

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 287
3119153

BETWEEN	DANSTAN OHARA WICKRAMASINGHE MALAGODA GAMAGE Applicant
AND	NORTH CITY CAR VALET (2013) LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Dave Cain, advocate for the Applicant Cherie Holland, counsel for the Respondent
Investigation Meeting:	21 January 2022 and 30 March 2022
Submissions received:	6 February 2022 from Applicant 19 January and 22 February 2022 from Respondent
Determination:	30 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Danstan Ohara Wickramasinghe Malagoda Gamage (Mr Ohara) is a work visa holder from Sri Lanka who has asked the Authority to investigate claims of unjustified dismissal, recovery of unpaid wages and entitlements, and various penalties against North City Car Valet (2013) Limited (North City), a small car grooming business in the North Shore.

The Authority's investigation

[2] For the Authority's investigation, witness statements were provided from Mr Ohara and his former landlord, Rex Wilson, both of whom appeared and gave evidence before the Authority. For North City, written statements from Zhangyu (Kelvin) Guo,

the company director and business owner, Vaneet Kumar, the business manager of North City, and Jigarkumar Ramanbhai, a former employee of the business, gave evidence. Mr Ramanbhai attended the investigation meeting by audio-visual link (AVL).

[3] All witnesses were questioned under oath or affirmation by the Authority and the representatives. Given that Mr Guo's evidence did not finish until approximately 5.25 pm, a submissions' hearing by audio-visual link was held on 30 March 2022 for the hearing of closing oral submissions. Mr Ohara also attended that hearing.

[4] 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.

The issues

- [5] The issues requiring investigation and determination were:
- (a) Was Mr Ohara a casual or permanent employee of North City?
 - (b) Was Mr Ohara unjustifiably dismissed or did he reach an agreement with Mr Guo that he would resign?
 - (c) Are unpaid wages and entitlements owed to Mr Ohara?
 - (d) Should penalties be imposed against North City including for failing to provide Mr Ohara with a written employment agreement and breach of good faith?

Was Mr Ohara a casual or permanent employee of North City

[6] Mr Ohara came to New Zealand as a student visa holder in February 2017. From February 2017 to March 2019, he lived on personal savings and worked as a kitchen assistant and at other times as a cleaner. It is noted that Mr Ohara had some previous training in computer science and computer technician work from Sri Lanka. In February 2019, he commenced computer science studies at a New Zealand tertiary education provider. Under the conditions of his student visa, he was able to work an average of 20 hours per week during the semester.

[7] In or about June 2019, Mr Guo advertised on Facebook’s marketplace for a car groomer. The advertisement recorded an hourly rate between \$17.70 and \$20 per hour and included the word “Part-time”. There was no mention of the position being casual but Mr Guo stated that this was due to the way Facebook’s marketplace was set up in that, while he could choose the advertisement, he could not state that the position was casual.

[8] While Mr Ohara responded to the advertisement and was successful with his application, he was not provided with a written employment agreement. It was Mr Ohara’s evidence that he was initially employed on a part-time permanent basis and that he was to be paid \$20 per hour. This was denied by Mr Guo who stated that Mr Ohara was employed as a casual worker only and that his starting rate was \$17.70 per hour, which was the applicable minimum wage rate at the time.

[9] Before I turn to consider Mr Ohara’s employment status (casual or permanent) I prefer Mr Guo’s evidence concerning Mr Ohara’s starting hourly rate. As noted above, Mr Ohara had previously worked as a kitchen hand and as a cleaner in New Zealand. I find it unlikely that Mr Guo would have agreed to pay him \$20 per hour when Mr Ohara had no previous car grooming experience.

[10] Mr Ohara stated that, from the outset of his employment on 26 June 2019 to when he obtained his post-study work visa in February 2020, a period of over seven months, he worked as a part-time employee for North City. In *Jinkinson v Oceania Gold (NZ) Ltd*, the Employment Court focused on identifying the “real nature of the relationship” as required by s 6 (2) and amplified by s 6 (3) of the Act which states:¹

6. Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
- ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[11] In determining whether a person is employed by another under a contract of service, s 6(2) of the Act requires the Authority to determine the real nature of the relationship between the parties. What “label” may be used to describe the employment relationship is not of itself determinative.

