

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANANA
TAIMAHI ŌTAUTAHI ROHE**

[2023] NZERA 219
3157001

BETWEEN DAVID WILSON
 Applicant

AND MAJOR MOTORS LIMITED
 Respondent

Member of Authority: Antoinette Baker

Representatives: Paul Mathews, advocate for the Applicant
 Anastasia Eliseeva for the Respondent

Investigation Meeting: 8 November 2022 at Christchurch

Submissions received: 3 February 2023 from the Applicant only

Determination: 3 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Wilson groomed cars for the respondent (MM) from mid-August 2021 until October 2021. There was no written individual employment agreement and no other type of written contract to define the working relationship. Mr Wilson filled in invoices for some of his work showing the days and hours of work performed on each identified car. MM paid Mr Wilson into his bank account for the amounts showing on the invoices. Mr Wilson received \$20.00 per hour for work he recorded on the invoices throughout the time he groomed cars for MM.

[2] Soon after Mr Wilson started grooming cars for MM, New Zealand entered a COVID-19 lockdown¹ (the lockdown). Mr Wilson did not groom cars for MM during this time. MM did not pay him during the lockdown.

[3] During the lockdown Mr Wilson began asking MM about his pay and for his individual employment agreement (IEA). Ms Eliseeva responded by saying that Mr Wilson was on ‘invoices-based work.’

[4] After the lockdown Mr Wilson returned to groom cars for MM on 1 September 2021. In October 2021 Mr Wilson asked for safety equipment to protect his hands and eyes. There is a dispute about what was communicated about this and about the provision of this equipment. Mr Wilson says he suffered injury from exposure to the chemicals he was using when grooming the cars.

[5] On 19 October 2021 Mr Wilson left the workplace early after he was spoken to about his performance by the director of MM, Mr Potapov through an interpreter. He did not return.

[6] On 20 October 2021 Mr Wilson through his representative raised a grievance for disadvantage (first grievance)² based on not being provided with an employment agreement after asking for one, not having tax reconciled from his wages, and not having safety equipment provided to him to protect him from the chemicals he was using. Mr Wilson indicated he would not return to work until these matters were resolved.

[7] MM’s response was to say that Mr Wilson was not an employee.

[8] Mr Wilson through his representative resigned and raised a grievance³ based on constructive unjustified dismissal (second grievance) because he said he had to resign due to the things raised in the first grievance not being addressed by MM.

¹ This was from 11.59am 17 August 2021 to 11.59am 31 August 2021 (ended for areas south of Auckland only).

² Email from Paul Mathews to Anastasia Eliseeva dated 20 October 2021

³ Email from Paul Mathews to Anastasia Eliseeva dated 1 November 2021.

[9] Mr Wilson claims compensation and lost earnings due to the grievances. He claims wage arrears from the lock down, and for two other days when work was not offered to him. He claims costs, the filing fee, and penalties.

[10] MM denies Mr Wilson's claims based on him not being an employee. It says that it was discussed at the outset that he was not an employee, that he could work when he wanted to, that he used his own equipment and provided invoices. It also says it provided him with confirmation it would pay for the safety equipment he wanted and that he did not follow through on this.

[11] The sole director and shareholder of MM is Mr Oleg Potapov. Ms Eliseeva is Mr Potapov's personal partner who ran the business for MM.

The Authority's investigation

[12] An investigation meeting was held. Briefs of evidence were lodged before the meeting by Mr Wilson and his partner Ms Price, and they were asked questions about their evidence on oath. MM provided documentary information with its initial Statement in Reply and then some other emailed material. This was treated as evidence. Ms Eliseeva and Mr Potapov were asked questions on oath. They attended by audio visual means because they were outside of New Zealand. Mr Potapov communicated through an interpreter.

[13] Mr Mathews summarised Mr Wilson's position in written submissions after the investigation meeting. These were provided later than timetabled. The Authority communicated to MM it had an extension to file submissions due to this lateness. Nothing further has been received from MM.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[15] The issues requiring determination are:

- a. Was Mr Wilson an employee or a self-employed contractor?
- b. If Mr Wilson was an employee, was he disadvantaged in his employment by MM's unjustified actions?
- c. If Mr Wilson was an employee, was he unjustifiably constructively dismissed?
- d. What if any remedies are to be ordered?
- e. Is Mr Wilson entitled to be paid holiday pay and Kiwi Saver contributions?
- f. Did Mr Wilson do anything that contributed to the situation that led to the grievances and if so, should any remedies be reduced accordingly?
- g. Should penalties be awarded?
- h. Should either party contribute to the costs of the other?

