IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 377
3177128

	BETWEEN	HAPATI MAGUIRE Applicant
	AND	CONCRETE LIMITED t/a CONCRETE UNLIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Alex Kersjes, advocate for the Applicant Hilary Palmer, counsel for the Respondent	
Investigation Meeting:	2 June 2023 by audio visual link	
Submissions Received:	2 June 2023 from the Applicant 2 June 2023 from the Respondent	
Date of Determination:	18 July 2023	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hapati Maguire was engaged by Concrete Limited t/a Concrete Unlimited (Concrete Ltd) as a labourer from early December 2021, until he was summarily dismissed on 23 February 2022.

[2] Mr Maguire raised a personal grievance with Concrete Ltd on 17 April 2022, alleging he had been unjustifiably dismissed. The matter was filed in the Authority on 6 July 2022 and Mr Maguire seeks lost wages and compensation.

[3] Concrete Ltd deny unjustifiably dismissing Mr Maguire, asserting the basis of his employment was casual and that he either resigned by conduct before he was dismissed or was later justifiably dismissed for serious misconduct.

The Authority's investigation

[4] 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.

[5] All evidence and submissions were heard by an Audio-Visual Link. Hapati Maguire and two of his ex-co-workers: Tyler Bradley and Kerry Sutherland, gave evidence. Ryan Berkett and Siobhan Berkett, Directors of Concrete Ltd, gave evidence for Concrete Ltd.

Issues

The issues to be decided are:

(a) Was Mr Maguire an independent contractor or an employee for the first period of engagement between 2 December 2021 – 20 January 2022?

(b) Was Mr Maguire a casual employee with no expectation of ongoing regular employment and did his employment end because of this categorisation?

(c) If not, was Mr Maguire unjustifiably dismissed?

(d) If Concrete Ltd's actions in dismissing Mr Maguire do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:

i. lost wages; and:

ii. compensation under s 123(1)(c)(i) of the Act.

(e) If Mr Maguire is successful in all or any element of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?

(f) How costs are to be dealt with.

What caused Mr Maguire's Employment Relationship Problem?

[6] Concrete Ltd is a small Nelson based business that was incorporated in October 2021 by the Becketts, a married couple. The award-winning company provides decorative and standard concrete services in residential and commercial settings including: floors, driveways and outdoor areas.

[7] It is the Berkett's first business venture. Ryan Berkett, who has prior experience in the concrete industry, works on the operational side of the business and Siobhan Berkett undertakes all administration support work including devising employment and contractor agreements. Siobhan Berkett says they have never employed more than six workers – at the time of this dispute they said they employed three permanent workers and the rest were casual or contractors depending on workflow.

[8] The Berketts initially engaged Mr Maguire in early December 2021. Mr Maguire had previously worked alongside Ryan Berkett at another concreting company and recalls Mr Berkett leaving a couple of months earlier to set up Concrete Ltd. He said he had given up his previous job and was flatting with a friend who was an employee of Concrete Ltd, who suggested he (Mr Maguire) approach Mr Berkett who was looking for extra workers.

[9] There was conflicting evidence on how the first stage of the engagement was arranged. Mr Maguire says he was initially paid in cash while Ryan Berkett sorted out paperwork to get the business up and operational. Mr Maguire described doing prepping and boxing work and pouring and finishing the concrete on jobs. He says he was provided with tools, PPE and at some point in time, a company branded uniform.

[10] The Berketts say they, after a short period of paying him cash, initially engaged Mr Maguire as an independent contractor and that was at his insistence, as Mr Maguire wished to retain the ability to work elsewhere and undertake personal recreational activities. The Berketts produced a brief one page: "Independent Contractor Agreement" signed by both Mr Maguire and Ryan Berkett with both signatures dated 2 December 2021. The terms were rudimentary with remuneration of $25 per hour inclusive of GST paid weekly. The nature of

the service Mr Maguire was providing is not defined except Mr Maguire agreed to "carry out services on a project by project basis". Remuneration was detailed as being paid by either direct credit to bank account or by cash payment. Tax, ACC levies and insurance are described as Mr Maguires' responsibility.

[11] While claiming to be set up to allow Mr Maguire the flexibility to work elsewhere, this term was not included in the agreement. The implication from the limited wording used, was Mr Maguire was committing to make himself available for unspecified projects. Ryan Berkett claimed Mr Maguire had "100% ability to turn down jobs". A situation was cited when Mr Maguire did work elsewhere for a short period but it was not clear whether that was just because Concrete Ltd had a lull in their workflow and was not offering him work. Mr Maguire says he regarded Concrete Ltd as his employer and his prime focus of loyalty and if he had to work elsewhere, he checked this with Ryan Berkett. Mr Maguire denied he had sought the independent contract including for the reasons the Berketts suggest.

[12] Mr Maguire made no mention of the independent contractor agreement in his brief of evidence and when questioned he said he could not recollect signing it. However, when pressed, Mr Maguire recalled signing an agreement in the Berketts home kitchen and it being nothing like any agreement he had ever signed before, as he had only ever worked as an employee.

[13] Mr Maguire says he did not register a company or provide invoices for work undertaken (he was not asked to) and he had no tools other than what Concrete Ltd provided. Mr Maguire says Ryan Berkett assured him the company was growing and Mr Maguire would be an employee for the next few years.

[14] Siobhan Berkett says she recalled the circumstances of the independent contract being presented to Mr Maguire as she had discussed it with Ryan beforehand and she had drafted it, without taking any legal or accounting advice.

[15] While Ryan Berkett says he suggested Mr Maguire get legal advice on the independent contractor agreement he conceded he signed it there and then, on 2 December, in the Berkett's kitchen. It was not established that Mr Maguire was provided with a copy of the agreement.

[16] In early January 2022, discussion shifted to Mr Maguire becoming an employee. The Berketts claimed this was on Mr Maguire's initiative to gain more flexibility and they suggested he did not want to be a permanent employee. Ryan Berkett recalled a discussion about getting Mr Maguire engaged as a casual employee to fill in when required. Mr Maguire's perspective was that things just went on as before after he signed an employment agreement that was initiated by Ryan Berkett but his pay was reduced to $23 per hour which he did not challenge as he thought the business was in its early stages. The Berketts claimed the reduction was simply to reduce the cost from paying a contractor a premium and to get Mr Maguire onto a casual basis.

The two employment agreements

[17] In pursuit of the latter objective, Siobhan Berkett again without any legal advice, put together an employment agreement from the internet and it was presented to Mr Maguire on 19 January 2022. The agreement was signed at the time it was presented by the Berketts. Ryan Berkett says he observed Siobhan explaining the agreement to Mr Maguire before he signed it, including telling him he could seek advice. However, Siobhan Berkett says she immediately noticed the agreement she had provided was from her perspective a draft one, saying in her written brief that "it did not have any paragraph numbers and looked to be incomplete." Siobhan says she immediately asked for it back and then gave him another version of the agreement and told him not to sign it immediately but to take it home to read. The second agreement was signed by both parties on 20 January 2022. Mr Maguire says he can only recall signing one agreement but he did not challenge the validity of the second one and he then recalled providing his IRD number on 26 January (confirmed by text exchange). Mr Maguire did not retain a copy of the agreement he later signed and apparently was not provided with a copy of the signed agreement.

[18] While both versions presented were casual employment agreements the changes made went clearly beyond Siobhan Berkett's innocuous explanation – some of these included the second agreement:

- Being described clearer by a cover sheet and title page that it was "casual," including the job title was changed to "casual concrete labourer" and casual was defined in several places including the classic formulation that:

> Each engagement undertaken by you is a stand-alone employment arrangement and the employment will be at an end at the completion of the work required. No redundancy compensation is payable.

- A two- hour notice period of termination of the agreement (whereas the draft had been two weeks).
- A reduced hourly rate to $22.50c per hour.
- A 90-day trial period
- The specific provision allowing the employee to decline work was removed in favour of more permissive hours of work being set "by us as is necessary to facilitate the efficient operation of the business." And confirmation (in two locations) that there was "no minimum number of hours or days of work guaranteed."
- It contained a more permissive drug and alcohol testing policy.

[19] Although mentioned in the later dismissal letter, counsel for Concrete Ltd conceded their reliance on the expressed 90 day trial period was unsustainable both based on a belief that the employment was casual and the fact that Mr Maguire had already worked for Concrete Ltd (for cash) prior to executing the second employment agreement containing the trial period.

Hours of work

[20] There was some dispute over the regularity of Mr Maguire's hours worked. Mr Maguire asserted he worked regular hours of 8 hours per day, Monday to Friday and Mr Bradley supported this assertion confirming they would meet every day at 7am at the Berketts house to commence work for the day. Mr Sutherland says it was his understanding that Mr Maguire was a full-time employee. However, Mr Maguire also conceded on three days he was not provided with work he worked for a friend (15-17 February inclusive).

[21] Concrete Ltd provided a timeline that showed days when work was offered and days Mr Maguire worked. This showed for the period 21 January to 21 February (including Saturdays and Sundays) that Mr Maguire worked on eleven days and for 21 Days no work was offered. The timeline indicated Mr Maguire turned down a day to work on Saturday 29 January.

[22] Concrete Ltd, in a memorandum from counsel of 31 March 2023, says for the first period of the engagement up to 20 January 2022 no record of hours worked was kept (on the belief he was a contractor) but Mr Maguire receive six payments as follows:

Cash

- 6 December 2021 – 10 December $400
- 13 December – 17 December $400
- 20 December – 23 December $300

Bank transfers

- 22 December $585.15
- 13 January $400
- 19 January $458.22

[23] There were no wage, time or holidays records kept for the period after 20 January 2022. Concrete Ltd says hours were set by Texts, Facebook Messages and Telephone Calls between Mr Maguire and Ryan Berkett. The reason for not keeping formal records (in breach of two statutory provisions) [1] was described as Concrete Ltd was a new set up with systems and policies under development. However, payslips prepared by Concrete Ltd's accountant were provided and showed:

- Period end 25 January $990 – 44.00 Hours
- Period end 1 February $708.75 – 23.50 Hours
- Period end 6 February $495 – 22.00 Hours
- Period end 13 February $180 – No hours recorded
- Period end 20 February – no hours or pay recorded (**note** a leave balance was recorded on this payslip of 0.44 weeks but on none of the other payslips)
- Period end 27 February 234.90 – no hours recorded

Ending of the employment relationship

[24] In mid-February 2022, Ryan Berkett says he became concerned that Mr Maguire was not turning up on time for jobs he had agreed to make himself available for. Matters 'came to a head' when Ryan Berkett says Mr Maguire did not turn up at an agreed time of 5 am on Friday 18 February and made no contact on that day until 11:24 am to indicate he was stuck in

[1] Section 130 Employment Relations Act 2000 and Section 81 of the Holidays Act 2003.

Havelock where he had been working for a friend. Concrete Ltd had no work available on Tuesday-Thursday of that week and, previously between 4 – 13 February, Mr Maguire was only provided one day of work. Mr Maguire had apprised Mr Berkett he was going to work for a friend when not needed by Concrete Ltd, which was agreed.

[25] Mr Berkett says he rang Mr Maguire on Friday 18 February, to advise he wanted to meet on the following Monday to discuss repetitive lateness and failure to turn up at work; he said he also advised Mr Maguire of the need to have a support person present. Mr Berkett also claimed he messaged Mr Maguire on the Sunday evening before the meeting to say the meeting was at 3pm and, says Mr Maguire rang him back and they agreed to an earlier time around mid-day. Mr Berkett did not produce a copy of the text or phone record to evidence these exchanges. Mr Maguire could not recall being called by Ryan Berkett and had not retained texts but he was certain he had not been advised of the need to have a support person at the meeting. However, I do note Concrete Ltd disclosed text exchanges between 22 Jan – 18 February 2022.

[26] I consider it more likely than not, that Ryan Berkett did call Mr Maguire to set up the meeting and it is likely he may have discussed the purpose of the meeting. Given the nature of the meeting that was to discuss emerging rather than serious timekeeping issues, I consider it was more likely than not that Ryan Berkett did not advise Mr Maguire of the need for a support person to be present. Given the parties communicate regularly by text it is perplexing that the meeting was not set up by text and the purpose clearly explained. This was a significant procedural failure and did not assist my investigation.

The 21 February meeting

[27] The parties met at the Berketts' house at around 11:30 am. There was a clash of evidence on who attended the meeting: with the Berketts indicating it was confined to them and Mr Maguire and Mr Maguire insisting that Mr Sullivan also attended and, Mr Bradley was also close by and another worker too. All agreed the meeting took place around an outdoor table in the Berketts' yard.

[28] What was not in dispute, was that after hearing Ryan Berkett express his concerns, Mr Maguire reacted angrily: was abusive and walked away followed by Ryan who Mr Maguire and his witnesses claimed 'stood over him' as he left the property.

[29] It would appear the meeting was brief and no verbatim notes were taken by the Berketts during the meeting. However, after an Authority direction to disclose all relevant documentation made at a second Directions Conference of 23 March 2023, Concrete Ltd on 31 March 2023 disclosed what they said were meeting notes taken by Siobhan Berkett after the meeting. The notes, that I accept are genuine, confirm that Mr Maguire's employment was terminated during the 21 February meeting by Ryan Berkett (Siobhan Berkett conceded this to be the case in her 31 May 2023, written brief of evidence) in response to Mr Maguire's reaction to being chastised for his timekeeping issues and that Mr Maguire acted in an intimidating fashion.

[30] The meeting note reveals the extent of the timekeeping issue related to two instances when Mr Maguire was late for work and one day when he was a 'no show.' When questioned as to the assertion that Mr Maguire was 'casual' and could supposedly decline work offers, Siobhan Berkett said the issue was Mr Maguire's timekeeping and attendance after he had committed to working a shift. At the notes end under the heading "Actions," are bullet points starting with "Send termination letter" and then that Mr Maguire was to return a phone, a Hi-Viz Jacket, gumboots, and uniform.

[31] By contrast, Mr Maguire says he was dismissed at the meeting without being given an opportunity to explain anything and his adverse reaction was to the abrupt dismissal being communicated to him. Mr Maguire conceded he was angry as he was humiliated and used language he later regretted. Mr Maguire denied being physically threatening toward Ryan Berkett.

[32] Mr Sullivan says in a conversation with Ryan Berkett prior to the meeting he was advised of a decision to let Mr Maguire go and claimed to be present at the 21 February meeting where he corroborated Mr Maguire's account that he was dismissed before he reacted.

[33] Mr Maguire was not offered further work and the Berketts say they resolved to dismiss him after the meeting. They did not seek legal advice on this decision or the content of the subsequent dismissal letter.

Dismissal letter

[34] Concrete Ltd confirmed Mr Maguire's dismissal by an emailed letter of 23 February 2022 over Ryan Berkett's signature. To confuse matters, the letter quoted a passage from Maguire's second employment agreement but attached the first draft employment agreement, in response to Mr Maguire's request for a copy of such. I, however, accept Siobhan Berkett's evidence that this was an unfortunate oversight.

[35] While Concrete Ltd later claimed the dismissal letter was based upon Siobhan Berkett's note of the 21 February meeting, the letter outlined that Mr Maguire had provided an explanation for his 'no show' when questioned during the meeting which was that his truck had broken down and his phone was flat. This is not alluded to in the notes of the meeting.

[36] The 23 February letter outlined the reason for dismissal as "your behaviour on the 21st of February was of a threatening nature, I regret to advise we have no option but to terminate your employment effective immediately". The letter whilst not purporting to rely on such, drew Mr Maguire's "further attention" to a 90 day trial period clause (for what purpose, was unclear other than to impliedly deter Mr Maguire from pursuing a personal grievance).

Issue 1: assessment – was Mr Maguire initially a contractor or employee?

[37] To determine whether Mr Maguire was first engaged as a contractor or an employee, s 6 of the Act requires the Authority examine the true nature of the relationship and assess all relevant factors. This includes applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited* [2] and considering how the parties went about meeting the terms of the agreement once established.

[38] Given the evident inequality in power between the parties (including how some of the express contractual terms were structured), regard should be had to the object of the Act as set out in s 3. This, amongst other considerations, requires the Authority to recognise and acknowledge that there is an "inherent inequality of power" in the employment relationship.

[2] *Bryson v Three Foot Six Limited* [2005] NZSC 34 (SC).

The full Employment Court, in *Prasad v LSG Sky Chefs New Zealand Ltd* expressed that this involves eschewing a sole focus on a strict test-based formulae that:

> …. Runs the risk of obscuring the practical realities of working relationships and focusing on form over substance. That is not an approach mandated by the Employment Relations Act and is at odds with the underlying objectives of the legislation (including addressing inherent imbalances in bargaining power).

And:

> It is well accepted that the nature of work and the way it is undertaken is rapidly evolving, both within New Zealand and overseas. [3]

[39] Further, the Employment Court in *Leota v Parcel Express Ltd* noted the broad conceptual distinction as:

> An employee works for the employer, within the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[40] The court in *Leota* also referencing *Prasad* observed:

> It is now well established that employment relationships should not be viewed through a conventional contractual lens. As the full Court observed in *Prasad v LSG Sky Chefs New Zealand Ltd:*
>
> "[18] We are not drawn to this [strict contractual offer, acceptance, consideration analysis] aspect of the defendant's argument. It seems to us that it has been overtaken by developments in the law, specifically in the employment sphere in New Zealand and in contract law more generally. In this regard the strict contractual approach favoured under the previous Employment Contracts Act 1991 was displaced 17 years ago by the enactment of the [Employment Relations] Act. That Act, as the name suggests, heralded in a new way of looking at contractual relationships in the workplace. It has more generally been acknowledged that a rigid offer/acceptance/consideration approach in contract law can give rise to difficulties.
>
> [19] The reality is that it is not uncommon for workplace relationships (to use a neutral term) to morph over time and to change their nature incrementally, or for their true nature to emerge once the particular factual context is considered. It is certainly not unusual for there to be no contractual documentation, or documentation of any sort, evidencing a relationship. Nor is it unusual for documentation, when it does exist, to mask the true nature of the parties' relationship, either deliberately or inadvertently. And it is not uncommon for one party to have no idea about what the legal framework for the relationship is. This is particularly so in cases involving vulnerable workers. [4]

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[3] *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] ERNZ 835 at [20] and [23].
[4] *Leota v Parcel Express Ltd* ERNZ 164[2020] at [31].

[41] Taking account of "reality" factors expounded above, the following matters identified in *Bryson* require attention in assessing the real nature of the relationship in this case:

(a) The intention of the parties.

(b) Whether there was any written documentation setting out the terms of the relationship or 'label' attached to such.

(c) An examination of how the relationship operated in context including looking at issues of control and integration.

(d) Whether overall, it could be reasonably established that Mr Maguire was operating a business on his own account; and: whether there is overwhelming evidence of any industry practice defining contractual relationships.

[42] In *Southern Taxis v Labour Inspector,* the Employment Court cited Judge Perkins' observation in *Clark v Northland Hunt Ltd* that:

> None of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix. What is important is an overall impression of the underlying and true or real nature of the relationship between the parties. [5]

[43] A discussion of application of the tests in context is as follows.

Intention of the parties

[44] While express agreement provisions detailing the structure of the relationship are not necessarily decisive it could not be contended here that Mr Maguire's written agreement was misleading – the wording used sets out the intended nature of the relationship as an independent contracting situation. Mr Maguire is described as the "contractor" and although the terms are brief the use of this term is repetitive.

[45] Mr Maguire could recall little of the circumstances when he signed the agreement except that it was unlike anything he had previously signed and he was trusting of Ryan Berkett as he

[5] *Southern Taxis v Labour Inspector* [2020] ERNZ 183 at [70] citing *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC) at [224].

had promised him ongoing work. The purported contracting relationship was established after Mr Maguire had started in employment with Concrete Ltd being paid cash for work undertaken.

[46] I find it is unlikely Mr Maguire, who presented as a young relatively unsophisticated and underconfident worker, was familiar with the legal distinction between employee and contractor. However, he did work in an industry where contracting and sub-contracting are not uncommon. The brief agreement, although using the term "independent contractor" throughout, did not define the term and contrast it with an employment setting. It was apparent that Mr Maguire did not raise any issues despite the agreement appearing unfamiliar and he signed it when presented.

[47] Objectively, I would normally conclude that a person choosing to sign an agreement whilst consciously deciding not to question it, if they had doubts, should bear the responsibility for the consequences of such an action unless exceptional circumstances were evident. Mr Maguire struck me as reasonably articulate but he was also a practical learner and may have struggled with the terminology used and been reliant on Ryan Berkett.

[48] I find Mr Maguire chose not to challenge or question the agreement and if he had done so he would have been able to appreciate Concrete Ltd's offer was not one of employment.

[49] However, Ryan Berkett understood what he was offering but took no additional care to ensure Mr Maguire obtained some legal advice or that he appreciated the terms of the agreement and his tax obligations. Mr Berkett's position was Mr Maguire sought an independent contracting relationship to maintain flexibility. Mr Maguire disagreed with this and explained he had no other work at the time and only later took on work with a friend so he could pay his rent and living expenses when no income was coming from Concrete Ltd. I prefer Mr Maguire's evidence.

[50] In the context of the business being new, Concrete Ltd gained a specific advantage in establishing the engagement of Mr Maguire on a contracting basis. The agreement did not specify any work project or fixed price and it relied on Mr Maguire making himself available 'as and when needed with no availability compensation.'

The control test

[51] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.[6]

[52] Overall, the timing of each engagement and work allocation was under the control of Concrete Ltd. Ryan Berkett offered work as and when needed. Mr Maguire had nominal control over when he chose to make himself available for work but he had no other certain income stream. He also had no ability to expand any customer base to his advantage.

[53] I find Concrete Ltd exercised absolute control over the timing and allocation of work and where it was to be performed, they set remuneration at a fixed hourly rate, controlled information available on jobs and communication with clients. Ryan Berkett directly supervised Mr Maguire.

[54] Mr Maguire had a 'notional choice' over his hours and place of work albeit that he had no minimum income guaranteed nor was he remunerated for being available for work. Whether the latter factors amount to autonomy and independence is debatable.

[55] In weighing up the elements of the test, while Mr Maguire had a notional degree of choice over when he could work, the model of engagement gave Concrete Ltd significant control over Mr Maguire when he was working and this factor tips in Mr Maguire's favour.

The Integration Test

[56] This test requires a consideration of whether Mr Maguire could be viewed as an integral part of Concrete Ltd's business. It is relatively easy to determine this test at a conceptual level as the labouring role Mr Maguire undertook was required by Concrete Ltd. He was supplied with equipment and when on the job, was working alongside Concrete Ltd's other employees and to a client would be indistinguishable from those employees.

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[6] Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1st ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

[57] I find Mr Maguire was integral to Concrete Ltd's business and the application of this test leans toward categorising him as an employee.

Fundamental test

[58] This test considered whether Mr Maguire could reasonably be seen as operating in business on his own account or performing services on his own account and thus assuming an element of risk in his engagement with Concrete Ltd including profit and loss from any joint venture. In a traditional sense of a contracting situation a business may engage specialist assistance/expertise or help with work overload on a specific project. Here however, Mr Maguire had no specialist skills other than a rudimentary knowledge of pouring concrete.

[59] I found no evidence that Mr Maguire ran a business on his own account – he owned no plant or equipment, he did not use an accountant or explore defraying business expenses. Mr Maguire did not engage with other companies apart from working for a friend for a brief period when no work was available from Concrete Ltd. Essentially, all Mr Maguire had to offer was his labour – at best, he was a dependent contractor.

[60] In applying the fundamental test, I am also obliged to take into consideration in this context, the objectives set by the Act as discussed.

[61] I find that this this type of engagement has all the elements of a dominant party setting terms and that party was not Mr Maguire.

Taxation Issues

[62] Mr Maguire did not invoice for his services nor was there any evidence that he was asked to do so. On the contrary, Mr Maguire was paid in cash for an initial period when he was purportedly an independent contractor.

Industry Practice

[63] There was no direct evidence from the parties from which to determine what industry practice is. The Supreme Court in *Bryson* held that industry practice is a factor, but it is not conclusive in establishing the intention of the parties and cannot override other factors such as

how the relationship operates in practice. [7] The court in *Leota*, suggested a cautionary approach was warranted to avoid "the tail wagging the dog" in cases where industry practice may just reflect a mistaken understanding of the status of some or all workers in a specific industry or service environment. [8]

Finding

[64] Section 6 of the Act requires the Authority to determine the true nature of the relationship. For the reasons discussed above, taking account of the totality of the relationship and how it operated and the objects of the Act, I conclude the real nature of Mr Maguire's initial engagement up to 20 January 2022, was as an employee and not an independent contractor.

Issue 2: assessment - was the employment 'casual'?

[65] I examine whether the employment relationship was casual from both the onset of the relationship and at the time of dismissal.

[66] I have found above [at paras 15-16] the two employment agreements produced both describe the relationship as casual (the second one more explicitly). To balance this, I also found that the second agreement did not state Mr Maguire had the ability to turn down work and it was arguable that the way the relationship operated was more akin to a part-time "zero hours" agreement where the worker was committing to be available when asked to work. The fact that the relationship ended due to timekeeping issues tended to reinforce this premise.

[67] In describing how annual leave was to be dealt with, it is specified in the employment agreement that 8% on top of the employee's earnings would be paid instead of paid holidays. While this was indicative of the relationship being casual at the outset, it is noted that the agreement at clause 8a, indicated that 8% holiday pay was not 'pay as you go' in that it specified it was paid "each three month calendar period in full recognition of our obligation towards holiday entitlement". I find this 'arrangement' on holiday pay is inconsistent with s 28(1) of the Holidays Act 2003 which refers to an employer regularly paying holiday pay at 8%, if agreed. A perusal of the pay slips provided by Concrete Ltd, shows that no holiday pay was paid on a

[7] At [40].
[8] *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [38].

regular basis and Mr Maguire's final pay slip did not identify an amount of accumulated holiday pay.

[68] In Mr Maguire's final pay there is a deduction of $183.49 that does not appear to have been made in consultation with Mr Maguire. This is an unlawful deduction as it was not made in accord with s 5(1A) of the Wages Protection Act 1983 that requires prior consultation even if there is a general deductions clause in the employment agreement. [9] I also note cl 6 d of Mr Maguire's employment agreement specifies the legal position by indicating: "We will consult with you on each specific deduction…".

[69] In contrast, the employment agreement had a trial period provision, misconduct provision, an employee protection provision and a drug and alcohol testing regime and, a notice provision (albeit only two hours) – all indicative of ongoing employment.

[70] In addition to provisions in the employment agreement and the fact that the Act provides no definition of 'casual employment,' useful guidance on assessing what is a genuine casual relationship is found in the Employment Court decision *Jinkinson v Oceania Gold (NZ) Ltd* [10]. In *Jinkinson* the court took an approach of utilising s 6 of the Act to essentially 'look behind the label' defining the work as casual and examine the "real nature of the relationship" between the parties. To determine this question, the court in *Jinkinson* identified the following relevant factors:

a) The number of hours worked each week.

b) Whether work is allocated in advance by a roster.

c) Whether there is a regular pattern of work.

d) Whether there is a mutual expectation of continuity of employment.

e) Whether the employer requires notice before an employee is absent or on leave.

[9] See for example Member van Keulen's determination *Tony McKenzie v BNT Contracting Limited* [2020] NZERA 232.
[10] *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

f) Whether the employee works to consistent starting and finish times.

[71] Given the relatively short period of employment which when I include the time Concrete Ltd considered Mr Maguire was a contractor, amounted to some eleven weeks and the work was intermittent with no roster, it is difficult to discern whether a regular pattern was present or emerging. A further complication is much of the time was over the Christmas/early New Year period when the nature of the work was likely to be slow. I set this against Mr Maguire's evidence, that he was told his work would be ongoing and increasing as the business developed and that Ryan Berkett indicated that 'but for' the dismissal Mr Maguire was required as part of the business albeit on a casual basis and that is why he raised timekeeping issues with him. This suggests a mutual ongoing relationship was envisaged.

[72] I find that the second employment agreement categorisation and how the work operated at the time of the dismissal, was on a casual basis but some aspects of the employment agreement were indicative of an ongoing relationship. The work was ongoing as opposed to an engagement for a short period of time for a specific task or project.[11] Mr Maguire was also not filling in for an absent worker or plugging holes in a roster.

[73] Mr Maguire was arguably an integral part of Concrete Ltd's business and it was more likely than not, that as the business developed, he was needed in an ongoing role, albeit potentially part-time.

[74] It is also, from the above analysis, apparent that the nature of the relationship was likely to change over time (it did from cash payments to a purported contracting situation and then to an employment relationship) and the final employment agreement casual label was not decisive. The court also indicated in *Jinkinson*[12]:

> It is important to recognise that an employment arrangement may be varied over a period of time …. Occasionally, such changes will be the result of an explicit agreement between the parties. Much more often, changes occur in day to day conduct which justify the conclusion that the parties have implicitly agreed to vary their original agreement. Many of the decided cases deal with this sort of implied variation.