[12] The Authority was provided with copies of text messages from Mr Ohara (16 July 2019, 18 July 2019, 24 July 2019, 12 September 2019, and 22 October 2019) to Mr Guo which all predate the grant of Mr Ohara’s post-study work visa in February 2020. In these text messages, Mr Ohara apologises to Mr Guo that he is not able to work for reasons to do with his tertiary studies.

[13] Ms Holland, North City’s counsel, submitted that it could be inferred from the above text messages that Mr Ohara was able to dictate to his employer when he was able to work or not. It was further noted that he had no set hours of work, was not subject to a roster system (Mr Guo texted Mr Ohara the day before whether he was available to work the following day), and had no regular pattern of work in that he had no consistent start or finish times.

[14] I have had regard to North City’s wages and time record for Mr Ohara for the first seven months of his employment to February 2020. During this period, I note that Mr Ohara’s work hours fluctuated from week to week and were not consistent. In addition to his hours not being regular, the number of hours per week ranged from as low as 5.25 hours per week to a high of 37.25 hours per week. As such, I find no clear pattern of work emerge for Mr Ohara during this seven month period.

[15] Mr Cain submitted that the non-payment of eight percent for annual leave for Mr Ohara on a “pay as you go” basis suggests that he was permanently employed. However, this is not determinative given that Mr Ohara’s work hours for the first seven months of his employment was inconsistent and variable. As such it would not have been practical for North City to pay Mr Ohara annual leave on a pay as you go basis.

[16] However, I am satisfied that while Mr Ohara was initially employed on a casual basis, he subsequently became a permanent employee of North City shortly after he obtained his post-study work visa which enabled him to work more than 20 hours per week. While Mr Guo says that Mr Ohara's work visa did not change his employment status with North City, I note a significant increase in Mr Ohara's work hours from an average of 19 to approximately 31 hours per week during the post-study work visa period.

[17] This significant increase in hours was such that it cannot be said that Mr Ohara was someone who was spasmodically called upon once in a while to do a bit of work for an indeterminate period. Nor can it be said that Mr Ohara was someone who was called on to cover an unforeseen event for which North City required to have work done. From February 2020 to early September 2020, a clear pattern of regular ongoing work emerges for Mr Ohara such that I am driven to conclude that the casual nature of his employment had evolved into a permanent one.

[18] While I accept that Mr Ohara's initial period of casual employment had morphed into permanent employment by February 2020, it has not been established that Mr Ohara was promised 40 hours of work per week by his employer. Mr Guo stated that this was not so as the work was not there and that he had other employees who needed to be provided with a sufficient amount of work.

[19] In a preliminary determination for this employment relationship problem, I held that the transcript of a surreptitious audio recording by Mr Ohara of a meeting he had with Mr Guo on 28 August 2020 to be admissible.² As the following excerpts from the transcript show, Mr Guo, did not confirm or accept that he had agreed to provide Mr Ohara with 40 hours of work per week following the grant of his post-study work visa:

Kelvin : so actually you think that we have to pay you that way like 40 hours and I already asked there and they tell us actually if we discuss I can pay you 80%. Am I correct?

Ohara : No.

Kelvin : oh No again

Ohara : that's what I mean. 80% is only an employer and an employee has to be agree. Right?

² *Danstan Malagoda v North City Car Valet (2013) Limited* [2021] NZERA 309 at [23].

Kelvin : yes. Yes so I want 80% you want to be 40%. Am I correct? Sorry you are talking about hours. Sorry Sorry Sorry. So you, I am consider is to 32 hours and you think I supposed to pay you 40 hours am I correct?

Ohara : Yes

Kelvin : yes, so the thing is you think is 40 but I think is 32. So actually we have different there.

[20] While the above shows that Mr Guo did not agree to provide Mr Ohara with 40 hours of work per week, it is also clear that English is neither Mr Guo's nor Mr Ohara's first language. As such, when Mr Guo makes reference to 80 percent and 32 hours, I cannot discount the real possibility of things being lost in translation and that he may be referring to another member of staff and not Mr Ohara in particular.