Was Mr Wilson an employee or a self-employed contractor?

[16] The Act provides a definition of employee as a person employed to do any work for hire or reward under a contract of service.⁴ In deciding this the Authority must determine the 'true nature of the relationship'⁵. This includes all relevant matters, including things that indicate the intention of the parties although not taking as determining the matter 'any statement' that parties describe as 'the nature of their relationship.'⁶

[17] A person who is not an employee but is in business in his or her own right is likely to be independent of the purported employer's business and able to decide on how they do their work to best fulfil their own independent business. An inquiry into whether a person is one or the other includes asking to what extent the person on receipt of the services directs the person's work and the way they do that work; what the parties recorded about their relationship (a contract or communications) to show what they may have intended; who supplied equipment and materials; how income tax is paid; whether the person performing work can contract out or control the way and the time that they work. Each on their own may not be definitive. Ultimately, I need to consider the real nature of the relationship based on the facts before me.⁷

⁴ Employment Relations Act 2000, s6(1).

⁵ Employment Relations Act 2000, s6(2).

⁶ Employment Relations Act 2000, s6(3)(a)&(b).

⁷ Above at n5; *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

What was agreed to at the commencement of the relationship

[18] This was a period of working that was relatively short. What was agreed at the commencement will assist me to determine what the likely intention of the parties was about their relationship.

[19] MM has been described by Ms Eliseeva and Mr Potapov as a business that imports cars for on sale. The cars require grooming before sale.

[20] Mr Wilson says he was interviewed for a position of employment by MM as a car groomer. He says he did not hear back. He says some months later he was contacted by email dated 28 July 2021 by Ms Eliseeva about working as a car groomer:

“Hi David,

We have a car grooming position open. I just wondering will you be interested in to come for an interview?”

Best regards,

Anastasia

[contact details]

[21] Ms Eliseeva for MM says that she contacted David the second time after scrolling through contacts. She says this was on a different basis than the first time when Mr Wilson was interviewed. The above email does not support this. At best it is silent if that was MM’s intention. While MM may say they only had a need for a groomer when there were cars to groom (and this fluctuated) I find this does not on its own support here that that MM and Mr Wilson agreed he was to be self-employed. People can be employed on an as-and-when-required basis to fit with the business model described to me. I find that the above email can be given a reasonable interpretation that MM was offering employment. It is consistent with Mr Wilson’s understanding.

[22] Mr Wilson says he met with and verbally agreed with Ms Eliseeva to work for \$20.00 per hour, Monday to Friday from 9.00 am to 5.00pm with the occasional Saturday. In his oral evidence he recalled 2-3 cars per day to groom being discussed as the expectation. Mr Wilson has later referred to being employed on 'full time' work. While I am not satisfied this word was used it could have been a reasonable assumption for him to make given the hours and days of worked that he says were discussed. There is nothing written about this agreement either in an individual employment agreement (IEA) or in any other emails or documentation. Mr Wilson says it was simply never discussed and denies anything was said to him about him not being an employee.

[23] Ms Eliseeva says she explained to David that 'it is not a full-time position and there was no employment contract' and that he would be working 'unsupervised'.⁸ Ms Eliseeva says David agreed to work unsupervised, said he needed work and agreed to this and that 'David clearly understood invoices was inclusive tax.'

[24] Ms Eliseeva says the evidence that there was an agreement about Mr Wilson being a contractor is in her email dated 30 August 2021 (the end of the lockdown) saying that the work was 'invoices based work'. This email was as follows:

Hi David

We closed on level 4 [the lockdown]. You can come in one level 3 and groom vehicles on invoices-based work as agreed with you before. See you on Wednesday at 9.00am.

Best Regards,

Anastasia.

[Address and MM company name]

[25] This email was communicated after Mr Wilson had been working and paid on an hourly rate for about 7.5 hours each working day albeit by then for a very short time just before the lockdown (about a week and a half). Mr Wilson was firm and consistent in his evidence that he did not understand he was anything other than an

⁸ Statement in Reply 8 December 2021

employee. He recalls being asked to provide his driver's licence and his IRD number. His partner, Ms Price gave plausible evidence to support this. Mr Wilson had to phone her to get his IRD number something unlikely to be required if Mr Wilson was not an employee. Ms Price described Mr Wilson as being very excited and proud to have obtained employment to support their young family. I prefer Mr Wilson and Ms Price's evidence as more reliable than Ms Eliseeva's evidence about what she says was discussed at that first meeting and around the time Mr Wilson started grooming cars. That evidence supports that Mr Wilson was offered and accepted employment by MM albeit in an informal way.

