

**IN THE EMPLOYMENT RELATIONS AUTHORITY**

**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**

**ŌTAUTAHI ROHE**

[2023] NZERA 161

3144687

BETWEEN            WARD HAWKER

Applicant

AND

NORTH CANTERBURY  
REFRIGERATION & ELECTRICAL  
(2018) LIMITED

Respondent

Member of Authority:    David G Beck

Representatives:        Anthony Marsh, advocate for the Applicant

Robert Thompson, advocate for the Respondent

Investigation Meeting:    12 December 2022 in Christchurch

Submissions Received:    27 January 2023 from the applicant

23 January 2023 from the respondent

Date of Determination:    3 April 2023

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] Ward Hawker worked continuously as an electrician for North Canterbury Refrigeration and Electrical (NCRE) from 31 March 2017 until 1 November 2018 and then for North Canterbury Refrigeration & Electrical (2018) Limited (NCRE2018), until he resigned on 19 March 2021.

[2] Mr Hawker claims he was the subject of ongoing, unreasonable treatment that led to his resignation in circumstances that he claims amount to a constructive dismissal. Mr Hawker also asserts he was not appropriately remunerated for all hours worked.

[3] Mr Hawker seeks a finding of unjustified dismissal, compensation for distress and humiliation and lost wages (including unpaid wages). Mr Hawker also seeks the imposition of a penalty against NCRE2018 for them failing to provide an employment agreement at the time NCRE2018 became his employer.

[4] By contrast, NCRE2018 contests the degree of unreasonable treatment claimed by Mr Hawker, accepts that communication had broken down but maintains Mr Hawker at times, contributed to poor communication and, that NCRE2018 took adequate steps to resolve matters. NCRE2018 asserts Mr Hawker voluntarily resigned to set up his own company that operates in competition to NCRE2018.

[5] NCRE2018 contends Mr Hawker was paid for all hours worked that were compiled in an app time recording system that Mr Hawker had control of but failed to properly record his time worked. NCRE2018 concedes that Mr Hawker raised issues with time recording but says the dispute was resolved at the time and, Mr Hawker has not advanced any contrary evidence of underpayments.

[6] The parties attended mediation but the matter remained unresolved.

## **The Authority's investigation**

[7] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[8] Mr Hawker and his supporting witnesses: his partner Penny Westwood, ex-NCRE2018 employees: James Edwards, Steve Whitlow and Jeff Hofland, a counsellor, provided written briefs and gave evidence at the investigation meeting. For NCRE2108, I heard from equal shareholders: Mike Westwood and Pam Westwood and Gerard Gallagher a business advisor contracted to NCRE2018.

## **Issues**

[9] The issues are:

- (i) Did NCRE2018 breach terms of employment or duties owed to Mr Hawker and if so, was it reasonably foreseeable that he would resign and the ending of his employment be categorised as a constructive dismissal rather than a resignation?
- (ii) Has Mr Hawker as an alternative, established that the actions of NCRE2018 caused him to suffer disadvantage?
- (iii) Did NCRE2018 properly remunerate Mr Hawker whilst he was employed?
- (iv) Was NCRE2018's failure to provide an employment agreement prior to 1 November 2018, a breach of s 63A of the Act and if so, should this breach attract a penalty?
- (v) If any of Mr Hawker's claims are established what remedies should follow?
- (vi) If Mr Hawker is successful in all or any element of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct?
- (vii) How costs are to be dealt with.

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

[10] A complicating contextual factor was Mr Hawker is in an ongoing relationship with the Westwoods' daughter (Penny) and has been since mid-2017. The Westwoods indicated this meant initially a considerable time was spent socialising

outside the employment context and but for, the breakdown in the relationship between Mike Westwood and Mr Hawker, they had hoped Mr Hawker would play a more prominent role in the family business.