[21] On balance, it has not been established by Mr Ohara that he was promised 40 hours of work per week by Mr Guo. Such a view is not supported by North City's wages and time record for Mr Ohara from February 2020 to August 2020. While the record shows a significant increase in hours for him, it is well short of 40 hours per week.

Whether Mr Ohara was dismissed

[22] This issue forms the core of this employment relationship problem between Mr Ohara and Mr Guo. At 11.30 am, 25 August 2020, three days before the second meeting that was secretly recorded by Mr Ohara, there was a meeting in Mr Guo's work office between them. There is a difference of opinion as to who initiated the meeting but suffice to say it was impromptu.

[23] The meeting was to discuss Mr Ohara's long running complaint with Mr Guo that he was owed money in relation to not being provided with 40 hours of work per week and him not receiving the 2020 COVID wage subsidy extension on 16 July and 23 July 2020.

[24] Mr Ohara stated that while Mr Guo did not agree that he owed him any money, he was prepared to pay him in return for his immediate resignation. Mr Ohara further stated that he did not agree to resign but took from Mr Guo that he was no longer wanted. After the meeting ended, Mr Ohara stated that he immediately went home and did not continue working that day.

[25] Mr Guo's recollection of the same meeting and what happened immediately after it was notably different. He stated that leading up to that meeting, Mr Ohara had become distracted at work about the COVID-19 wage subsidy extension to the point that he was starting to affect the work of his co-workers who he would question about the wage subsidy extension. As it would turn out, Mr Ohara was correct about not being paid the wage subsidy extension correctly. However, unbeknownst to Mr Guo, the shortfall was inadvertently incorporated in the payment he made to Mr Ohara on 25 August 2020.

[26] During that meeting, Mr Guo proposed that he would pay what Mr Ohara believed was owed to him and in return, Mr Ohara agreed to resign. It was agreed he would be given two weeks' notice. As a result, Mr Ohara was paid \$1,455 which included the amount owed under the COVID-19 wage subsidy extension. On 3 September 2020, Mr Guo paid Mr Ohara all that was outstanding by way of wages and holiday pay in the amount of \$1,838 (gross).

[27] After the meeting, the two men walked out of the office where Mr Guo explained to his manager, Mr Kumar, and his former car groomer, Mr Ramanbhai, the details of his and Mr Ohara's mutual agreement. There was no objection raised by Mr Ohara who returned to his work station and worked the remainder of the day.

[28] Supporting evidence of Mr Guo's recollection of events can be found in the transcript of the meeting that took place three days later on 28 August 2020 which was surreptitiously recorded by Mr Ohara:

Kelvin: The thing is you think your calculation is right but I think your calculation is wrong. I disagree you got me, but I pay what you want, and I told If I pay this one like that, if you are happy we are finished and you said ok pay It. I paid it and I paid straight away. Isn't It. I am not hiding anything. I pay you that day. I calculate it in front of you and you agreed the all I payment I have done before I pay it. Isn't It.

[29] At the time of the first meeting on 25 August 2020, Mr Kumar and Mr Ramanbhai were working outside Mr Guo's office. The office door had been left slightly ajar and it was possible for the two men to hear parts of Mr Guo and Mr Ohara's conversation. As witnesses, I found both Mr Kumar and Mr Ramanbhai credible for they acknowledged that they had not heard all points of the conversation. However,

even so, as stated above, when Mr Guo and Mr Ohara emerged from the office, the parties' agreement was explained to them by Mr Guo in Mr Ohara's presence.

[30] I do not consider who may have been the prime mover behind Mr Ohara's resignation to be helpful in this particular case.³ This is because, as noted above, English is neither Mr Guo's nor Mr Ohara's first language and there are clear examples from the transcript of the 28 August 2020 meeting where the two men appear to be talking at cross purposes with each other.