[26] Mr Potapov gave oral evidence that he thought he was getting a professional groomer and that he had a lot of cars to get groomed at the time. His oral evidence appeared to focus on Mr Wilson (in his view) not doing a good job. My understanding from him was that he met briefly with Mr Wilson at the time he came in to discuss the job. Mr Wilson recalls this too. The meet was only minutes. Both say that Mr Potapov just wanted to know about how well Mr Wilson could groom cars. I did not understand he said anything about Mr Wilson not being an employee.

[27] Mr Wilson's evidence about what he understood from the first meeting is further supported by the pattern of work he then actually performed and was paid for. A comparison of the 'invoices' that Mr Wilson filled in with Mr Wilson's bank records shows he worked Monday to Friday for either 7.5 hours per day or 8 hours per day. This excludes two days that he appears not to have worked on 14 and 15 September 2021 when he says he was told there was no work (I will return to this later) and the period of the lockdown. He also worked (likely) three additional Saturdays and on the final three days, two six-hour days and the last day (when he left early), four hours. I have assumed he worked two weeks (end of September and beginning of October 2021) when I do not have invoices to match the payments showing in Mr Wilson's bank records.

[28] Ms Eliseeva's evidence is not supported by anything to show me she communicated to Mr Wilson that he was not an employee until her email dated 30 August 2021. This was just before the lockdown went to 'level 3' and work could resume. I am satisfied this was likely in response to Mr Wilson asking about his pay during the lockdown and asking for his employment agreement. Ms Price gave

straightforward evidence that they were on a joint benefit and had to provide proof of employment to WINZ⁹. Ms Eliseeva's email also came well after Mr Wilson had already commenced work.

[29] Considering the above I find that what likely happened here was that MM needed a groomer, it had cars that needed grooming, things were not discussed at length or with any detail and Mr Wilson started grooming cars almost immediately. It was all very informally done and in the absence of showing me there was a meeting of minds to create a legal relationship between Mr Wilson as someone who was agreeing to be self-employed, I find there was a likely verbal agreement that Mr Wilson could reasonably have understood was employment.

Could Mr Wilson work whenever he wanted to with no direction from MM as to how he completed his work?

[30] A person operating in business in their own right could be expected to structure their business to enable them to enhance their own profitability. Being directed in their work and expected to turn up every working day on regular hours (as I have already found) would be inconsistent with the type of control that could be expected by a person who is self-employed.

[31] Mr Potapov says Mr Wilson was taken on as an experienced groomer. However, this does not support that Mr Wilson was in business in his own right. He could equally be employed with this level of experience. As I noted above MM has put forward that Mr Wilson agreed to work unsupervised. However, Mr Wilson says someone called 'Harvey'(H) was introduced to him on the first day by Ms Eliseeva as the person who would tell him what to do in his work. Mr Wilson in oral evidence said he thinks it was H who gave him the keys of a car to clean on the first day. He says that H was not always present but opened up and closed the premises, sometimes told him what cars were to be done, and gave him an 'invoice' book and showed him how Ms Eliseeva wanted him to fill in his hours when he got the first attempt wrong.

[32] Ms Eliseeva says that Mr Wilson obtained the 'invoice' book himself and she knows this because she asked H. She says that H was not there to supervise Mr

⁹ The New Zealand Government department called *Work and Income, Te Hiranga Tangata*.

Wilson. I did not hear from H or have any evidence to test from him. I prefer the evidence of Mr Wilson that H was likely someone who played some part in giving him some form of guidance in his work and likely gave him the 'invoice' book and helped him to fill it in.

[33] Mr Potapov said that H was not a supervisor but also said that H 'guided' Mr Wilson in his work. When cross examined Mr Potapov said H was the 'recondition manager' and that he 'helped to adjust the way' that Mr Wilson did his work and made suggestions to Mr Wilson if Mr Wilson's work was not up to standard. Mr Wilson said H was sometimes very helpful to him. Mr Potapov said that he himself had no time to be checking whether the grooming work was done up to standard and had people assessing Mr Wilson's work including 'Raoul' (R) who was the person who photographed the groomed cars for sale.