[11] Mr Hawker was initially employed by NCRE as an electrician reporting to Mike Westwood then a sole director of the company, who also occupied an operational management role. The engagement was the subject of a signed individual employment agreement dated 31 March 2017 at an hourly pay rate of \$31. The nature of the business is commercial/residential refrigeration, air conditioning/heat pump installation and maintenance and general electrical work in North Canterbury.

[12] From 1 November 2018, NCRE2018 was incorporated and the ongoing business traded as Laser Electrical Rangiora (part of the Laser Group Services network). Pam Westwood became the sole Director of NCRE2018 and continued as the Office Manager – a role that includes accounts, payroll and HR matters. Mike Westwood carried on in an operational role of Business Manager. Essentially, the Westwoods owned and operated the business.

[13] Mr Hawker says his role in a team of up to six co-workers, was to project lead jobs as he was the only employed, qualified and experienced electrician. He described Mr Westwood's role as not being 'on the tools' but he was an allocator of jobs, customer liaison and he would often visit job sites to ensure progress was on target.

[14] Mr Hawker says the first six months of his employment was "reasonably professional" but thereafter he started to experience and observe, Mr Westwood not handling stress well. This would manifest in Mr Westwood aggressively swearing and yelling at staff, including Pam Westwood and, belittling others when mistakes were made. Mr Hawker says he was not offended by bad language per se, but it was different when it was aggressively used and directed at him and others by Mr Westwood.

[15] In late 2017, Mr Hawker says in a meeting with the Westwoods, that James Edwards then a co-worker attended, they broached the issue of Mr Westwood's temper issues. They both described things improving but only temporarily with Mr Westwood reverting to his previous behaviour.

[16] Mr Edwards evidence was consistent with Mr Hawker's and he also described Mr Westwood as being aggressive toward him on a more regular basis and frequent use of derogatory language to him. Mr Edwards says he left his employment at NCRE2018 in early January 2019 as he was unable to cope with Mr Westwood. NCRE2018's advocate however, noted Mr Edwards did not raise any issues of Mr Westwood's aggression when he subsequently resigned and that an employment dispute ensued suggesting the Authority treat his evidence with caution.

[17] The Westwoods' did not recall the 2017 meeting but on being pressed during the investigation meeting, Pam Westwood accepted it had occurred but she could not remember any details of the meeting.

### **The employment agreement**

[18] An emerging issue after NCRE2018 became the employer from 1 November 2018, was an inability to conclude a new employment agreement. The timing of the provision of the employment agreement was the initial issue, as it was not provided prior to NCRE2018 being incorporated.

[19] In February 2020, NCRE2018 engaged Gerard Gallagher as a business advisor/mentor to assist in planning and management support and specifically they said to assist with an emerging relationship problem between Mr Westwood and Mr Hawker. Mr Westwood's written brief indicated "... we decided to engage a business coach and someone to be able to mediate and/or resolve some of our concerns". In addition, Mr Gallagher was tasked with putting new employment agreements in place for all staff and developing policies.

[20] The policies used were from the Laser Electrical Group and were headed "Code of Conduct and Company Policies" in a format that included a: code of conduct; drug and alcohol policy; use of electronic devices policy; company vehicle use policy; tools provision; client expectations and health and safety policy. It was not clear if the policy process included consultation with the workers. It would appear they were just promulgated. Mike Westwood signed the policy document on 12 March 2020.

[21] The policies did not include any policy to deal with bullying and harassment complaints. The code of conduct had a reference to the prohibition of: "Any harassment of another employee (verbal, physical, or visual)" but no extended

definition of harassment and no mention of bullying. Under a: “Breach of Code”: heading it suggested: “Any behaviour or action which may be in breach of this Code will be given full and impartial consideration” before any disciplinary action may be taken.

[22] Mr Gallagher says he has experience in working within the wider Laser Group of businesses and at the time of the investigation he remained in an ongoing contracting relationship with NCRE2018. Mr Gallagher’s evidence was he got embroiled in the employment agreement issue, despite it not being his specific area of expertise. He described difficulty in getting agreement on terms with Mr Hawker and another employee and thought by a 2 November 2020 staff meeting, all issues had been concluded but says Mr Hawker after initially signalling he would do so, then did not sign his employment agreement.