[31] It matters less who started the conversation but what can be taken from it. I find the behaviour of Mr Guo and Mr Ohara immediately after the 25 August 2020 meeting to be more helpful than who may have been the prime mover. Upon exiting the office and seeing Mr Kumar and Mr Ramanbhai, Mr Guo explained to them in the presence of Mr Ohara the mutual arrangement that had been reached. I find that this was done by Mr Guo so that he had witnesses who could verify matters should that later be necessary, which it was.

[32] Mr Ohara is a mature Sri Lankan male who I find was more than capable of correcting Mr Guo's description to Mr Kumar and Mr Ramanbhai of the arrangement if it was inaccurate. However, there was no dissent or objection raised by Mr Ohara which I find was evidence of him and Mr Guo having reached a mutual agreement that he would resign.

[33] In addition to the evidence of Mr Guo, Mr Kumar and Mr Ramanbhai, is a text message from Mr Ohara from 5 September 2020 in which he appears to be making fun of Mr Guo. In his text, Mr Ohara says

Mate, I am coming back to work from Monday (7 September 2020). Because I did not submit my resignation. I am not resigning. 🙄

[34] At the end of Mr Ohara's text message was an emoji yellow face with its tongue out and making a wink. According to the emojipedia website, the meaning of this particular emoji is to convey a sense of fun, excitement, wackiness, buffoonery, or joking.⁴

³ *Marshall v TNL Freight Link* [1998] 1 ERNZ 395.

⁴ www.emojipedia.org/winking-face-with-tongue/

[35] However, upon seeing this message from Mr Ohara, it was Mr Guo's evidence before the Authority that he felt he had been "played". Given the timing of Mr Ohara's emoji message which followed the two meetings of 25 and 28 August 2020, I find Mr Guo's interpretation of the emoji message plausible and reasonable. Despite being paid the money that had been agreed to by both men in good faith in exchange for Mr Ohara's resignation, he was now backtracking in a way that was clearly disrespectful and provocative.

[36] The effect of the emoji message on Mr Guo was to abridge the two weeks' notice period he had agreed to with Mr Ohara from 8 September 2020 to 4 September 2020. While Mr Ohara's notice period had been abridged by a few days, it is noted that he was absent from work since 25 August 2020. Given that he had been absent from work for 11 consecutive days, I am not satisfied that Mr Ohara would have attended work on 7 May 2022 because his emoji message to Mr Guo was intended to provoke and cause upset. This is evident from Mr Guo's email of Sunday 6 September 2020 which he had a lawyer friend of his help him draft. That email ended as follows:

As such, your employment with us has officially ended on 4th Sep after following proper legal procedure as required by law. If you intend to come back next Monday to disrupt my business operations, I reserve all my legal rights in relation to that.

...

[37] Mr Ohara did not attend work after 25 August 2020 and claimed that he was sick due to stress and anxiety. The Authority was provided with a medical certificate which records that he saw his family doctor on 7 September 2020 and stated that he had been unfit for work since 26 August 2020 but would return to work from 13 September 2020. I cannot take the medical certificate at face value given the self-reported nature of its contents and the lack of reasons as to what was wrong with Mr Ohara (if any).

[38] The evidence of the landlord, Mr Wilson, did not advance matters for Mr Ohara. While he noted a big difference in his behaviour in that he had become more reclusive, Mr Wilson was not able to pin point the change specifically to the 25 August 2020 meeting.

[39] For the reasons given above and noting the internally consistent evidence of Mr Guo, Mr Kumar, and Mr Ramanbhai, I find the termination of Mr Ohara's employment to have been on mutually agreed terms. At some point after the 25 August 2020

meeting, Mr Ohara has genuinely come to believe that the agreement to terminate was reached under pressure and that he was unjustifiably dismissed. However, I do not find that to be the case, but rather with the benefit of hindsight, Mr Ohara has simply changed his mind. The claim of unjustified dismissal and a breach of the employer's good faith requirements under s 4 of the Act are not made out.

Are unpaid wages and other entitlements owed?