[34] I find some likelihood it was either H or R who did this assessing of Mr Wilson's work. R had an office on site. Ms Eliseeva had emailed Raoul to organise safety equipment for Mr Wilson but denied Raoul had anything to do with directing Mr Wilson's employment. Mr Wilson refers to R giving him the sheet to fill in for his employment which required his IRD number.

[35] Standing back and considering the above, I find some likelihood that Mr Wilson's work was being assessed and likely directed by MM by those on site and it is reasonable to take from this that there was direction from MM in a way that supports Mr Wilson being an employee rather than an independent person in business in his own right.

Who supplied equipment and materials?

[36] A person in business in his own right may be expected alongside controlling their own work to best enhance their business profitability, to have their own equipment and materials to complete whatever work they were doing. The 'invoices' show no additional charging for materials used. MM says that Mr Wilson provided some of his own materials. Mr Wilson says he took his own polish in at one stage because he felt he could get the windows cleaned faster. He says this was due to feeling under pressure to get the cars groomed faster. That Mr Wilson was under

pressure to complete grooms is consistent with his partner's evidence saying he brought his lunch home not eaten and was increasingly stressed. When Mr Wilson raised issues about the chemicals affecting his hands MM sent an email to indicate it would pay for safety apparel if Mr Wilson sent a quote.

[37] I find that mostly MM provided what was needed for Mr Wilson to groom cars. This included the overall work premises with onsite water, power, equipment and chemicals to be used.

[38] Weighing the above, I do not find Mr Wilson provided his own equipment and materials to any extent that would indicate that Mr Wilson was in business in his own right. This again supports that Mr Wilson was likely an employee.

Did Mr Wilson have control over what he could charge for his services?

[39] I have already found that Mr Wilson was likely provided with an 'invoice' book and shown how to fill it in. Mr Wilson confirmed he filled these 'invoices' in by hand. He says he was confused by this but simply thought it was the way to get paid. At the very least the 'invoices' are simplistic. They record nothing about tax, neither PAYE nor GST. They record handwritten lines of each day worked, hours and the \$20.00 per hour rate against car 'VIN' numbers showing what cars were worked on each day.

[40] Mr Wilson's bank statements show he was paid the same amounts totalled in the 'invoices.' I have considered whether Mr Wilson ought to have known but I also found him to be unsophisticated about this. I accept his evidence that he was confused about having to fill in 'invoices'. He explained that initially after getting it wrong, he simply wanted to please because he desperately wanted the job. Ms Price gave evidence that he was excited to have employment. In short, I find that Mr Wilson did not likely take any notice of the 'invoice' totals to check what he was then paid. He did not keep any invoices once he handed them in for payment. Again, this weighs against someone who may be in business contracting their services.

[41] Mr Wilson's bank records do not show he had much to come and go on each week and he has had income interspersed with benefits. I also accept he was surprised

that upon calling Inland Revenue¹⁰ later he discovered that no tax was being forwarded by MM. This further supports that Mr Wilson could not reasonably be seen as being in business in his own right.

[42] I asked Ms Eliseeva to confirm how MM came to agree the amount Mr Wilson would charge for his services as a contractor. She initially gave oral evidence that the agreement was \$50.00-\$60.00 per car dependant on the type of car and level of cleaning needed. I asked her why the 'invoices' only recorded an hourly rate and what she described (which could be consistent with a contractor arrangement) she explained she checked the invoices and decided herself whether they looked about right cost-wise. That is, cars recorded as completed by Mr Wilson against what was charged in the invoice on hours and then satisfying herself this was about \$50.00-\$60.00 per car. I found Ms Eliseeva's evidence to be unreliable. I do not accept it supports there was an agreement that Mr Wilson was contracting his services to MM. I prefer Mr Wilson's evidence that he simply thought he had to fill in the 'invoices' to get paid on a rate that was the legal minimum wage rate¹¹ per hour he worked, an unlikely rate for someone in business in their own right.

[43] Based on the above I do not find Mr Wilson had control over charging for his services as if he was in business in his own right. He was paid by the hour at minimum wage, both hall marks of him being employed.

[44] Standing back and considering the above, I do not accept there was any agreement that Mr Wilson would provide his services to MM as a contractor, and I find that he was likely an employee of MM.

[45] I will now go on to consider the grievances Mr Wilson is entitled to have raised as an employee of MM.

Was Mr Wilson disadvantaged in his employment by MM's unjustified actions?

[46] Section 103A of the Act requires the Authority to assess whether a dismissal or an action was justifiable based on 'whether the employer's actions, and how the

¹⁰ The New Zealand Government department called *Inland Revenue, Te Tari Taake*.

¹¹ <https://www.employment.govt.nz/hours-and-wages/pay/minimum-wage/previous-rates/>

employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.’ Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[47] Under s 103A of the Act the following factors are considered to measure an employer’s fair process leading to a decision to dismiss or take action:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

[48] Section 4 of the Act sets out that parties to an employment relationship are to deal with each other in ‘good faith’ which includes not to mislead or deceive each other or do anything that would have that affect. It is also a wider concept than just one of trust and confidence and includes that the parties are to be ‘active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative’.¹²

Safety from the effect of chemical use

[49] Mr Wilson says that the chemicals he used when grooming cars for MM produced an adverse effect to his hands and that he got a splash in his eye which caused irritation. There is no evidence before me as to exactly when this happened, and I find it likely Mr Wilson, being concerned that he did not want to rock the boat, did not report the effects immediately. Ms Price says she encouraged him to raise the issue. Mr Wilson thinks this all happened after he returned to work after the lockdown, and I find this likely. He had only worked about a week and a half before the lockdown happened.

¹² Employment Relations Act 2000, s4(1A)(b).

[50] Mr Wilson says some gloves were available, but they were not suitable, Ms Price says he had told her they had run out. MM says safety equipment was available but has given no specifics about this.

[51] Ms Eliseeva gave oral evidence that she had a look at Mr Wilson's hands and thought them "not too bad". Ms Price's evidence is that Mr Wilson came home saying his hands hurt. She looked at his hands. She says the burns on the fingertips 'were not severe but enough to cause irritations' and 'his hands were also rough, cracked and starting to bleed.' She says Mr Wilson told her he had not worn gloves because MM had run out of them.

[52] Mr Wilson says the irritation to his eye happened when a chemical splashed in his eye when he was using a machine that he was given to clean the interior of the cars. Ms Price's evidence is that a few days after she observed the problem with Mr Wilson's hands 'he came home complaining of a sore eye, looking at him you could see how red his eye was and how painful it looked I had to rinse his eye out and place a cold compact over it to try and help.'

[53] I accept Mr Wilson has likely suffered the effects of chemical use on his hands and eye. I rely on the situation described by Ms Price. Her evidence was straightforward. She was the person who lived with and cared for Mr Wilson. She described them talking about his day when he would come home each night. I prefer the more detailed description that was Ms Price's observation than Ms Eliseeva's observation that "they didn't look too bad."

[54] MM says that it offered to provide the safety equipment that Mr Wilson wanted when he raised the issue. MM refers to an email without a date:

Hi David, can you please give me a quote for the gear you need and after approval it can be paid.

[55] Mr Eliseeva further says that 'on 16 October I asked David to make an invoice for cloth and special gloves needed and Major Motors can pay for it. Meanwhile Major Motors always had gloves and mask in place for staff to use. David was aware of it.'

[56] I find it likely that MM responded to the above affects on Mr Wilson's hands (and possibly eye) in the way Ms Eliseeva says in the email. Mr Wilson under cross examination did not accept that Ms Eliseeva and Mr Potapov met with him about his hands. Ms Eliseeva says they did. Either way, Ms Price confirms she helped Mr Wilson to put together a quote that was sent to MM but nothing further was done by MM. Ms Eliseeva says a quote was never provided to MM. There is no evidence MM followed up about this if it did not get the quote. I prefer Mr Wilson and Ms Price's evidence that a quote was provided because this matter was important to Mr Wilson and Ms Price to resolve. I accept Mr Wilson's evidence that gloves were available but not suitable or had run out. Ms Price's evidence supports this.

[57] When, something was raised about getting safety gear, I find it likely MM's response was minimal and had no apparent follow through. In other words, I accept this was an unjustified action by MM that was seriously unfair to Mr Wilson in his employment. That unfairness disadvantaged him and was exacerbated because without adequate safety gear I accept his concerns about being at continued risk from the chemicals used. I find this likely affected his ability to work and or affected him emotionally.

[58] Based on the above I find that Mr Wilson was disadvantaged in his employment, and this had an unfair effect on him.

Non provision of a written individual employment agreement

[59] It is submitted for Mr Wilson that non provision of an individual employment agreement is at the heart of his claim for disadvantage. I agree. I have found Mr Wilson was an employee. MM could have sought assistance to structure how it engaged groomers. While it may not be totally uncommon for informal employment to occur with parties not bothering to ensure they write down and agree to their terms and conditions, it is nevertheless the legal obligation on an employer in New Zealand.¹³ The purpose should be obvious. It enables the parties to be clear about the terms of their relationship and supports the maintenance of a productive relationship. I accept the submission for Mr Wilson that he was denied this because MM simply told

¹³ Employment Relations Act 2000, s 64.

him some time after he commenced that he was not an employee, relying on nothing other than saying his work was ‘invoices based’ work, something that I have already found above was not supported by evidence of what was agreed to at commencement or the real nature of the relationship.

[60] Accordingly, I find that Mr Wilson was disadvantaged in his employment by not having an individual written employment agreement confirming his employment and this had an unfair effect on him particularly when he struggled to understand his situation when the lockdown occurred, and he was suddenly without income.

Tax not deducted from earnings

[61] I have already noted above that despite a raising of this as a disadvantage in terms of tax being deducted but not forwarded to Inland Revenue, Mr Wilson was in fact paid exactly the amount he ‘invoiced’. I have already found that Mr Wilson did not likely take much notice of what he was paid.

[62] The Authority is not involved in what reconciliation needs to happen with Inland Revenue. While I will return to this point at the end of this determination, I find it more likely than not, that MM created this situation, and it has disadvantaged Mr Wilson in his employment and potentially beyond. I find this action is far from what a fair and reasonable employer could have done in all the circumstances at the time, an unjustified action causing unfairness to Mr Wilson.

Was Mr Wilson unjustifiably constructively dismissed by MM because he felt he had no option but to resign due to factors raised as part of the disadvantage claim?

[63] The Court of Appeal¹⁴ has listed three non-exhaustive situations where constructive dismissal might occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign

¹⁴ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

- Where a breach of a duty by the employer leads a worker to resign

[64] I agree with the submission for Mr Wilson that a ‘breach of duty’ type of dismissal also requires a finding that the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to continue to work.¹⁵

[65] I find that MM has breached its duty of good faith to Mr Wilson and this has resulted in him resigning. My reasons follow.

[66] Mr Wilson’s evidence is that he left work early on his last day after becoming upset with the way Mr Potapov talked to him through R as an interpreter. Mr Potapov denies he acted this way.

[67] At the investigation meeting Mr Potapov was apparently angry and discursive and objected aggressively when I asked him to stop so that I could ask him questions and hear the answer, allowing for the interpreter’s assistance. The interpreter at a single point was reluctant to interpret what I took to be abusive language towards me after I had asked him to stop talking fast and at length.

[68] I make three observations. Firstly, I had summonsed Mr Potapov to appear given he was the sole director of MM and the claim allegedly involved his actions. This may sometimes cause a witness to be unhappy about being present. Secondly, I appreciate that both Mr Potapov and Ms Eliseeva were appearing from a time zone with a 9-hour difference with New Zealand. Thirdly, Mr Potapov was giving evidence through an interpreter. However, when weighing up the credibility of the description given by Mr Wilson on the final day, he worked at MM with the way Mr Potapov behaved at the investigation meeting, even allowing for my three observations, I find a likelihood that Mr Wilson’s version of what occurred on the final day of his employment is to be preferred.

[69] I find it likely that Mr Wilson left the workplace distressed after Mr Potapov spoke to him aggressively through R’s translation. Ms Price gave evidence of the

¹⁵ *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 1 ERNZ 168 at [172].

level of distress when Mr Wilson called her, and she encouraged him to leave the workplace. After the disadvantage actions that I find had by then already occurred, I can understand why Mr Wilson felt he needed to leave.

[70] MM took no steps to rectify the situation of Mr Wilson leaving. There is no apparent evidence that MM communicated to Mr Wilson's first grievance other than saying he was not an employee and then later not responding. When cross examined Ms Eliseeva's response to whether she responded was to say, 'I don't remember, it was long ago.' This came across at best as not understanding the significance of communicating productively as an employer to at worst unreasonably dismissive.

[71] At the least I find MM breached its duty of good faith towards Mr Wilson and that a reasonable employer could have foreseen that an employee would not likely remain working in the circumstances. This breach I find was a culmination of the things that I have found in the disadvantage grievance. They all could have been rectified with constructive communication from MM and I accept the submission that most importantly the unreasonable stance of not accepting the real nature of the relationship as employment.

[72] Based on the above I find that Mr Wilson was constructively dismissed, and as a dismissal it was unjustified. There was no reason to dismiss Mr Wilson. Mr Potapov seems unhappy with Mr Wilson's performance but there was no process to address this.

[73] Accordingly, I find that Mr Wilson is successful in his grievance that he was unjustifiably dismissed through a constructive dismissal.

Remedies for the grievances

Compensation under s 123(1)(c)(i) of the Act

[74] It is submitted for Mr Wilson that I should individually consider two heads of compensation for Mr Wilson for each grievance. The facts that support each are the same. I find it appropriate to consider compensation as a global remedy.

[75] Mr Wilson says that the experience at MM had a serious affect on him. I do not need to traverse this evidence. However, Mr Wilson accepted in his oral evidence that the grievances contributed to rather than fully caused the serious effect on him that he and Ms Price have described.

[76] I accept the distress Mr Wilson likely suffered in having no communication from MM when the lockdown occurred, and when he was suddenly without the income to support his young family. I accept he felt this humiliating given his excitement at obtaining a job. I accept the submission for Mr Wilson that MM's refusal to acknowledge he was an employee went to the fundamental aspect of the relationship beyond just an issue of breaching an obligation to provide a written individual employment agreement. Mr Wilson has had to bring a claim to the Authority and participate in answering questions which in my observation showed me was a stressful exercise for him. This was likely exacerbated by Mr Potapov's behaviour which may have been similar to the meeting on his last day of employment.

[77] I find it reasonable in the above circumstances that MM pays Mr Wilson \$10,000.00 in compensation under s 123(1)(a)(i) of the Act.

Lost earnings under s 123(1)(b) of the Act

[78] I find that Mr Wilson had no communication from his employer when the second lockdown occurred until close to when he asked to return to work. A government subsidy was available. There is no evidence this was applied for to assist with paying Mr Wilson when work could not be offered. In any event employment relationships were not suspended when New Zealand went into lockdown¹⁶ and an employer was still obliged to pay an employee the amount they would have been earning under their employment unless an agreement to vary this was reached. I am satisfied that none of this happened here.

[79] Accordingly, I find that Mr Wilson is to be reimbursed for the wages he ought to have continued to be paid during the lockdown period. I base this award on the number of Monday to Friday days that fell during the lockdown that Mr Wilson did not work and multiply these by 7.5 hour at a \$20.00 hourly rate. I take it at 7.5 hours

¹⁶ *Gate Gourmet New Zealand Limited v Sandhu* [2020] NZEmpC 237 at [23].

per day giving some recognition for the slight variance showing in some days of work after comparing the 'invoices' and bank statements. I also calculate this as 11 days considering that Mr Wilson was not paid on the 17 August 2021 which was the weekday that the lockdown started just before midnight.

[80] I am further satisfied that I should award Mr Wilson for the two days he was told (likely by H) that there were no cars to groom, being 14 and 15 September 2021. While MM may have had a business that at times meant there were fluctuations in cars in the yard to groom, it could reasonably have taken an opportunity to be clear in how this would impact an employee groomer's hours of work. This ought to have been clearly clarified at commencement. Instead, Mr Wilson was left with what I accept was a very reasonable expectation of Monday to Friday work paid at minimum wage per hour. I accept that he was willing to work these two days. He is to receive two further days of reimbursement at 7.5 hour at \$20.00 rate.

[81] Accordingly, MM is to pay Mr Wilson the following:

11 x 7.5 hour days	@ \$20.00 per day	1,650.00
2 x 7.5 hour days	@ \$20.00 per day	300.00
		<hr/>
		1,950.00 gross

[82] It is submitted for Mr Wilson that he should also be paid for wages he has lost beyond his employment termination to the level of 10 weeks which takes into account a time up to when he commenced a training program. There is evidence to show there may have been a delay in applying for other jobs which could have mitigated this loss due to things Mr Wilson was experiencing. I understand however that Mr Wilson had an opportunity put to him to do plastering work but decided that a training course later was more suitable. In these circumstances and that I have already found some adverse issues for Mr Wilson were not likely solely attributable to MM's actions (things that I find may have affected him applying for or obtaining work earlier) I award 6 weeks lost wages at 7.5 hours per day based on five-day weeks. This is a total of \$4,500.00 gross.

Is Mr Wilson entitled to be paid holiday pay and Kiwi Saver contributions?

[83] Mr Wilson worked less than one year. Therefore, he would have been entitled at termination to 8% of his total gross earnings as a payment for holiday pay less any payment for annual leave taken in advance.¹⁷ Mr Wilson did not take paid annual leave in advance. The total gross earnings (adding up all payments Made by MM into Mr Wilson's account from MM) were \$6,785.00. I have ordered as above a further total of \$6,450.00 for wage arrears. The calculation then for holiday pay owing to Mr Wilson is as follows:

- a. Total gross earnings paid to Mr Wilson of \$6,785.00 gross multiplied by 8% is \$542.80 gross
- b. Total amount awarded in this determination for lost earnings of \$6,450.00 gross, multiplied by 8% is \$516.00 gross
- c. Total holiday pay entitlement at termination (a. + b.) is \$1,058.80 gross.

[84] It has been further submitted that I should make an award for employer Kiwi Saver contribution. There is nothing before me to support this was an option Mr Wilson would have chosen to participate in. I make no award for Kiwi Saver contributions.

Did Mr Wilson do anything that contributed to the situation that led to the grievances and if so, should any remedies be reduced accordingly?

[85] I find nothing before me that shows Mr Wilson contributed to the grievances to justify reducing the remedies awarded.

Non provision of breaks

[86] For the sake of completion, I had little specific information about this. I have acknowledged the evidence of Ms Price at paragraph [36] above that she observed lunches not eaten and that Mr Wilson was stressed about the pressure of having to

¹⁷ Section 23 Holidays Act 2003.

complete car grooms. Ms Eliseeva's evidence was that Mr Wilson could choose to work whenever he wanted including when he took breaks. Breaks were also not raised as part of the disadvantage claim, and nothing was recorded in the 'invoices' deducting time for breaks. If anything, the compensation above acknowledges the stress that Mr Wilson felt during his brief employment at MM. Accordingly, I have not progressed this further.

Penalties

[87] Mr Wilson has claimed penalties. I am not persuaded penalties are appropriate. The potential statutory breaches that are submitted for Mr Wilson (non-payment for wages and lack of an individual employment agreement) likely stem from MM's erroneous decision to consider him a contractor. Mr Wilson has already been awarded remedies for this. While it is submitted that these breaches were deliberate after MM had faced a prior determination in the Authority and that this supports a level of 'cynicism' which should attract penalties, I am not satisfied I have sufficient beyond Mr Wilson's submission that this is so.

[88] I do not condone MM's actions. However, I note an element here of poor communication on the part of the employer which may in part be attributed to using English as a second language. I strongly suggest the director of MM and Ms Eliseeva seek assistance to understand a New Zealand employer's obligations as well as a better understanding of how employment relationships are formed in New Zealand. In making the assessment that penalties are not appropriate, I rely generally upon s 160 of the Act.

Costs

[89] Mr Wilson has largely succeeded in his claims. He is entitled to an award of costs towards his representation. The Authority uses a notional daily tariff unless there are reasons to consider less or more.¹⁸ I have no reasons before me to depart from the tariff. Mr Wilson seeks the tariff awarded for a one-day investigation meeting which is \$4,500.00. I note that while written submissions from Mr Wilson were late, they included more content than what might usually be expected for a grievance claim with

¹⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

the first issue being whether Mr Wilson was an employee. The meeting finished at 2.50pm. Accordingly, it took the better part of a day. I find it reasonable to award Mr Wilson \$4,500.00 as a contribution towards his costs.

Summary of Orders

[90] As is usual in Authority determinations where remedies are awarded for lost earnings or reimbursement of unpaid wages and holiday pay, the figures are expressed in gross amounts. Given the circumstances here, it will be for Mr Wilson to reconcile any tax that he may owe on all of his earnings. MM remains ordered to pay the amounts in this determination in gross.

[91] Major Motors Limited is to pay David Wilson the following:

- a. \$10,000.00 compensation under s123(1)(c)(i) of the Act
- b. \$13,235.00 gross for lost earnings under s123(1)(b) of the Act
- c. \$1,058.80 gross for holiday pay under s25 Holidays Act 2003
- d. Costs of \$4,500.00
- e. The filing fee of \$ 71.56.

Antoinette Baker
Member of the Employment Relations Authority