[23] In terms of trying to resolve evident differences between Mr Hawker and Mr Westwood and other staff, Mr Gallagher says he initially conducted interviews with all the workers. Mr Gallagher described it as a sort of ‘climate survey’. He recalled only Mr Hawker describing Mr Westwood’s behaviour as volatile and Mr Hawker had described prior negative interchanges with Mr Westwood but when pressed Mr Gallagher did not recall details of what these involved. Mr Gallagher says he surmised there was mutual, communication dysfunction between Mr Hawker and Mr Westwood.

[24] When pressed and bearing in mind his continued affiliation with NCRE2018, Mr Gallagher conceded that Mr Westwood’s management style was “very demanding” and Mr Westwood held high expectations of his workers. When asked how does he motivate people? Mr Gallagher replied he was “not sure”. Mr Gallagher was asked if he had been aware of Mr Westwood ever apologising for his outbursts of temper and he said he was not aware of such and when asked further was it his view that Mr Westwood was aware of his behaviour (i.e.: did he own it?), he answered - “no”.

[25] In contrast, Mr Gallagher’s view was that Mr Hawker wound Mr Westwood up and he cited Mr Hawker’s bargaining position that he wanted all his tools paid for (the tools policy prepared by Mr Westwood, listed items employees were expected to supply including smaller power tools). He also suggested Mr Hawker was exaggerating the extent of his concerns.

[26] Mr Gallagher first said he took no notes of the 1:1 staff interviews he had with workers but the initial interview with Mr Hawker was on or around 3 March 2020. He recalled Mr Hawker expressing a dim view of how the business operated, claiming communication was poor with Mr Westwood having tendency to ‘blow up’ with him. Mr Gallagher says he shared his notes of the workers’ interviews with the Westwoods. Mr Gallagher described his ongoing role as chairing monthly staff meetings and acting as a ‘go between’ Mr Hawker and the Westwoods.

[27] Mr Hawker described tension escalating during March-April 2020, as Covid restrictions impacted the business. During this period Mr Hawker recounted, after he had deferred some domestic jobs for safety reasons, Mr Westwood ringing him and yelling down the phone to such an extent that Penny Westwood could overhear the call. Penny Westwood’s recall of the conversation was not challenged and she remembered Mr Hawker being “aggressively yelled at”. Mr Westwood’s evidence, although not recalling this specific exchange, was candid in admitting his frustration with Mr Hawker. Mr Westwood conceded he had yelled at him on occasions and used abusive language and had ‘stand up arguments’ with him. Mr Westwood explained this was only when Mr Hawker provoked him and that he, at times felt belittled by Mr Hawker not showing him enough respect. Mr Westwood’s perspective was that Mr Hawker deliberately got ‘under his skin’ and intentionally irritated him.

### **Communication issues**

[28] Mr Westwood described a stark difference between his and Mr Hawker’s communication styles – he as short and to the point and Mr Hawker long winded and careful. During the investigation this analysis was reinforced by the manner in which both answered questions. However, Mr Westwood’s expressed threshold of annoyance was described as his view, that although very capable and clever, he felt Mr Hawker was not working hard enough or committing to jobs. The common flashpoint was Mr Westwood’s belief that Mr Hawker took too long to complete jobs. Whereas the two witnesses for Mr Hawker, described him as careful and thorough.

[29] In early July 2020, Mr Gallagher convened a meeting involving Mr Hawker and the Westwoods. Mr Hawker had limited recall of the meeting and did not refer to it in his written evidence. Mr Westwood recalled it in his written brief as an attempt to address communication issues and suggested Mr Gallagher set the meeting up.

[30] Mr Westwood says a number of matters were agreed at the meeting held on 7 July. A telling comment Mr Westwood put in his evidence was:

The Applicant also asked us to be more “asking than commanding” when asking him to undertake duties. Whilst I didn’t agree with all the Applicant’s comments, I certainly agreed that we all needed to move on, move forward, and find a resolution as agreed.

