Graham accepts the incident Dr Wilson relies upon occurred though he says it was about 4km. He says the vehicle was warranted but when he realised they had failed to bring the dealer plates (registration) he was worried and told Dr Wilson they would not take the vehicle. He says Dr Wilson ignored that and left in the vehicle anyway. This evidence went unchallenged and I accept it, which means that with respect to the single event upon which Dr Wilson relies I find he was in fact the author of his own potential disadvantage. His claims regarding the movement of vehicles between yards was undermined by his own admission "the cops didn't care" and there was no risk. In other words there was no potential disadvantage.

[44] For the above reasons I conclude Dr Wilson had failed to provide sufficient evidence to show any of his six allegations has substance to the extent it might constitute a personal grievance or warrant any other form of censure such as a penalty. What the evidence strongly suggests is Dr Wilson had fallen on hard times and could not maintain the income his qualifications might otherwise have warranted. His prime dissatisfaction was about his earnings and here I note his admission, when questioned about this, that MJB was, to some extent, correct when it said that was the real issue. That is not grounds for a personal grievance.

## **Conclusion**

[45] For the above reasons I conclude Dr Wilson has failed to establish a personal grievance on any of the grounds claimed. His application is therefore dismissed.

[46] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority