

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 313
3174403

BETWEEN LANCE KERRY-HOPWOOD
MORRELL
Applicant

AND ELITE COATINGS (2017) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Keshila Fayen, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: By audio visual conference on 24 May 2023

Submissions Received: On the day

Date of Determination: 14 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lance Morrell says that he was employed by Elite Coatings (2017) Limited (Elite Coatings) as a labourer between 1 March and 9 April 2022. He says in his statement of problem that he was unjustifiably disadvantaged in, and constructively dismissed from, his employment.

[2] Elite Coatings is a duly incorporated company. It has its registered office in Alexandra and carries on the business of painting and decorating.

[3] Elite Coatings have not participated in the Authority investigation process. They have not lodged a statement in reply and did not attend a case management conference on 31 August 2022.

[4] Mr Morrell seeks compensation in the sum of \$8,000 together with reimbursement of lost wages, payment of unpaid wages and a contribution to costs. Some additional claims were advanced by Ms Fayen at or shortly before the time of the investigation meeting. One was for penalties for failing to have an employment agreement and provide wage and time records when requested. The Authority is not prepared to allow a late claim for penalties. No claim for penalties was commenced in the statement of problem. Elite Coatings has had no notice of this claim.

[5] There are two new claims that are not in the statement of problem. One is a claim for holiday pay and the other for interest on monies found owing. It is appropriate to deal with these matters. The Authority will give Elite Coatings an opportunity for a response to these new matters before determining them.

Investigation process

[6] After a direction to mediation, a date was given for an investigation meeting on 24 January 2022. Ms Fayen advised shortly before that date that she was confident the parties could resolve the matter. On that basis the investigation meeting was adjourned and the parties told a further investigation meeting could be brought back on at short notice if the matter did not resolve. Ms Fayen subsequently advised the Authority that the matter had not been resolved and she wished to have a further investigation meeting.

[7] I am satisfied that Elite Coatings was served at its registered office and address for service in Alexander with the statement of problem, notice of direction following a case management conference on 31 August 2022 and the new investigation meeting notice. Details as to how to connect by Teams was provided in the notice of investigation meeting. The notice of investigation meeting was also served on the sole director of Elite Coatings, Benson Jeffery at an email address that he had used to communicate with Ms Fayen.

[8] There was no appearance on behalf of Elite Coatings at the investigation meeting on 24 May 2023 and no reason advanced for the non-appearance.

[9] In the absence of any good reason advanced on behalf of Elite Coatings for its failure to appear the Authority proceeded with its investigation meeting and heard evidence from Mr Morrell and submissions from Ms Fayen.

The issues

[10] The Authority needs to determine the following issues in this case:

- (a) Was Mr Morrell an employee of Elite Coatings?
- (b) If Mr Morrell was an employee of Elite Coatings then how did the relationship end?
- (c) If the relationship ended by way of resignation then was the resignation in the nature of a constructive dismissal, or alternatively, was Mr Morrell unjustifiably disadvantaged in his employment?
- (d) If Mr Morrell was constructively dismissed from his employment, then was the dismissal unjustified?
- (e) If the dismissal was unjustified, then what remedies should be awarded and are there issues of mitigation and contribution?
- (f) Are there wage arrears owed?
- (g) Is there holiday pay owing?
- (h) Should interest be awarded?

Was Mr Morrell an employee of Elite Coatings?

[11] At the material time Mr Morrell was subject to a community-based sentence that essentially confined him to his home address unless absences were approved by the Department of Corrections (Corrections). He was friendly with Mr Jeffery who was supportive toward him.

[12] Mr Morrell said that Mr Jeffery was happy to employ him to work for Elite Coatings on the basis that agreement was obtained from his probation officer at Corrections. There was no written employment agreement or independent contracting agreement entered into.

[13] Ms Fayen sent a letter dated 5 May 2022 to Elite Coatings after the relationship ended raising personal grievances for unjustified disadvantage and unjustified dismissal. Mr Jeffery responded by email dated 17 May 2022 to Ms Fayen and denied Mr Morrell was an employee. Therefore it is an issue for determination.

[14] There were some Facebook messages between Mr Morrell and Mr Jeffery in February 2022 before the relationship commenced consistent with the need for Corrections approval if Mr Morrell left his home address.

[15] On 15 February 2022, Mr Jeffery sent a message that provided:

“Probation got intouch breather [brother] so all looking not bad”

[16] On 17 February 2022, Mr Jeffery sent a further message to Mr Morrell as below:

Mōrena hey am planning on kicking into your first day around the 24th I’ll ring probation to [too].

[17] Mr Morrell produced a Corrections document dated 14 February 2022. It was headed ‘Employment Agreement – Home Detention/Residential Restriction’. It provided that Mr Jeffery agreed to employ Mr Morrell, who was subject to home detention, at Elite Coatings. There were certain requirements in the document that the employer had to agree to and there was a space for signature by the employer. Mr Morrell also had to agree to certain terms and requirements. The document was not signed by Mr Morrell or Mr Jeffery.

[18] Mr Morrell said in his evidence at that time there were COVID-19 restrictions, and it was likely agreement was indicated verbally to the Department of Corrections.

[19] The Authority was provided with a copy of a Corrections direction notice of approved absences directing Mr Morrell to leave his address on Tuesday 1 March 2022 for the purpose of attending employment. It was noted that this was an ongoing absence that will occur that week between the hours of 0730 and 1730.

[20] There is an email dated 24 May 2022 from Mr Morrell’s probation officer that confirms absences utilised by Mr Morrell over the period 1 March to 8 April 2022 for employment purposes. The email contains details of several sites where Mr Morrell says he worked with absences approved from 7:30 am to 5:30 pm in the main. On two occasions the absence was extended until 7:30 pm to accommodate working late.

[21] An employee is defined in s 6 of the Employment Relations Act 2000 (the Act). The material parts of s 6 are set out below:

(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.
- (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.

[22] Mr Jeffery would pick Mr Morrell up from his home each day that he worked and take him to the site where the work was to be undertaken. When work was finished for the day Mr Jeffery would drop Mr Morrell back home. Mr Morrell's work was based mainly around Hebel panel fixing, heavy plastering, GIB stopping and plastering/tiling. He also started undertaking some painting work. Whilst Mr Morrell was learning the nature of the work, Mr Jeffery worked alongside him.

[23] The Supreme Court has provided guidance as to all relevant matters to be considered when determining the real nature of the relationship.¹ It stated in a judgment which upheld the decision of the Employment Court:

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of the common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her account (the fundamental test), which were importance determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it has actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration, and fundamental test ...

¹ *Bryson v Three Foot Six Ltd No. 2* [2005] ERNZ 372 at [32] (SC).

What was said by the parties about their intentions for the relationship?

[24] Mr Morrell said that he intended to enter an employment agreement with Elite Coatings.

[25] The Authority did not hear from Mr Jeffery but concludes it more likely than not from the Corrections documentation that Corrections considered the intention of the parties was to enter into an employment agreement. The evidence supports that there was communication from Corrections with Mr Morrell and Mr Jeffery. It is most unlikely that Corrections would have approved Mr Morrell's absences from his home for the purpose of employment if Mr Jeffery had not agreed with Corrections that the relationship was of that nature.

[26] The evidence viewed overall supports a common intention about the relationship at the time it was entered into that it was one of employment.

Was the way the relationship operated in practice different to this intention?

[27] The work was undertaken by Mr Morrell over six days a week Monday to Saturday. The Corrections approved absences show that there was some variation in Mr Morrell's pattern of work week to week. For the first week Mr Morrell worked four days. For the second week he worked two days. For the third week he worked five days. For the fourth week he worked four days. For the fifth work Mr Morrell worked five days and for the sixth and final week he worked four days.

[28] Mr Morrell was supervised closely at least initially. It appears clear that Mr Jeffery was able to exercise control over Mr Morrell and some of the text messages towards the end of the relationship express dissatisfaction with his work. Mr Morrell says it was only after he raised the issue of payment that there was any concern about his work raised.

[29] When Mr Morrell worked he did so on a full time basis each day in the main between about 7.30am and 5.30pm. That is supported by Corrections records. Travel times to and from sites varied. Mr Morrell was required by Corrections to always remain on the agreed worksite and not leave without written permission from his probation officer. This included lunch breaks. He did not therefore have any flexibility to come and go as he wished and work for others.

[30] There was no clear evidence of a date for payments to be made to Mr Morrell but Mr Morrell said that there was agreement he would receive \$24 an hour. Mr Morrell was not provided with any payslips. He only received two payments in cash. The first was a few days after he had commenced working when Mr Jeffery gave him \$600 cash. On 4 April 2022 Mr Jeffery gave Mr Morrell \$1,000 cash after pulling up to an ATM machine and withdrawing that amount. A disagreement about not being paid what he was owed was the main reason Mr Morrell said he ended the relationship.

[31] It is unlikely that tax was accounted for. Mr Morrell said his expectation was that Elite Coatings would pay tax although from the Facebook messages where amounts owing were discussed I can't be satisfied that either party turned their attention to the requirement to pay tax.

[32] The evidence did not support there was an ability for Mr Morrell to make a profit from a job and he did not bear any risk of loss. There was no evidence that he supplied any tools and he was picked up and dropped off. Objectively assessed he was integrated into Elite Coatings' business.

[33] The relationship was one of short duration. The evidence supports there was a common intention that the relationship would be one of employment and this intention was conveyed to Corrections by both parties. Viewed overall and applying the usual tests in assessing the real nature of the relationship I am not satisfied that the common intention was displaced.

[34] I conclude that the real nature of the relationship Mr Morrell had with Elite Coatings was one of employment.

[35] The Authority has jurisdiction to consider Mr Morrell's claims for personal grievances and reimbursement of wages and holiday pay.

How did the relationship end?

[36] The relationship from Mr Morrell's perspective was initially a positive one. It was positive for him to be able to leave his home and engage in productive activity. Mr Morrell said there was no negative feedback about his work and that Mr Jeffery praised his work ethic,

supplied him with personal equipment and said he would give him a company vehicle when he got his licence back and a pay rise.

[37] Mr Morrell said that Mr Jeffery came around for a coffee about three to four days after he had started work and they talked about the hours he had worked and he was paid \$600 cash. Mr Morrell considered that that payment was the correct amount for the hours of work he had undertaken to that date.

[38] There was a further payment of \$1000 on 4 April 2022. Mr Morrell said that at that time he had undertaken 84.5 hours and had been asking for about two or three weeks for further payment.

[39] The relationship took a turn for the worse over the weekend of 9 and 10 April 2022.

[40] On 9 April by Facebook message Mr Morrell asked to Mr Jeffery amongst other matters for \$800. Mr Jeffery responded by Facebook message that he had to give money to other people and that would not leave much in the account for Mr Morrell. He also made a critical comment about a recent job that a customer was moaning about the fact that he had charged the customer for Mr Morrell at the same rate as him and “fact you not doing fuck all.”

[41] Mr Morrell responded by Facebook message and said amongst other matters that he had done nearly three weeks and about 100 hours and had only received \$1000. He wrote in the message:

...The maths on that don't even reach \$10 a hour. Very disappointed.

[42] The Facebook messages continue in a similar vein between the two. I don't intend to set the contents out, but it is clear when the messages are considered that Mr Morrell considered he had had not been paid properly. He was concerned and angry when he requested payment, that several other issues were raised by Mr Jeffery that he considered were designed to obfuscate the issue of payment to him.

[43] Mr Morrell did not consider he had been paid properly and he did not return to undertake work for Elite Coatings.

Was the resignation on the nature of a constructive dismissal?

[44] In some circumstances a resignation may amount to a dismissal. It has been stated by the Court of Appeal that there is no substantial difference between an employer intending to terminate employment who dismisses an employee and an employer whose conduct forces the employee to leave.²

[45] Three non-exhaustive situations are listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur.³

- (a) Where the employee is given a choice of resignation or dismissal.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[46] Mr Morrell relies on the third situation that Elite Coatings breached its obligations to pay him properly.

[47] In determining if resignation was caused by a breach on the part of the employer the circumstances of resignation need to be examined and if a breach of duty is found then it needs to be of sufficient seriousness to make resignation reasonably foreseeable.

What were the reasons for the resignation

[48] The relationship ended because Mr Morrell was concerned that he had not been paid his wages in full. He became agitated when issues were raised by Mr Jeffery that he saw as designed to obfuscate the issue of payment to him. He did not believe that he would be paid further.

Was the resignation caused by breaches of duty to Mr Morrell

[49] From the Facebook messages over the period 9 and 10 April 2022 Mr Jeffery accepted that there were unpaid wages owing to Mr Morrell.

² *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

³ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

[50] Mr Jeffery said about payment to Mr Morrell that he would have to wait and see because he had other people to pay. In other messages he disputed that Mr Morrell had worked the number of hours he said he did. He also said in one message that if Mr Morrell was not happy he would pay him out and “be done with it.” He referred in the message to it being hard to pay people cash and that he lost a lot paying in that manner. He stated he was getting the feeling that Mr Morrell did not appreciate what he was doing for him and the length he went to to get him a day’s work. He suggested in another message that he would pay all the amount owing and then in another half of the amount to a third person who he said was owed money by Mr Morrell.

[51] It is unclear when it was agreed payment of wages would be made to Mr Morrell. The first payment of \$600 cash at the end of his first week commencing 1 March 2022 created a not unreasonable expectation that payment of wages could be weekly. Mr Morrell was however not paid again until 4 April 2022 and then only after repeated requests for payment. He was not paid the full amount owing at that time. Payment was short, as will be set out later in the determination.

[52] When Mr Morrell asked for payment of wages in full on 9 April 2022 the communications created further difficulties in the relationship. The communications agitated Mr Morrell and failed to reassure him that he would be paid what was owing if he continued to work. There was a breach of the obligation to pay wages in full.⁴ Mr Morrell resigned because of the breach of duty to pay wages in full.

If there were breaches by Elite Coatings then were they of a serious nature to make the resignation reasonably foreseeable?

[53] A failure to pay wages in full is a serious breach.

[54] Mr Morrell would not agree to any further delay in payment of full wages without a reasonable basis to conclude payment would be forthcoming. Mr Jeffery’s responses did not provide that reassurance. In response to being asked for payment Mr Jeffery raised other issues that agitated Mr Morrell including that payments to others would come first and that part of what was owed would be paid to a third party. Mr Morrell saw the raising of those other issues, not unreasonably, as an attempt to avoid the issue of payment. Viewed in totality the

⁴ Wages Protection Act 1983 section 4.

communications between Mr Morrell and Mr Jeffery were such that it would have been reasonably foreseeable to Mr Jeffery that Mr Morrell would not be prepared to continue to work in circumstances where he was not paid properly for work he had carried out.

[55] Mr Morrell has made out his personal grievance that he was constructively dismissed.

Was the dismissal justified?

[56] The failure to pay wages in full to Mr Morrell is not justified.

[57] Mr Morrell has made out his personal grievance that he was unjustifiably constructively dismissed and is entitled to consideration of remedies. This finding absorbs the grievance of unjustified disadvantage.

Remedies

Lost wages

[58] If the Authority determines that an employee has lost remuneration because of a personal grievance then s 128(2) of the Employment Relations Act 2000 (the Act) provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time. Three months ordinary time is the lesser sum as Mr Morrell was without a job until 23 July 2022 and to find work he had to relocate.

[59] Mr Morrell, because of his sentence, faced some hurdles in finding new employment. There was limited evidence about attempts to mitigate.

[60] I accept that Mr Morrell enjoyed his job and that if he had been paid properly, he would still have wanted to continue to work at Elite Coatings. The relationship however impressed me as particularly informal and somewhat ad hoc. Payment to Mr Morrell from Elite Coatings appeared to depend on payment for each job. Even when payment was made by customers payment of other bills took priority over wages. The friendship between Mr Morrell and Mr Jeffery from the Facebook messages, whilst helpful in securing employment whilst serving a community sentence, unfortunately seemed a barrier to a more professional employment relationship.

[61] Standing back and making an assessment under this head of remedy I could not be satisfied that the employment relationship would have lasted for three months. Adopting a

counter-factual analysis I conclude an appropriate award to account for the limited financial ability of Elite Coatings to sustain an employment relationship for any extended period is an award for seven weeks lost wages.

[62] Mr Morrell usually worked between 7.30am and 5.30 pm. His absence was extended by Corrections on two occasions to a finish time of 7.30pm. The average days he worked each week were four. I've adopted a broad approach and allowed for an unpaid half hour travel time there and back to the work site and a lunch break of half an hour. I've arrived at an average of eight and a half hours work each day at \$24 per hour which is \$204 gross per day and \$816 gross per week (\$204 multiplied by four days).

[63] Subject to any issues of contribution Mr Morrell is entitled to reimbursement of lost wages for seven weeks in the sum of \$5,712 gross.

Compensation

[64] Mr Morrell said that the dismissal had a significant effect on him. He seeks the sum of \$8000 for compensation. Employment with Elite Coatings had been a helpful way for him to reintegrate back into the community however he said that he was made to feel that he was not entitled to be paid and that asking for his money was the wrong thing to do. Mr Morrell said that there were significant financial impacts and impacts on his relationship from the dismissal. He said that he had further treatment with Mental Health services to deal with the isolation again following dismissal. He was also hurt by Mr Jeffery after employment denying the relationship and saying that the messages were code for criminal activity at a point in time when he was trying to turn his life around.

[65] Under each of the heads in s 123(1)(c)(i) of the Act I am satisfied that Mr Morrell has experienced harm. I have had regard to other awards of compensation in other cases that are similar to this matter.⁵

[66] An appropriate award for compensation subject to any issues of contribution is the sum of \$8000.

⁵ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

Contribution

[67] The Authority is required under s 124 of the Act where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance. If required, then the Authority can reduce remedies that would otherwise have been awarded.

[68] I do not conclude that Mr Morrell contributed to the situation that gave rise to the personal grievance when he asked for payment of his wages in full. His more emotive Facebook messages arose from a sense of frustration at Mr Jeffery's messages after he requested payment for wages he was owed.

[69] I do not make any deductions from the awards above.

Unpaid wages

[70] Mr Morrell says that he is owed unpaid wages for work he performed. As the two payments he received were in cash it is necessary to arrive at gross figures. Ms Fayen advised that Mr Morrell's tax code is ME and she has endeavoured to calculate what tax would have been which is helpful. The tax rate would have been 17.5%.

[71] Adopting a broad approach, I have multiplied each cash payment by that rate. Mr Morrell says that the first payment of \$600 paid him up to date at that time. For the first payment of \$600 the gross amount is \$705 gross. That is a payment for 29.4 hours which would have been about three and a half days work.

[72] For the next period of his employment Mr Morrell said that he had worked 84.5 hours at the time he was given \$1000 cash and then a further three days before the relationship ended. I accept his evidence about the hours he worked. I have assessed the hours worked for the further three days at 8.5 hours a day which is a total of 25.5 hours on the same basis set out at paragraph 62. That is therefore a total number of 110 hours.

[73] The gross amount owing to Mr Morrell after the first payment of \$600 would be \$2640 (110 hours multiplied by \$24 per hour). The net is \$2178. Mr Morrell was paid \$1000 net and there are unpaid wages of \$1178 net. Ms Fayen's calculations from using the Inland Revenue Department calculator differed only slightly from this however she had started with 111.5 hours worked after the initial period rather than 110 hours which would account for this

in the main. For completeness if Elite Coatings has paid some of the amount owing to Mr Morrell to a third party that Mr Morrell owed money to then the Authority is not satisfied that Mr Morrell authorised this and he is entitled to payment of his wages in full.⁶

[74] Mr Morrell is owed the sum of \$1178 net by Elite Coatings. Elite Coatings is required to account for the tax on the net amount to the Inland Revenue Department.

Holiday Pay

[75] Mr Morrells, it appears, is owed holiday pay. Section 23 of the Holidays Act 2003 applies when calculating annual holiday pay because Mr Morrell's employment ended within 12 months and he was not entitled to annual holidays. Mr Morrell is entitled to payment of 8% of his gross earnings.

[76] I have assessed gross earnings should have been \$3,345 being the amounts of \$705 and \$2,640. 8% of \$3,345 is the sum of \$267.60. That is the amount the Authority calculates is owing to Mr Morrell for holiday pay. As indicated earlier I will give Elite Coatings an opportunity to comment on this within 10 working days of the date of this determination, before making any order.

Interest

[77] There was a claim for interest at the investigation meeting. The Authority is minded to award interest on the unpaid wages and the holiday pay from 11 April 2022 which is the first working day after 9 April 2022.

[78] The Authority has the power to award interest under clause 11 of the second schedule of the Act calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[79] As indicated earlier I will give Elite Coatings an opportunity to comment on this within 10 working days from the date of this determination before making any order.

⁶ Section 4 of the Wages Protection Act 1983.

Findings and orders made

[80] Elite Coatings has been found to have unjustifiably constructively dismissed Lance Morrell which finding absorbs the unjustified disadvantage claim. To settle the grievance the Authority orders that:

- (a) Elite Coatings pay to Lance Morrell the sum of \$5,712 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (b) Elite Coatings pay to Lance Morrell the sum of \$8000 without deduction being compensation under s 123 (1)(c) (i) of the Act.

[81] Elite Coatings (2017) Limited has been found to owe unpaid wages to Mr Morrell and the Authority orders that:

- (a) Elite Coatings pay to Lance Morrell the sum of \$1178 net for unpaid wage arrears and account for the tax on the net amount to the Inland Revenue Department.

[82] The Authority has indicated that holiday pay appears to be owed to Mr Morrell in the sum of \$267.60 and that it may award interest on the unpaid wages amount and any holiday pay found to be owing. As these matters were only raised at the investigation meeting Elite Coatings has 10 working days from the date of this determination to respond.

Costs

[83] Costs are reserved.

[84] Ms Fayen may lodge and serve a costs submission within 14 days from the date of this determination. Elite Coatings will have a further 14 days from receipt of the submission to lodge and serve reply submissions as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[85] The Authority will determine any issue of costs together with the outstanding matters of holiday pay and interest at the same time.

[86] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.⁷

Helen Doyle
Member of the Employment Relations Authority

⁷ <https://www.era.govt.nz/assets/Uploads/practice-note-2>.