[31] After the meeting on 8 July, Mr Gallagher emailed Mr Hawker setting out twelve points discussed described as “key issues and agreements” and the email indicated “if you think there should be something changed or added let me know”. The Authority was provided with no response from Mr Hawker. The twelve points mainly concerned with how communication could be improved between the parties, what Mr Hawker should do to ensure him and the team completed job sheets and, it ended with an agreement that the Westwoods’ amend the employment agreement on offer to include an annual salary review clause (consistent with the 2017 NCRE employment agreement).

[32] I was provided with a copy of the proposed unsigned employment agreement but no evidence of communications between the parties to conclude it, apart from an email of 11 November 2020 indicating Mr Hawker was holding off on signing the new agreement until his pay issues were resolved.

### **Pay issues**

[33] On 10 July 2020, Mr Hawker emailed Mr Gallagher to raise concerns about how a newly introduced payroll app was recording his and others’ hours of work. Mr Hawker’s concern was the system only recorded hours allocated to each job and not actual attendance times including downtime when awaiting job allocations. Mr Hawker suggested a manual timesheet for comparison purposes. Mr Hawker expressed a view that he may have been “underpaid by hundreds of dollars”.

[34] Mr Gallagher undertook to resolve matters, convening a meeting between Mr Hawker and Pam Westwood on 21 July. It would appear from Mr Gallagher’s notes of this meeting that both parties accepted blame for inaccurate recording of hours of work to be paid and job time recordings, including acknowledgment that Mr Hawker had been paid for only 32 hours after a COVID lockdown period when his 2017 employment agreement guaranteed 40 hours per week expressed as eight hours per day (Monday to Friday). Mr Gallagher says as a “good will gesture”, NCRE2018

agreed to pay out some hours that were in question and that Mr Hawker agreed to this outcome. I was provided with nothing in writing to establish how the this was calculated.

[35] In a follow up email of 26 July to Pam Westwood, after being rebuffed on a further meeting request, Mr Hawker reiterated his time recording concerns. Mr Hawker requested timesheets for the previous year. Pam Westwood did not address this request and Mr Gallagher says he tried to dissuade Mr Hawker from pursuing the issue. Mr Gallagher affirmed he asked Pam Westwood to produce the timesheets requested.

[36] Pam Westwood's written evidence suggested by this point in time (around September 2019) her belief was Mr Hawker was being belligerent but other than claiming to be too busy, she did not address the timesheet disclosure request. Pam Westwood in an apparent acknowledgement of the failings of the payroll system app, noted NCRE2018 now use a compliant payroll system.

[37] Pam Westwood says after this dispute that remained unresolved, she noticed a further deterioration in Mr Hawker's working approach and escalating tension between him and Mr Westwood.

### **The ending of the employment relationship**

[38] On 5 January 2021, Mr Hawker incorporated his own company with the intention of undertaking work as an electrician but he did not disclose this to the Westwoods. He initially did not advertise or trade but accepts in February 2021, he completed electrical work for a friend's business and received \$3,260.25 in return. NCRE2018's advocate submitted they had reason to believe Mr Hawker used equipment belonging to NCRE2018 and that the undertaking of such work was a breach of employment agreement obligations he owed to NCRE2018.

[39] It was suggested that had Mr Hawker's fledgling business activity been known at the time, it would have been an issue of potential serious misconduct. In assessing this, I note Mr Hawker potentially breached clauses 7.3 and 7.4 of the employment agreement with NZCRE that mandated Mr Hawker seek permission for such an activity and a disclosure obligation. However, no such obligations were agreed with NZCRE2018 as no employment agreement was executed. However, it is arguable that an implied duty of fidelity extended to Mr Hawker but no claim for such

a breach was advanced. In the event, for reasons discussed below, I find the matter is not at issue either as subsequently discovered misconduct (as argued by NCRE2018), a breach or a factor extending to contribution giving rise to the personal grievance.