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[11] See comments of Judge Shaw in *Lee v Minor Developments Ltd t/a Before Six Childcare Centre* (Employment Court, Auckland AC 52/08, 23 December 2008) at [45].
[12] At [43] per Couch J.

Finding on second issue

[75] I find by a narrow margin that the employment was not genuinely casual as it was ongoing and there was an expectation created by Ryan Berkett that Mr Maguire make himself ready for work when available as opposed to the work being of an inherently casual nature.

Issue three – was Mr Maguire unjustifiably dismissed?

[76] At the outset of dealing with this issue, I need to be clear that if I am wrong in the above finding that Mr Maguire was not casual, the circumstances of his dismissal are still to be assessed as this was not akin to a refusal to offer a further casual engagement which would have amounted to a legitimate ending of the employment relationship. So, in either case, I can consider whether the dismissal was justified or not, as observed by Judge Colgan in *Rush Security Services Ltd (Trading as Darien Rush Security) v Samoa*:

> Questions of justification for Mr Samoa's dismissal are the same, whether he was dismissed from casual employment or, as is his case and, as the Authority found, from ongoing employment. [13]

[77] Objectively viewed, the reasons given for ending Mr Maguire's employment on the face of it, could establish serious misconduct was at issue. From the witness accounts and by Mr Maguire's own admission, he was reactive, angry, and abusive during the 21 February meeting. I was, however not convinced that Mr Maguire acted in a threatening manner. I accept the evidence that the Berketts' were surprised by Mr Maguire's actions and considered them out of character (that is not consistent with pervious dealings with him). This places the issue in the category of a 'one off incident' where, after a cooling down period, the employment relationship may have been capable of being repaired. Mr Maguire says he later texted Ryan Berkett and apologised for his remarks at the meeting.

[78] However, there is considerable doubt as to the timing of the dismissal and whether it was pre-determined. Mr Maguire's witnesses claim that Ryan Berkett apprised co-workers of his intention to dismiss Mr Maguire prior to the 21 February meeting and boasted about it

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[13] *Rush Security Services Ltd (Trading as Darien Rush Security) v Samoa* [2011] NZEmpC 76 at [32].

thereafter. The credibility of Mr Maguire's witnesses was in some doubt as both claimed to be present at the 21 February meeting and this was vigorously contested by the Berketts. There was also credible evidence of a significant ongoing dispute between one of the witnesses and the Berketts.

[79] However, having weighed up the fact that Mr Maguire introduced the claim of the witnesses' presence at a late stage in proceeding and the timing of the meeting, I am led to the conclusion that the witnesses claim of attendance or being close enough in the yard to hear proceedings was not credible. I was unable to form a conclusion on the evidence either way, as to whether the dismissal was pre-determined.

[80] The key issue I then need to assess is, is it more likely than not, that Mr Maguire's overreaction during the meeting was because he was told he was dismissed or a response to counselling over his timekeeping. I conclude it was the former which would explain the abusive nature of Mr Maguire's comments – the more likely explanation is he felt betrayed by Ryan Berkett for reneging on what he saw was a promise of ongoing work and he considered it as a 'sending away' at the meeting. It is unlikely the words Mr Maguire used would in context, be adopted just in response to timekeeping matters.

[81] I consider it more likely than not, that the Berketts resolved to dismiss Mr Maguire for him not turning up for work on the Friday prior to the meeting, coupled with emerging difficulties they had identified in his timekeeping and this was communicated at the 21 February meeting before Mr Maguire reacted.

[82] The above scenario impliedly explains why the Berketts felt it necessary to then seize upon Mr Maguire's reaction at the meeting to justify a formal dismissal letter. This neatly covered up the problem that they had already dismissed him at the 21 February meeting. A fact that up until the Berketts filed evidence of the meeting note that they had not acknowledged. Prior to filing evidence, the Berketts through counsel in an open letter of 16 September 2022 in response to Mr Maguire making an application to the Authority, portrayed the situation as a resignation by Mr Maguire that he was not entitled to resile from and they also made an inappropriate and unsustainable reference to Mr Maguire being the subject of a 90 days' trial period.

[83] Mr Maguire essentially claims that Concrete Ltd dismissed him in a procedurally and substantively unjustified manner that cannot satisfy s 103A of the Act and he was, therefore, unjustifiably dismissed.

[84] The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A(3), requires that I consider several factors, including the employer's resources, whether they properly investigated matters of concern, whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal.

[85] I find the manner of the dismissal was more than likely pre-determined and abrupt with no opportunity for Mr Maguire to obtain representation and have input into the dismissal decision. Section 103A of the Act and good faith considerations were absent in the decision to dismiss. The procedural defects were significant including not affording Mr Maguire an opportunity to meet further and discuss potential reasons for dismissal as outlined in the dismissal letter.