[40] In the first two weeks of Mr Ohara's employment, it was claimed that he was paid incorrectly. For the first week, it was claimed that Mr Ohara worked 19.5 hours at \$17.70 per hour but that he was only paid \$214.50. In the second week, it was claimed that he worked 21.5 hours but was paid only \$258. However, Mr Guo accepted that he had made a mistake with the first two weeks of Mr Ohara's pay which he rectified by paying what was owed in cash. I prefer Mr Guo's evidence over Mr Ohara's and, consequently, I consider this matter to have been resolved some time ago.

[41] Mr Cain submits that from 26 August to 30 August, the applicant was not paid for six hours of work at \$17.70 per hour. I note that Mr Guo relied on the advice given by Mr Ohara as to how many hours he worked which was not always correct. Even so, when Mr Ohara made a mistake in the information he provided, as he did in a text message on 12 September 2019, he provided the correct information to North City who paid him accordingly. I am satisfied that Mr Ohara is owed \$106.20 as identified by Mr Cain.

[42] As I have found Mr Ohara to have been a permanent employee of North City from February 2020 to when his employment ended in early September 2020, he is entitled to holiday pay for the eight consecutive weeks of the first COVID-19 lockdown. Mr Ohara is entitled to holiday pay of \$374.72 (gross) for that period (\$585.50 x 8 weeks x 8 percent). The error was minor and not sustained over a long period. I consider the mistake to have been inadvertent but not intentional or negligent. In light of the remaining factors under s 133A of the Act, to award a penalty under these circumstances would be out of all proportion to the nature and extent of the breach.

Interest owed

[43] I find that Mr Ohara is owed wages and holiday pay arrears in the total amount of \$480.92 (gross). Pursuant to clause 11 of the Second Schedule of the Act, the

Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. As Mr Ohara has been deprived of the use of what is owed to him, the Authority orders North City to pay interest on \$480.92 from 4 September 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later than 4pm 29 July 2022.⁵

[44] As for the alleged COVID-19 wage subsidy extension arrears, North City now concedes that it mistakenly did not pay the full wage subsidy to Mr Ohara on 16 July and 23 July 2020. The shortfall equated to \$258.60 which was incorporated in the \$1,455 payment Mr Guo made to Mr Ohara on 25 August 2020 as part of their mutual agreement. I find that no arrears relating to the COVID-19 wage subsidy are owing to Mr Ohara.

[45] Given that I have found Mr Ohara not to have been unjustifiably dismissed by North City, his claim for lost wages and compensation for hurt and humiliation fall away. I have also found that there was no agreement between Mr Ohara and Mr Guo that North City would provide him with 40 hours of work. Consequently, Mr Ohara's claim for a penalty under the Wages Protection Act 1983 for not being paid the full COVID-19 wage subsidy extension on two occasions in July 2020 is not warranted.

[46] However, that being said, Mr Ohara's claim for a penalty under s 65 of the Act for his employer's failure to provide him with a written employment agreement is established. Had a written employment agreement been provided, it may not have been necessary for Mr Ohara to file proceedings in the Authority. The maximum penalty for a corporate entity is \$20,000. To avoid this from happening again, North City should ensure that it provides all its staff, including any casual workers, with a written employment agreement.

[47] Taking into account the relevant factors set out at s 133A of the Act and the range of penalties awarded in similar cases, I conclude that the appropriate penalty is \$2,000. This is to be paid directly to Mr Ohara in compensation for some of the

⁵ www.justice.govt.nz/fines/civil-debt-interest-calculator.

inconvenience, distress and cost he has suffered or incurred through North City not meeting its obligations.

Summary of Orders

[48] North City Car City Valet (2013) Limited is to pay Danstan Ohara Wickramasinghe Malagoda Gamage the following no later than 4 pm Friday 29 July 2022:

- (i) \$106.20 (gross) for unpaid wages;
- (ii) \$374.72 (gross) for holiday pay;
- (iii) interest on the sum of \$480.92 from 4 September 2020 to the date of payment using the Ministry of Justice civil debt calculator to calculate interest;
- (iv) the filing fee of \$71.56 for the statement of problem; and
- (v) \$2,000 for breaching s 65 of the Act with payment to be made directly to Mr Ohara rather than the Crown Bank Account.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] 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.⁶

Peter Fuiava
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].