[40] Matters came to a head in early March 2021. Mr Westwood related a “robust discussion” on the phone they had on the afternoon of Friday 5 March with Mr Westwood imploring Mr Hawker to finish a job by working overtime. Mr Hawker says he had called Mr Westwood at 4pm that day to tell him due to being a worker short on the job, it would not be finished by 4:30pm. Mr Hawker says Mr Westwood yelled at him and insisted the job must be complete and when Mr Hawker said he was not available to work beyond 5pm he was not best pleased.

[41] Steve Whitlow who had related issues of negative interchanges with Mr Westwood, resigned on 5 March by email of 12:44 pm.

[42] A similar exchange occurred on Friday 12 March, when Mr Westwood visited a job site at around 3-3:30pm. Mr Hawker says he and three co-workers were working on a task envisaged to be of a day’s duration. Mr Hawker says he advised they were unlikely to finish that day by 4:30 pm and Mr Westwood just walked away. Mr Hawker says he then rang Mr Westwood at 4:30pm to relate they were packing up and the job would have to be returned to on the following Monday. Mr Hawker says Mr Westwood suggested either they would have to return the next day or do overtime and that he should have been told this earlier. Mr Hawker says he reminded Mr Westwood that he had informed him earlier and he was not prepared to work overtime at such short notice or work the weekend without agreement.

[43] Mr Hawker says Mr Westwood then angrily suggested “fucking read your contract better cunt”. Mr Hawker says he clarified what Mr Westwood had just said and, Mr Westwood said “well your acting like one” – Mr Hawker then protested about the use of explicit language and says Mr Westwood terminated the call.

[44] The 2017 employment agreement hours of work provision was not precise. It has a clause in schedule 1, hours of work suggesting: “Additional hours shall be worked, from time to time, where required by the Employer”. However, working days were confined to eight hours per day - Monday to Friday, between 7 am and 6pm. There was no provision for working weekends but overtime beyond 45 hours per week was deemed to be paid at the rate of time and a half.

[45] Mr Hawker then emailed Pam Westwood at 5:29 pm on 12 March and after indicating he was raising a formal complaint and reciting the explicit words Mr Westwood used in their telephone exchange, he concluded:

I wish to meet with you at some stage early next week to ensure that proper action is being taken as I believe this is in serious breach of a number of things and I wish to pursue this to the full extent.

[46] Pam Westwood replied with: “We are arranging a meeting for mid next week and will advise you of the time”.

[47] Mr Westwood meanwhile discussed the email with Pam Westwood and says he decided to stay out of it and let her and Mr Gallagher, “make some decisions on what should be done”. Mr Westwood conceded he made the comments as described but sought to minimise the use of his explicit language and approach to the call, by claiming it was ubiquitous in the workplace and he suggested Mr Hawker had deliberately refused to work additional hours due to “his concerns over pay and his disputes with us”.

[48] Despite the negative interchange, Mr Hawker continued working the next week (although he was absent on the Monday) and he attended a meeting with Pam Westwood on Tuesday 16 March asking how his complaint would be progressed and Pam indicated she was going to contact Mr Gallagher to deal with the issue.

[49] Pam Westwood says she emailed Mr Gallagher on 17 March and was advised he was not available for a couple of days “and I allowed Gerard to be the one to contact the Applicant, setting out the method that he would undertake his inquiry”. I observe that given Pam Westwood’s invidious position it was entirely appropriate that she seek assistance. Mr Gallagher may not have been objectively seen as independent but he had a history of acting as a conduit for communication between the parties.

## **Resignation**

[50] However, before Mr Gallagher contacted Mr Hawker, he resigned by way of two emails on 19 March 2021. The first sent to “Pam and Mike” at 10:40 am, said:

Due to the toxic work environment I am made to work in due to the regular verbal abuse directed at me by Mike I am left with no choice but to resign.

I have made numerous attempts in the past to sit with you both to express my concerns of how I am being treated and gain an understanding of any miscommunications. I have also offered to support Mike in exploring alternative ways of dealing with his frustration and anger.