[86] This was a summary dismissal and guidance on how behaviour justifying dismissal is to be assessed is summarised by the Employment Court in *Emmanuel v Waikato District Health Board.*[14] In conducting this assessment, I have carefully considered oral evidence and examined various text messages to draw a conclusion that a combination of a 'one-sided' and shifting contractual relationship heavily favouring Concrete Ltd led to an expectation that they could exercise more control over Mr Maguire than envisaged in a casual arrangement. When Mr Maguire then reacted in an inappropriate manner, I find this was due to his pent-up sense of injustice at being dismissed.

[87] Overall, I find Mr Maguire did not engage in misconduct sufficiently serious to warrant consideration of a sanction of summary dismissal before he was dismissed at the 21 February meeting. The dismissal in the circumstances was substantively unjustified due to relatively

[14] *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

minor timekeeping issues. Concrete Ltd could have dealt with the timekeeping issue in a less formal manner and simply reminded Mr Maguire of their expectations of him when he agreed to jobs.

Finding

[88] In the circumstances described, I find Mr Maguire was unjustifiably dismissed and entitled to a consideration of remedies

Issue 4 – consideration of remedies

Lost wages

[89] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Maguire should I find that he has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[90] Here I find Mr Maguire's lost remuneration was attributed to the personal grievance and he was dismissed summarily without any notice payment. Mr Maguire says he found alternative employment with another concrete company starting on 21 March 2022. Mr Maguire claimed four weeks lost wages in the amount of $2,700.

[91] I have found that there was no soundly established reason to engage Mr Maguire on a casual basis and his work was ongoing but at times intermittent.

[92] Concrete Ltd is ordered to pay Mr Maguire four weeks lost wages in the sum of $2,700 gross (a sum lesser than 3 months but reflecting the actual loss in the intervening period between his employment ending and the new employment commencing). The sum, as claimed, was I find reasonably calculated by the applicant at 30 weekly hours at $22.50 per hour.

Compensation for hurt and humiliation

[93] Mr Maguire gave compelling evidence of the impact of the summary nature of the dismissal and the uncertainty it created at a difficult time to find immediate alternative employment and pay living costs.

[94] Mr Maguire was entitled to feel he had been used and humiliated by the nature of his abrupt dismissal and in giving evidence I was convinced the dismissal had a reasonably significant impact on his confidence and mental well-being.

[95] I am convinced that at the time, Mr Maguire suffered humiliation, loss of dignity and injury to feelings but has now moved on. Considering the circumstances and awards made by the Authority and Court in similar situations and how Concrete Ltd effected this dismissal, I consider Mr Maguire's evidence warrants compensation of $10,000 under s 123(1)(c)(i) of the Act.

Issue 5 - Contribution

[96] Section 124 of the Act states that I must consider the extent to which, if any, Mr Maguire's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*[15].

[97] I do find that Mr Maguire, on his own admission, was unnecessarily reactive and abusive and confrontational during the meeting he was dismissed but, while not condoning this conduct, it was post- dismissal. I, however, do leave some room for a consideration that the dismissal may not have occurred or it may have been reconsidered by Concrete Ltd if Mr Maguire had approached the meeting in a more conciliatory fashion. Overall, I find Mr Maguire did in some way potentially contribute to the situation giving rise to the personal grievance by hardening his employer's negative attitude toward him but I must balance that up with my finding that Concrete Ltd had no procedural or substantive grounds to dismiss Mr Maguire. Mr Maguire cannot be blamed for the deficiencies in process and an outcome that significantly worked against him.

[98] The hasty decision to dismiss in context was a wholly disproportionate response to timekeeping concerns and any reasonable employer would have easily perceived that they had overreacted. Concrete Ltd's witnesses led no evidence of having been the subject of any similar

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[15] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

abusive conduct during the employment relationship and their only emerging concern was over Mr Maguire's timekeeping reliability.

[99] I cannot objectively deem Mr Maguire's conduct to have been 'culpable' – he responded to what I have found to be an unjustified dismissal and that response in context, although not condoned, was understandable so the extent of his contribution could not be deemed blameworthy.

[100] On balance, considering the actions of both parties in context, I find that Mr Maguire's contribution to the situation does not warrant any reduction in the remedies I have awarded.

Orders

[101] I have found that:

a. For the entire period of his engagement with Concrete Limited from 2 December 2021 until 23 February 2022, Hapati Maguire was an employee.

b. Hapati Maguire was unjustifiably dismissed from his employment with Concrete Limited.

c. Concrete Limited is ordered to pay Hapati Maguire the amounts below within 28 days of this determination being issued:

   (i) $2,700 gross lost wages.

   (ii) $324 holiday pay on the above lost wages.

   (iii) $10,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

   (iv) I also direct that Concrete Limited calculate holiday pay over the entire period of Hapati Maguire's period of engagement and pay out the sum determined. Should there be a disagreement on this sum the parties have leave to return to the Authority to have the amount determined.

Issue 6 - Costs

[102] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party that considers it is entitled to seek a costs contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.[16]

David G Beck
Member of the Employment Relations Authority

[16] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*