Yet it has continued to get worse.

I am now at the point where continuing in my employment is having a detrimental impact on my mental health and well being.

This is my two weeks notice

Ward

[51] A further email of 3:14 pm on the same day, indicated:

Because the reason for my resignation is due to what would be considered constructive dismissal as I am left with no choice but resign as a result of the verbal abuse and harassment from Mike.

I am in a position where I would be within my rights to lodge a personal grievance against Mike for his treatment towards me and constructive dismissal.

There has also been no indication of any progress with my request to be provided with a copy of timesheets to correct the issues with my pay.

I am suggesting that I do not complete the two weeks following my resignation and that I be paid [sic] 3 weeks wages, my outstanding holiday pay and the equivalent of the total outstanding sick days I have available.

[52] Penny Westwood's evidence was that after the exchange with Mike Westwood on 12 March: "Ward came to me at a complete loss and broken" and said he wanted out immediately as he could not work under the instruction of Mike. After seeking some legal advice via an MBIE helpline they resolved to write out the resignation email. This evidence suggests that Mr Hawker had resolved to resign after the interchange with Mr Westwood on Friday 12 March and just after he had emailed Pam Westwood seeking a meeting to try and resolve matters but he took a further period of six days to communicate this.

[53] The response from Pam Westwood to Mr Hawker's resignation was by email on Sunday, 21 March that said:

We have received your resignation email and the information below. I am sad it has come to this.

I would like it if you could work out your final two weeks due to our current work load, while we try to employ someone to fill your place as

you are contractually obliged to. During this time you will have no contact with Mike – all contact will be via the office – myself and Georgia.

Mike's mental and physical health has also been affected, with a flow on effect to me. Your attitude at work at times has also been affecting other staff members and customers. Mike and I had big aspirations for you to work your way up to be a managing member and even part owner of our business but at times we have been quite disappointed by the way you have been acting. As you know we have tried to sort out different issues with Gerard over a number of meetings and Mike keeps hoping things will change. Unfortunately, over time they have not. I still don't why you have been stalling signing the new contract given to you a year ago.

I am currently working through the time sheets as I mentioned to you the other day, now that I have worked out a new system of recording work time while waiting for Simpro to work out any issues it has with the Laser Connect App. This will be through to you later this week, time depending.

## **Aftermath**

[54] On 22 March, Mr Hawker emailed indicating he was unwell and would not be working that day and he later visited his GP and obtained a medical certificate saying he had presented describing "signs of stress and this is affecting his psychological health". The GP indicated Mr Hawker was unfit to return to work for a period of 14 days. Mr Hawker says he struggled to cope with the impact of resigning and sought counselling in mid-June 2021 and he followed this up later in December 2021, consulting Jeff Hofland to work through issues he says, remained extant from his employment with NCRE2018.

[55] In an emailed letter of 23 March 2021 from his advocate, Mr Hawker raised a personal grievance suggesting he had been constructively dismissed. A further letter of 30 March sought information including a wage and time record, that was not subsequently disclosed in a timely manner.

[56] Upon not being able to resolve matters, an application was filed in the Authority on 1 July 2021 but it did not properly identify the respondent employer – an amended statement of problem to correct this was filed on 8 November 2021 and a further statement of problem detailing wage arrears was filed on 11 May 2022. The parties were then directed to mediation but the matter did not resolve.

[57] Mr Hawker mitigated his loss by trading with his new company.

## **Assessment**

[58] The evidence of Mr Westwood's "robust" communication impacting negatively upon Mr Hawker was convincing. Mr Hawker's two witnesses established that Mr Westwood was frequently reactive and prone to outbursts over a considerable timeframe. Mr Hawker tried to address the issues using Mr Gallagher as a mediator but it was apparent from the evidence, that Mr Westwood did not consider his reactive behaviour to be an issue. Whilst he was honest in accepting some of the negative interchanges had occurred, Mr Westwood sought to justify his overbearing style of management by citing Mr Hawker's personality and communication style as starkly contrasting to his and he suggested Mr Hawker was deliberately obstructive.

[59] Whilst it was evident during the investigation meeting that Mr Hawker and Mr Westwood had starkly different communication approaches, I had to objectively assess whether Mr Westwood's reactive conflict resolution skills were inappropriate. I find they were and that they impacted negatively on Mr Westwood. To be frank, yelling and using abusive language is not an approach likely to motivate a worker and there was an imbalance of power between the parties.

[60] I have accepted that Mr Hawker may have engaged in conduct that Mr Westwood perceived as obstructive and do not disbelieve his perception of this – however objectively, how Mr Westwood responded were not the actions of a fair and reasonable employer.

[61] Mr Hawker was also frustrated by a lack of a timely and reasonable response to address his legitimate issue on time recording. Unfortunately, as time went on Pam Westwood inexplicably chose to aggravate the situation by abrogating responsibility to Mr Gallagher and the inexplicable failure to disclose payroll information, exacerbated the tension between the parties.

[62] Mr Hawker was also entitled to have an employment agreement properly prepared prior to NCRE2018 taking over as his employer. The failure to conclude the employment agreement subsequently got caught up in the dispute over recording hours of work rather than obstructive bargaining positions – the fault for this was not mutual. The time recording issue fault lay with NCRE2018 to demonstrate the accuracy of their job recording system that appeared to be more focused on recording client billing time rather than worker attendance time.

## Was Mr Hawker constructively dismissed?

[63] A 'constructive dismissal' can be found if an employer's conduct compels a worker to resign in circumstances where although on the surface, the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this construct is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the broad legal approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. <sup>1</sup>

[64] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith' <sup>2</sup> is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. <sup>3</sup>

[65] Mr Hawker's advocate suggested he had resigned in response to being unable to cope with Mr Westwood's ongoing negative and unpredictable behaviour towards him over a lengthy period of time including repeated abusive language and overbearing behaviour.

[66] In reviewing all the contextual circumstances leading up to the resignation, I conclude Mr Hawker was the subject of ongoing breaches of a serious nature and that Mr Westwood when made aware of such concerns, chose to not reflect upon and alter his reactive approach and assist the ongoing employment relationship. As such, Mr

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<sup>1</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

<sup>2</sup> Section 4 (1A)(a) and s 4(1A)(b).

<sup>3</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

Westwood's actions were partly causative of the ending of the employment relationship. I found Mr Westwood to have limited insight into his behaviour and a seeming inability to control his temper. He appeared to consistently consider his reactions were acceptable if he felt slighted or provoked. At the end of the employment relationship, Mr Westwood continued in this vein, believing that Mr Gallagher could, rather than investigate his behaviour, somehow just mediate between him and Mr Hawker and impliedly get Mr Hawker to be more compliant to his demanding approach.

[67] During the investigation meeting, Mr Westwood came to realise from Mr Hofland's evidence, the impact of his outbursts on Mr Hawker and expressed what I took to be genuine concern about the impact on Mr Hawker's mental health. I would trust Mr Westwood reflects further on this and gets some help to develop strategies to better his conflict skills.

[68] While the breaches identified are objectively serious and ongoing, I do conclude that prior to the March 2021 events that Mr Hawker asserts were causative of his need to resign, it was evident that Mr Hawker had taken steps to voluntarily leave his employment anyway and set up in business on his own account. The timing of the resignation and the fact that Mr Hawker did not allow Mr Gallagher to convene a meeting that he had sought, did not allow NCRE2018 to potentially address his concerns. This leads to a finding by a narrow margin, that Mr Hawker was not constructively dismissed.

[69] However, in all of the circumstances of this employment relationship problem, applying discretion the Authority has by utilising s 122 of the Act, I find in the alternative, Mr Hawker has established a personal grievance that he was affected during the employment to his disadvantage by Mr Westwood's unjustified actions. These actions went beyond feedback about the quality of Mr Hawker's work.

### **Finding**

[70] Having obtained a finding of an unjustified disadvantage Mr Hawker is successful in his personal grievance and is entitled to consideration of specific remedies.

## **Remedies**

### **Compensation for humiliation and loss of dignity, and injury to feelings**

[71] Mr Hawker, his partner Penny and counsellor, gave compelling evidence of the impact of Mr Westwood's management approach throughout the employment relationship and undermining of Mr Hawker's confidence and well-being.

[72] Mr Hawker impressed the Authority as a careful and considered personality who had tried to remain in his role for a considerable length of time despite observing the negative impact of Mr Westwood's outbursts on others and experiencing such himself. I do accept that Mr Hawker had a starkly different approach to his work and communication than Mr Westwood but objectively I have found that this did not justify the behaviours he was subjected to.

### **Finding**

[73] Taking account of the evidence proffered and awards made by the Authority and the Employment Court in similar situations and surveying cases brought to my attention in submissions, I consider that Mr Hawker's evidence, warrants compensation in the amount of \$20,000 under s 123(1)(c)(i) of the Act.<sup>4</sup>

### **Lost wages and other money**

[74] Given I have not found Mr Hawker was constructively dismissed and he took immediate steps to set himself up in business, no award of lost wages is appropriate under s 123(1)(b) of the Act.

[75] However, s 123(1)(b) also indicates "other money" lost because of a grievance is recoverable. I find this includes the shortfall in Mr Hawker's pay for the actual hours he worked. Any calculation of other money owed is hampered by there being no wage and time records and Mr Hawker's calculation (claiming \$11,000) was not based on any evidential documentation he retained recording his actual hours.

[76] In assessing whether Mr Hawker was paid for all hours worked which is essentially akin to an arrears claim under s 131 of the Act, I have regard to s 132 (2) of the Act which allows the Authority to accept as proved claims made by the

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<sup>4</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

employee due to a failure “to keep or produce records” prejudicing an employee’s ability to bring an accurate claim. Here, no accurate wage and time records were disclosed at the time or kept and I was struck by Pam Westwood’s admission that NCRE2018 now have an accurate time recording and payroll system.

[77] Exercising the discretion available to the Authority and adopting an equitable approach that takes account of the circumstances prevailing, I determine that NCRE2018 should pay Mr Hawker unpaid wages for unrecorded hours worked in an estimated amount of \$6,000.

**Should a penalty be awarded for the failure to provide Mr Hawker with an employment agreement at the time NCRE2018 assumed his employer status?**

[78] I am not persuaded a penalty is appropriate as an employment agreement was provided albeit not in a timely manner. NCERE2018 is a small family run business and already in its previous incarnation (NCRE) provided Mr Hawker with an employment agreement and apart from the legal employer changing, neither party identified significant changes in employment terms were at issue.

**Contribution**

[79] Section 124 of the Act states that I must assess the extent to what, if any, Mr Hawker’s actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced.

[80] On balance, I consider no reduction in remedies is warranted, Mr Hawker did not contribute to the factors that gave rise to the Authority’s discretionary finding that he established a disadvantage personal grievance – the grievance arose from NCRE2018’s ongoing breaches of obligations owed.

**Orders**

[81] I have found that:

- (a) Ward Hawker was not constructively dismissed but he was unjustifiably disadvantaged while in the employ of North Canterbury Refrigeration & Electrical (2018) Limited.
- (b) In the circumstances, North Canterbury Refrigeration & Electrical (2018) Limited must pay Ward Hawker:

- (i) \$20,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
- (ii) \$6,000 (gross) unpaid wages, pursuant to s 123(1)(b) Employment Relations Act 2000.
- (iii) 8% Holiday gross pay calculated on the above amounting to \$480 (gross).

### **Costs**

[82] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Ward Hawker has 14 days from the date of this determination in which to file and serve a memorandum on costs and North Canterbury Refrigeration & Electrical (2018) Limited has a further 14 days in which to file and serve a memorandum in reply.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>5</sup>

David G Beck

Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)